

Calcutta High Court

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Tata Motors Limited & Anr vs State Of West Bengal & Ors on 12 January, 2010

Author: Dipankar Datta

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G.A. No. 3876 of 2008

W.P. No. 1773 of 2008

IN THE HIGH COURT AT CALCUTTA

CONSTITUTIONAL WRIT JURISDICTION

ORIGINAL SIDE

Present : The Hon'ble Justice Dipankar Datta

Tata Motors Limited & anr.

...Petitioners

Vs.

State of West Bengal & ors.

...Respondents

For the petitioners : Mr. Samaraditya Pal, Senior Advocate Mr. Siddhartha Mitra, Senior Advocate

Ms. Vineeta Meheria

Mr. Soumitra Dutta

For the respondents 1 to 6 : Mr. Balai Chandra Ray, Advocate General Mr. Sandip Srimani

Mr. Rajdeep Biswas

For the respondent 7 : Mr. R.N. Chakraborty

Ms. Era Ghosh

For the respondents 8 & 9 : Mr. Kalyan Bandopadhyay, Senior Advocate Ms. Chaitali Bhattacharya

For the respondent 10 : Mr. Amitava Choudhury, in person For the respondent 12 : Mr. A.K. Gupta

Hearing concluded on : 8.12.2009

Judgment on : 12.1.2010

This is the second round of litigation between the same parties. In their earlier writ petition (W.P. No.1571 of 2008), the petitioners averred that for setting up an automobile plant at P.S. Singur, District Hooghly to

manufacture a passenger vehicle (Nano) and sell it in India at a price of Rs.1,00,000/-, the first petitioner had entered into a Memorandum of Agreement 2

(hereafter the MOA) with the Government of West Bengal and the West Bengal Industrial Development Corporation (hereafter the Corporation). According to the petitioners, information provided to the Government of West Bengal and the Corporation relating to manufacture of 'Nano' and as contained in the MOA, inter alia, "is of a commercially confidential nature" and such information was imparted in confidence on the understanding that it would not be made public and that any disclosure contemplated would be subject to the provisions of Section 11 of the Right to Information Act, 2005 (hereafter the Act). It was claimed that if such information is made public, it would affect the economic and financial viability of the small car project at Singur, and would be of immense value and a boon to the competitors of the first petitioner in the automobile sector as it contained critical information regarding the costing involved in manufacturing 'Nano'. Apprehending harm to the competitive position of the first petitioner, a request had been made to the Government and the Corporation not to disclose any part of such information to any third party without its consent. It was further claimed that the Government by its letter dated 9th March, 2007 had confirmed that subject to the laws of the land and the Government's accountability to the legislature, it would endeavour to fulfil the request. Similar confirmation was given by the Corporation by its letter of even date. Thereafter, on 15th March, 2007, an indenture of lease was executed between the Corporation (lessor) and the first petitioner (lessee) for lease of land measuring more or less 997 acres located at Singur for a period of 90 years.

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Grievance of the petitioners, as voiced in the petition, was that the information which the Government and the Corporation had confirmed would not be disclosed had been directed to be disclosed by an order passed by the State Chief Information Commissioner (hereafter the Chief Commissioner) dated 8th September, 2008.

By the said order, the Chief Commissioner, inter alia, directed as follows: "8.It is observed that the commission vide its letter No.262-WBIC/RTI/42/07 DATED 21.2.2007 requested the SPIO to clarify the reasons for which information as sought for by the applicant could not be disclosed u/s 8(1)(d). The Commission also summoned the SPIO to the Commission for the purpose of enquiry into the instant matter. When the SPIO appeared before the Commission on 17.7.2007 the Commission verbally advised the SPIO to furnish a written submission explaining why the information as sought comes under the exemption provision u/s 8(1)(d).

9. Nothing however has been furnished so far.

10. Disclosure of the agreement signed between the TATA Motors and the Government or its agencies has become a matter of public debate in recent times.

11. Section 8(1)(d) stipulates that there shall be no obligation to give any citizen "Information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party unless the competent authority is satisfied that larger public interest warrants the disclosure of such information""

12. The denial of disclosure by the public authority indicates that the contentious agreement either has some clause of commercial confidence or trade secrets or intellectual property or all of them which renders it exempt from disclosure.

13. The agreement for setting up an Industrial Project is unlikely to include something involving intellectual property.

14. The term trade secrets has been defined in Black's Law Dictionary as " A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors; information-including a formula, pattern,, compilation, program, device, method, technique, or process-that (1) derives independent economic value, actual or potential, from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use, and (2) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy".

15. It is also unlikely that such a clause should appear in a business agreement between the Government and a private enterprise. The term 4

commercial confidence has not been defined as such. But the word commercial is defined in the Shorter Oxford English Dictionary as something "pertaining to, or engaged in commerce. Interested in financial return rather than artistry; likely to make a profit; regarded as a mere matter of business".

16. But in absence of any reason or explanation from the public authority the Commission is unable to form an opinion as to the justification of denial of information. The Commission should not be expected to pass an order on presumption. The Commission therefore cannot agree with the public authority. Onus of proving the action taken by him is justified lies with the SPIO/public authority. The authority has not justified its action.

17. Rather, a business agreement of a government has some bearing with its finance which should be subjected to the scrutiny of the citizens at large. Moreover, it has been reported that the said agreement was read out in the meeting of the concerned Standing Committee of the State Legislature. The Government has not denied this report. This again attracts the proviso under Section 8(1) of the Act which states that "Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to a person."

18. Keeping larger public interest into consideration the Commission, therefore, orders that the said agreement between TATA Motors and the Government or its instrumentalities shall be made available in the public domain. The public authority shall, therefore, publish the said document in the website of the Public Authority and shall inform the appellants about such publication immediately. Copies of the said document such published shall be given to all the Complainants / Appellants immediately." This order formed the subject matter of challenge in that petition. I had the occasion to dispose of the earlier writ petition instituted by the petitioners by order dated 26th September, 2008. Operative portion thereof reads as follows : "Having regard to the order which is proposed to be passed, this Court considers it unnecessary to examine the issues raised by the petitioners that contents of Annexures I and II to the Memorandum of Agreement cannot be disclosed as the same are exempt under the provisions of the RTI Act, as well as the contentions urged by the respondent no.10 regarding the worth of the documents forming part of Annexure P-2 to the petition. Also, the Court having proceeded to decide the writ petition only on the point of non- compliance with provisions contained in Section 19(4) of the RTI Act, no opinion is expressed on merits of the other contentions urged by the parties. The writ petition succeeds. The order of the Information Commissioner impugned herein stands set aside. The Information Commissioner shall proceed to consider the appeals filed by the respondents 9 and 10 by putting the petitioners on notice and shall thereafter take an appropriate decision in accordance with law within eight weeks from date of receipt of a copy of this 5

order. It shall be open to the petitioners, the respondent no.10 as well as the other respondents to raise all such points which are available to them in law before the Information Commissioner."

In compliance with the said order, the Chief Commissioner put the petitioners as well as the information seekers i.e. the eighth to tenth respondents on notice. He was in the midst of hearing when the petitioners raised a preliminary issue. It was claimed that after the earlier writ petition was disposed of, certain subsequent developments took place as a result of which it became clear to the petitioners that it would not be possible to complete the project at Singur and start production. Ultimately, the first petitioner had taken a

decision to withdraw the project from Singur and to relocate the same to Sanand in Gujarat, where 1100 acres of land had been made available to it by the State Government of Gujarat. Since the ninth and tenth respondents had sought for disclosure of information relating to the MOA and the same together with the annexures were with regard to setting up of project at Singur, and a decision had been taken by the first petitioner to shift the project from Singur, they claimed that the MOA and its annexures lost efficacy, significance and relevance and, hence, the ninth and tenth respondents lost the locus standi to seek disclosure of the said MOA or the annexures thereto; consequently the Chief Commissioner lost the jurisdiction to hear and adjudicate the application/appeal in terms of order dated 26th September, 2008 passed by the Court. The preliminary issue regarding maintainability of the appeal/application before the Chief Commissioner was raised by the first petitioner without prejudice to its other rights and contentions and it reserved its right to make further submission regarding the information sought for after order is passed thereon. However, it is the grievance voiced by the petitioners in this petition that even before deciding the preliminary issue, on 19th November, 2008, the Chief Commissioner indicated that he would pass an order directing the Corporation to disclose the MOA and its annexures and to send the same to him in a sealed cover which, according to them, is without jurisdiction. Apprehending that service of notice and the present petition on the Chief Commissioner might encourage him to pass the interim order which he suggested he would pass on 19th 6

November, 2008, this petition was presented on 21st November, 2008 praying for, inter alia, the following main relief :

"b) A declaration do issue declaring that the proceedings initiated under 2434-WBIC/RTI/70/06-74/06-159/07 is illegal, null and void and no effect whatsoever; c) A writ of or in the nature of Mandamus do issue calling upon the Respondents and each one of them, their men, servants and/or agents to forthwith revoke, rescind, recall, cancel and set aside the proceedings initiated under 2434-WBIC/RTI/70/06-74/06-159/07; d) A writ of or in the nature of Prohibition do issue prohibiting the Respondents and each one of them, their men, servants and/or agents from proceeding any further in any manner whatsoever relating to the proceedings initiated under 2434-WBIC/RTI/70/06-74/06-159/07 pending before the Respondent Information Commissioner; e) A writ of and/or in the nature of Certiorari do issue calling upon the Respondents and each one of them, their servants, agents or assign to forthwith certify and transmit before this Hon'ble Court all the records relating to the proceedings before the Respondent No.7 so that the same may be quashed and conscionable justice redeemed;" An application for amendment of the writ petition (G.A.No.3876 of 2008) has since been filed by the petitioners wherein they have annexed copy of order dated 20th November, 2008 passed by the Chief Commissioner. The same is extracted below: "2. Considered the written statement submitted by TATA Motors Ltd. and also considered the written statement submitted by Shri Amitava Chowdhury. The commission decided to give copies of such written statements to the opposing parties and invited further written arguments/statements, if any, by 24.11.08.

3. Shri Partha Chatterjee, Shri Partha Chattopadhyay and Shri Amitava Chowdhury also submitted before the Commission that larger public interest was involved in the disclosure of the MoA along with its annexures. On being invited, TATA Motors refused to make any further submission without going through the written statement made by Shri Amitava Chowdhury except what has been submitted by them in their written statement.

4. Representatives of the Government reiterated their earlier stand against such disclosure under Section 8(1)(d) of the Act.

5. The Commission sought for clarification from the TATA Motors on the statement made by them in Para-23 regarding jurisdiction of the Commission to adjudicate the proceedings and in Para-24 about the locus standi of the information seekers to ask for disclosure of the said MoA or annexures thereto.

6. The Commission further directed MD, WBIDC to place before the Commission on November 24, 2008 full text of the agreement along with the enclosures in a sealed cover which will be resealed and handed over to

him after inspection. This order is made in terms powers conferred on the Commission under Section 18(3) of RTI Act, 2005. Objection of TATA Motors on this issue was rejected.

7. Next date of hearing is fixed on 28.11.08 at 11.30 A.M. in the Conference Hall of the Commission. No separate notice will be issued in this regard." Mr. Pal, learned senior counsel appearing for the petitioners, raised the following points for consideration:

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i. The project of manufacturing Nano now having being shifted from the State of West Bengal (Singur) to the State of Gujarat (Sanand), the State Information Commission of West Bengal has lost territorial jurisdiction in relation to the said project and the information seekers being the eighth to tenth respondents have no right to seek disclosure of the MOA and its annexures thereto;

ii. The Chief Commissioner was duty bound to dispose of the preliminary issue and erred in not doing so but purported to exercise further jurisdiction in relation to the main dispute, which is absolutely unjustified and unauthorised;

iii. The State Information Commission has not been validly constituted in terms of Section 15 of the Act and, therefore, proceedings conducted by the Chief Commissioner are without authority of law and hence inoperative;

iv. Annexures 1 and 2 to the MOA cannot be disclosed to the eighth to tenth respondents since disclosure of the same is exempt in terms of Section 8(1)(d) of the Act;

v. No valid proceedings are pending before the Chief Commissioner at the instance of the eighth respondent. The appeal and the application filed by the ninth and tenth respondents respectively before the State Information Commission are also not maintainable in law. Elaborating on this point, it was submitted that the eighth respondent had sought for information on 12th October, 2006 but his prayer was refused. He did not prefer any appeal against the order of refusal. Hence he has no right of audience before the State Information Commission. That apart, the ninth and the tenth respondents could not have approached the State Information Commission direct without preferring an appeal as provided by Section 19(1) of the Act. Only if an appeal preferred under 8

Section 19 (1) of the Act is rejected would a second appeal, in terms of provisions contained in Section 19(3) thereof, lie before the State Information Commission. These points were not raised before the Court on the earlier occasion due to inadvertence and it proceeded to pass an order, obviously by mistake, directing the Chief Commissioner to decide the appeal/application of the eighth to tenth respondents though he had no authority in this regard. It is within the inherent power of the High Court exercising writ jurisdiction to review an order passed by it on a mistake as to jurisdiction and appropriate orders ought to be passed to rectify the error that has crept in;

vi. Disclosure of the details mentioned in the annexures to the MOA to the public would result in revealing the cost structure of NANO. Cost structure of NANO is a trade secret and commercial confidential information;

vii. When trade secret is an independent annexure to an agreement, the annexure can be severed and only the agreement can be furnished and has in fact been disclosed on the website of the Corporation and, therefore, there is no justification for the information seekers to claim disclosure of material that is exempt under the Act; and

viii. There was no contract or agreement between the petitioner and the State Government or the Corporation when the requests were made and the MOA by reason of supervening events has come to an end and stands frustrated under Section 56 of the Contract Act. The information seekers therefore have no right to seek information in respect of the MOA.

In course of argument, Mr. Pal relied on the application for amendment to contend that certain provisions of the Act are ultra vires the Constitution. 9

However, having regard to the limited scope of judicial review on the present petition, I did not consider it necessary to call upon the respondents to file counter affidavit in respect thereof. I make it clear that I have not decided the issue of constitutional invalidity urged by Mr. Pal and that it would be open to the petitioners to urge such issue in an appropriate proceeding, if instituted according to law.

Mr. Amitava Choudhury, the tenth respondent, appearing in person contended by referring to provisions contained in Section 18 of the Act that his complaint submitted before the State Information Commission, directed against refusal of the State Public Information Officer to give him access to information sought for, is maintainable in law. According to him, the Act contemplates a dual remedy to an information seeker if he is denied information on his application under Section 6 thereof. He may either lodge a complaint under Section 18(1) of the Act before the State Information Commission or prefer an appeal before the first appellate authority under Section 18(1) thereof. In case the latter forum is approached and the grievance is not redressed, remedy lies in filing a second appeal by invoking the provisions of Section 19(3). In his wisdom, he had preferred to avail the remedy provided by Section 18 and, therefore, the State Information Commission did not act contrary to law and without jurisdiction in entertaining his complaint.

On the merits of the writ petition, he submitted that the contentions of Mr. Pal lack substance. Mere shifting of the factory for manufacturing 'Nano' to Sanand, Gujarat is not a valid ground to deny access to information that he had asked for. The petitioners may not be interested any further in setting up the factory at Singur but that would not preclude an information seeker like him to have access to the terms and conditions based whereon the Government decided to extend benefits to them. That apart, the Chief Commissioner had not decided any point and there is actually no reason for the petitioners to feel aggrieved. He, accordingly, prayed for dismissal of the writ petition.

Mr. Bandopadhyay, learned senior counsel appearing for the eighth and ninth respondents contended that the present petition has been filed in gross abuse of the process of 10

Court as also of law. According to him, the writ petition is barred by res judicata and/or analogous principles.

Next, it was argued by him that the petitioners having appeared before the Chief Commissioner and filed written arguments, they submitted to his jurisdiction. On the earlier occasion, the petitioners had complained before the Court that they had not been afforded opportunity of hearing. Now that the Court had directed the Chief Commissioner to pass appropriate order upon hearing the petitioners, they cannot turn around and complain that the Chief Commissioner has no authority to decide.

On the question of non-filing of appeal by the eighth and ninth respondents before the Chief Commissioner, he submitted that in the event the State Public Information Officer declined to disclose information as sought for it would be open to the information seeker, instead of preferring first appeal as is provided under the Act in terms of Section 19, to lodge a complaint before the State Information Commission under Section 18 thereof and exercise of jurisdiction by the Chief Commissioner on receipt of such complaint cannot be said to be without authority. He referred to paragraph 50 of the writ petition to contend that the petitioners have no cause of action to move the writ petition. The Chief Commissioner had only called for the MOA together with its annexures for the purpose of satisfying himself as to whether any part of it or the whole of it is exempt from disclosure under Section 8(1)(d) of the Act or not. The authority of the State Information Commission to

call for documents in terms of provisions contained in Section 18(3) of the Act is unquestionable. Since the petitioners had not approached the Court with clean hands, he urged that they were not entitled to any relief. Countering the submission of Mr. Pal that the State Information Commission has not been validly constituted, he contended that it is not the mandatory requirement of the statute to include in the Commission any State Information Commissioner. The word "shall" in Section 15(2) is not mandatory. It has to be read as "may" and Section 15(2) is a directory provision enabling the State to include within the body of the State Information Commission one or more than one but not in excess of 10 (ten) State Information Commissioners.

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He then referred to the provisions contained in Article 324 of the Constitution regarding constitution of the Election Commission and contended that for a substantial period of time Election Commission in India comprised of only the Chief Election Commissioner. Therefore, on the same analogy, constitution of the State Information Commission with the Chief Commissioner as the sole member cannot be treated invalid.

In support of his submissions that the word "shall" in Section 15 of the Act ought to be read as "may", reliance was placed by Mr. Bandopadhyay on the decisions reported in (2007) 8 SCC 338 : Dhampur Sugar Mills Ltd. vs. State of U.P., (2004) 8 SCC 402 : U.P. State Electricity Board vs. Shiv Mohan Singh, (1989) 1 SCC 1 : Amal Chandra Dutt vs. Second Additional District Judge and ors. and AIR 1980 SC 354 : Ebrahim Suleiman Sait vs. M.C. Mohammed and ano. On the point of res judicata and more particularly attraction of Explanation IV, Section 11 of the Code of Civil Procedure, he relied on the decisions reported in (2005) 6 SCC 751 : State of Maharashtra & ano. vs. R.S. Bhonde & ors., AIR 2004 SC 3491 : Meher Rusi Dalal vs. Union of India & ors., JT 1998 (7) SC 404 and AIR 1987 (4) SCC 585 : Kamlabai & ors. vs. Mangilal Dulichand Mantri.

He finally urged that the petitioners by their conduct have manifested dilatory tactics and it is clear that they intend to stall the proceedings pending before the State Information Commission at any cost. The petition, according to him, is not bonafide and must be dismissed with exemplary costs.

Mr. Chakraborty, learned counsel representing the Chief Commissioner, the seventh respondent, contended that he had proceeded to hear and decide the appeal/application filed by the ninth and tenth respondents strictly in accordance with the directions issued by this Court on the earlier occasion. Although the order dated 8th September, 2008 of the Chief Commissioner was under challenge in the earlier writ petition of the petitioners, no point of objection regarding the authority of the Chief Commissioner to decide the issue was raised and such point was also not raised before him by the petitioners. They had also not objected to maintainability of the appeal/application filed by the ninth and tenth respondents before the State Information Commission, or the presence of the eighth respondent despite the fact that he did not question 12

the order of the State Public Information Officer of the Corporation refusing his prayer for disclosure of information. The only point the petitioners called upon the Chief Commissioner to decide was in relation to subsistence of the right of the information seekers to claim disclosure of the annexures to the MOA despite the decision taken by them to discontinue manufacturing activities at Singur and to relocate the factory at Sanand. The Chief Commissioner by not giving his decision on such preliminary issue and by passing the order dated 20th November, 2009 calling for the MOA and the annexures thereto had not subjected the petitioners to any legal wrong. It is only an interim order passed in aid of the final relief and the same not being perverse, he urged that the Writ Court's interference in the present case is not at all called for. I may, however, place on record that Mr. Chakraborty did not advance any argument of worth with regard to constitution of the State Information Commission and left it to the Court to decide.

In course of hearing Mr. Pal in reply, I called upon him to place before me the annexures to the MOA which, according to the petitioners, contains materials relating to commercial confidence and trade secret. The direction was complied with, without handing over copies to the respondents. I had the occasion to peruse the same. Predominantly, the documents bore arithmetical figures reached on calculations. Annexure - 1 related to certain benefits which the Government of Uttarakhand had extended to the petitioners while annexure - 2

related to the factory at Singur. Finding it difficult to understand contents of annexure - 2, I admitted my failure whereupon Mr. Pal offered assistance of a representative of the first petitioner to explain how the cost price of 'Nano' could be worked out from those figures. The said representative tried to explain without being audible to the respondents' counsel. After hearing him, it transpired that not the whole of annexure - 2 could be withheld. Accordingly, by order dated 20.8.2009, I directed that in course of 5th August, 2009, the petitioner shall provide to the eighth to tenth respondents copy of Annexure 2 to the MOA between the petitioners, the State and the Corporation without being obliged to furnish the figures of number of cars mentioned in clause 3 as well as the amount in crores mentioned in the right side column of the summary. The order was duly complied with. However, on the next date of hearing, Mr. Bandopadhyay expressed his 13

inability to advance any argument of worth without having the complete entries of annexure 2. The tenth respondent despite notice did not appear.

None had appeared for the State respondents at any stage of this proceeding. The version of the State on the contentious issues was thus not made available. Having heard Mr. Pal, Mr. Bandopadhyay, Mr. Choudhury, Mr. Chakraborty, and Mr. Gupta, I reserved judgment on 20th August, 2009.

While preparing the judgment, I considered it necessary to defer its delivery and hear the learned Advocate General for the State of West Bengal on interpretation of Section 15 of the Act. I disclosed the reason for this in Court. To my mind, the argument advanced by Mr. Pal to the effect that the State Information Commission had not been duly constituted seemed acceptable and, as a sequel, consequences were bound to follow.

By order dated 17th November, 2009, I recalled the order reserving judgment and directed listing of the petition on 24th November, 2009 to hear Mr. Balai Chandra Ray, the learned Advocate General. On 1st December, 2009, he submitted that Mr. Sujit Sarkar, a retired officer of the Indian Police Service, has since been inducted in the State Information Commission as State Information Commissioner upon necessary approval being granted by His Excellency, the Governor of West Bengal. It was notified vide notification no.865-PAR(AR) dated 17th November, 2009 and that the Court may now proceed to decide the issue raised bearing in mind such subsequent development.

Mr. Pal, however, cited the decision reported in AIR 1964 SC 993 : Arjun Singh vs. Mohindra Kumar and relied on a portion of paragraph 20 reading thus: "20. ***Where, the hearing is completed the parties have no further rights or privileges in the matter and it is only for the convenience of the Court that Order XX Rule 1 permits judgment to be delivered after interval after the hearing is completed. It would, therefore, follow that after the stage contemplated by Order IX. Rule 7 is passed the next stage is only the passing of a decree which on the terms of Order IX. Rule 6 the Court is competent to pass. And then follows the remedy of the party to have that decree set aside by application under Order IX. Rule 13. There is thus no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to afford to the party the remedy of getting orders passed on the lines of Order IX. Rule 7.***" 14

We are, therefore, of the opinion that the Civil Judge was not competent to entertain the application dated May 31, 1958 purporting to be under Order IX. Rule 7 and that consequently the reasons given in the order passed would not be res judicata to bar the hearing of the petition under Order IX. Rule 13 filed by the appellant." It was, however, with some amount of hesitation he argued that the Court would not be justified in taking note of events and developments subsequent to reservation of judgment and prior to pronouncement thereof.

Upon hearing the parties and considering the materials on record, it appears to this Court that the following issues arise for determination:

1. Whether the writ petition is barred by res judicata and/or analogous principles?

2. Whether the word "shall" in sub-section (2) of Section 15 of the Act ought to be read as "may", as contended by Mr. Bandopadhyay?
3. Whether the State Information Commission has been validly constituted in terms of provisions contained in Section 15 of the Act?
4. Whether the eighth respondent ought to be extended right of audience by the State Information Commission?
5. Whether the appeal/complaint filed by the ninth and the tenth respondents before the State Information Commission maintainable?
6. Is the preliminary issue raised by the petitioners, based on re-location of the factory at Sanand, valid?
7. Whether the Chief Commissioner was justified in calling upon the petitioners to produce before him the annexures to the MOA before deciding the preliminary issue?
8. Is the claim of the petitioners claiming exemption from disclosure of annexures 1 and 2 to the MOA executed by and between the parties valid?
9. To what relief the petitioners are entitled on facts and in the circumstances? Issue No.1

It appears from a bare perusal of order dated 26th September, 2008 (extracted supra) that while setting aside the order of the Chief Commissioner dated 8th September, 2008, I directed him 15

to consider the appeals filed by the ninth and tenth respondents (Sri Partha Chattopadhyay and Sri Amitava Chowdhury) by putting the petitioners on notice and to take an appropriate decision in accordance with law within eight weeks from date of receipt of copy thereof. It was clarified that all the interested parties would have the liberty to raise all points that are available to them in law before the Chief Commissioner. I allowed the writ petition considering the point of non-compliance with provisions contained in Section 19(4) of the Act. No opinion was expressed on merits of the other contentions urged by the parties and, consequently, I refrained from examining the issue raised by the petitioners that the contents of annexures 1 and 2 to the MOA cannot be disclosed since the same attract the exemption clause as contained in Section 8(1)(d) of the Act.

It admits of no doubt that I decided only one point and decision on the other points, urged by the parties, was left open for being urged before the Chief Commissioner. There being no decision on merits on the other points, the bar of res judicata is not attracted. That apart, having regard to the contention raised before me now that the State Information Commission has not been validly constituted and, therefore, the Chief Commissioner has no jurisdiction to decide the appeal filed by the ninth respondent under Section 19 of the Act and the application (complaint) filed by the tenth respondent under Section 18 thereof, I find no force in the submission of Mr. Bandopadhyay that the present petition is barred by res judicata and/or analogous principles. Once an objection touching the competence of a quasi-judicial authority to decide contentious issues is voiced, it primarily is a challenge to the jurisdiction of such authority. An objection regarding inherent lack of jurisdiction to decide is worthy of being raised at any stage in course of proceedings before such authority and also before a superior forum, bonafide, and res judicata or analogous principles would not be attracted in such case. The authorities cited by him have been duly considered. The ratio laid down therein is of no assistance to him, on the face of the order dated 26th September, 2008. The objection thus stands overruled. The issue is answered accordingly. 16

Issue No.2

For the purpose of deciding this issue, Section 15 of the Act is required to be read. It provides as follows:

'15. Constitution of State Information Commission.--(1) Every State Government shall, by notification in the Official Gazette, constitute a body to be known as the (name of the State) Information Commission to exercise the powers conferred on, and to perform the functions assigned to, it under this Act.

(2) The State Information Commission shall consist of--

(a) the State Chief Information Commissioner, and

(b) such number of State Information Commissioners, not exceeding ten, as may be deemed necessary.

(3) The State Chief Information Commissioner and the State Information Commissioners shall be appointed by the Governor on the recommendation of a committee consisting of-- (i) the Chief Minister, who shall be the Chairperson of the committee; (ii) the Leader of Opposition in the Legislative Assembly; and (iii) a Cabinet Minister to be nominated by the Chief Minister. Explanation.--For the purposes of removal of doubts, it is hereby declared that where the Leader of Opposition in the Legislative Assembly has not been recognised as such, the Leader of the single largest group in opposition of the Government in the Legislative Assembly shall be deemed to be the Leader of Opposition. (4) The general superintendence, direction and management of the affairs of the State Information Commission shall vest in the State Chief Information Commissioner who shall be assisted by the State Information Commissioners and may exercise all such powers and do all such acts and things which may be exercised or done by the State Information Commission autonomously without being subjected to directions by any other authority under this Act.

(5) The State Chief Information Commissioner and the State Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.

(6) The State Chief Information Commissioner or a State Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursuing any profession.

(7) The headquarters of the State Information Commission shall be at such place in the State as the State Government may, by notification in the Official Gazette, specify and the State Information Commission may, with the previous approval of the State Government, establish offices at other places in the State."

It follows from the above that the State Information Commission constituted by the State Government, by notification in the Official Gazette, must be a body consisting of (i) the State Chief Information Commissioner and (ii) any number of State Information Commissioners as may be necessary, but not in excess of 10 (ten).

It was not disputed before me by Mr. Chakraborty that the State Information Commission while passing the order impugned herein did not comprise of at least 2 (two) members viz. the 17

Chief Commissioner and a State Information Commissioner. Instead, the order appears to have been made by the Chief Commissioner.

Mr. Ray, in course of his short but precise submissions, conceded that the State Information Commission ought to comprise of the Chief Commissioner and at least one State Information Commissioner.

One of the important tests that is employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision would cause

injustice or inconvenience and, if it does, the Court would say that the provision must be complied with and that it is obligatory in its character. Applying such test, contention of Mr. Bandopadhyay that the expression "shall" in sub-section (2) of Section 15 of the Act must be read as "may" is unworthy of acceptance. The expression "shall" has been used in sub-sections (1), (2), (3), (4), (5) and (6) of Section 15 whereas the expression "may" has been used in sub-sections (4) and (7) thereof. Reading the statutory provision as it is, it is difficult to accept that the word "shall" in sub-section (2) must be read as "may".

It appears to be the legislative intent that the State Information Commission upon being constituted would function on the basis of collective opinion of its members in the sense that there must be at least one State Information Commissioner apart from the Chief Commissioner. Any other meaning would render the provisions nugatory.

In the event "shall" in sub-section (2) is read as "may", there is no reason as to why "shall" in sub-section (1) may not, in like manner, be read as "may" and if so read, the State Government would enjoy the privilege of not being under any obligation to appoint a State Information Commission at all. That is not the object of the statute.

Similarly, if "shall" in sub-section (3) is read as "may", the members to comprise the State Information Commission may not be appointed in the manner directed. That would result in utter confusion.

I hold that the aim and object of the statute would be clearly defeated if the statutory mandate to constitute the State Commission in the manner prescribed is not strictly observed. 18

Reference to Article 324 by Mr. Bandopadhyay is inapposite. Provisions contained in clause (2) thereof are clear. The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix. The language of the statute permits non-appointment of any Election Commissioner at any given point of time. The expressions "such number" and "if any" are significant, not to be found in Section 15(2) of the Act.

I have, therefore, no hesitation to overrule Mr. Bandopadhyay's contention that the word "shall" used in sub-section (2) of Section 15 of the Act must be read as "may". The issue is answered accordingly.

Issue no.3

Till 16th November, 2009, the State Information Commission consisted of only the Chief Commissioner. It appears from the notification produced in Court on 24th November, 2009 that Mr. Sarkar has been inducted as State Information Commissioner with effect from 17th November, 2009. Having regard to my discussion in respect of the preceding issue to the effect that the State Information Commission must consist of the Chief Commissioner and at least one State Information Commissioner, the State Information Commission with the appointment of Mr. Sarkar can now be treated to have requisite number of members. But in order to function as the State Information Commission in terms of the provisions of the Act, there is one requirement prescribed by the statute which has not been followed.

On 17th November, 2009, a notification has been issued conveying appointment of Mr. Sarkar as State Information Commissioner. However, no notification in the Official Gazette in respect of constitution of the State Information Commission with at least two members (the Chief Commissioner and at least one State Information Commissioner) has been produced in Court. The statutory mandate [see section 15(1) of the Act] is that a State Information Commission shall be constituted by notification in the Official Gazette. So long as such gazette notification is not published notifying due constitution of the West Bengal State Information Commission, it is not entitled to function. It is only after publication of such gazette notification in terms of Section 19

15(1) that the State Information Commission shall be authorized to exercise the powers conferred on and to perform the functions assigned to it under the Act. Reliance placed by Mr. Pal on the decision in Arjun Singh (supra) is of no assistance to him. The said decision was rendered in a completely different fact situation. The defendant in the suit had applied under Order 9 Rule 13, Civil Procedure Code for setting aside the ex parte decree passed against him and prayed for reopening of the proceedings which had been conducted in his absence. The application had been dismissed as barred by res judicata since an earlier application filed by him under Order 9 Rule 7 had been dismissed. The Apex Court opined that the Civil Judge was not competent to entertain the application dated 31st May, 1958 purporting to be under Order 9 Rule 7 of the Code and that consequently the reasons given in the order passed would not be res judicata to bar the hearing of the petition under Order 9 Rule 13. The observations of the Apex Court on which Mr. Pal relied on have to be read in the context of the factual situation presented before it in that case. The defendant in that case had not appeared on the date fixed for ex parte hearing which led the Trial Court to hear the plaintiff and reserve its judgment. The defendant appeared after the conclusion of hearing but before delivery of judgment and filed an application under Order 9 Rule 7. The Civil Court rejected the application. It was in such a fact situation the Apex Court observed that the Court having reserved judgment, the stage contemplated by Order 9 Rule 7 had passed and that the only stage that was yet to be completed is to pronounce the judgment and pass the decree. In such circumstances, it was held that there was no hiatus between the two stages of reservation of judgment and pronouncing the judgment so as to make it necessary for the Court to offer to the party the remedy of getting orders passed on the line of Order 9 Rule 7. The case here is absolute different. Apart from anything else, it is not that the State Government has prayed for rehearing of the matter after appointment of Mr. Sarkar in the State Information Commission as the State Information Commissioner. It is the Court that had recalled its order reserving judgment for the purpose of hearing the State further on the point urged by Mr. Pal regarding constitution of the State Information Commission. In a case of the present nature, the Court of Writ has ample power to take into consideration any subsequent event that 20

may have occurred having bearing on the issue at hand prior to pronouncing the judgment. The objection of Mr. Pal is overruled being misconceived.

I answer the issue holding that the State Information Commission would be justified to consider the appeal/complaint of the ninth and tenth respondents after the State Government complies with provisions contained in Section 15(1) of the Act. Issue No.4

This issue was raised by the petitioners for the first time in course of these proceedings.

The eighth respondent, being the leader of the opposition in the Legislative Assembly of this State had made a request for information dated 10th November, 2006 before the State Public Information Officer, Commerce & Industries Department, Government of West Bengal. That request was declined and his application stood disposed of by the State Public Information Officer by an order dated 8th December, 2006. The eighth respondent did not file any appeal against the order dated 8th December, 2006 in terms of provisions contained in Section 19(1) of the Act. He also did not approach the State Information Commission with any complaint under Section 18 of the Act feeling aggrieved by such refusal.

It would, therefore, appear that the eighth respondent did not pursue either of the remedies provided in Sections 18 and 19 of the Act. He, thus, cannot be treated as a person aggrieved by non-disclosure of information sought for by him. In such circumstances, the eighth respondent has no right to participate in the proceedings before the State Information Commission.

It is true that by my earlier order dated 26th September, 2008, in the first round of litigation between the parties, I had directed the Chief Commissioner to hear all the respondents. That included the eighth respondent also. However, such order ought not to have been passed in the absence of any appeal or complaint having been lodged by the eighth respondent before the State Information Commission. It is equally true that the petitioners did not carry the said order 21

dated 26th September, 2008 in appeal and accepted the order by which the eighth respondent was extended opportunity to participate in the proceedings before the Chief Commissioner. That order, manifestly, is an order passed on an incorrect appreciation of the factual position. Though Mr. Pal sought to accept the responsibility for not bringing such fact of non-filing of appeal/complaint by the eighth respondent to my notice, I do not consider him blameworthy. Counsel for a party, whatever be his stature, as an officer of Court is duty bound to render effective assistance to the Court to dispense justice. It is as much the duty of the Court to ascertain the correct position on facts from counsel appearing before it and on perusal of the materials on record to pass appropriate orders based on proper appreciation thereof. It would be wholly improper for the Court to shift the blame on others. There is no loss of prestige or majesty if the Court admits a mistake committed by it. A patent mistake appearing on the face of the record cannot be allowed to perpetrate. Justice requires that within the bounds of its limits, the Court rectifies the mistake. The Court of Writ has plenary power to correct a mistake committed by it. Accordingly, on a review of the order dated 26th September, 2008, I hold that the eighth respondent shall have no further right of participation before the State Information Commission. The issue is answered accordingly.

Issue No.5

This issue was also not raised before the Chief Commissioner by the petitioners despite liberty granted by order dated 26th September, 2008. Although the State Information Commission, duly constituted, would be competent to decide the issue, I consider it proper to deal with and dispose of the same for it touches the jurisdiction of the Commission and also with a view to shorten the proceedings, which have already been delayed. The ninth respondent's request for information under Section 6 of the Act before the State Public Information Officer is dated 12th October, 2006. Such request was also declined by order dated 10th November, 2006. Feeling aggrieved by the said order, the ninth respondent preferred an appeal before the Joint Secretary and Appellate Authority, Commerce & Industries 22

Department, Government of West Bengal on 8th December, 2006. This was in exercise of right conferred by Section 19(1) of the Act. It is, however, not in dispute that no order was passed by the Appellate Authority on such appeal. Long 1½ years later, a second appeal was preferred by the ninth respondent before the State Information Commission on 29th August, 2008. Mr. Pal contended that a second appeal could be filed before the State Information Commission under Section 19(3) against a decision given by the Appellate Authority under Section 19(1) thereof and not otherwise. Decision on the appeal of the ninth respondent not having been given by the Appellate Authority, the second appeal is not maintainable in law and the State Information Commission exceeded its jurisdiction in entertaining the same. Assuming that a second appeal could be preferred against the inaction of the Appellate Authority to pass orders on the appeal, he further contended that the time limit of 30 days to dispose of a request in terms of Section 7 of the Act would equally apply to the first appellate authority. In the event the first appellate authority does not pass any order on the appeal directing access to information as sought for within 30 days of receipt thereof, an appeal if lies to the second appellate authority must be filed within 90 days from the date on which the decision should have been made. However, the second appeal before the State Information Commission was filed by the ninth respondent more than a year beyond the period of limitation and, therefore, the same was also time barred.

So far as the 10th respondent is concerned, he contended that he had also not filed any appeal before the Appellate Authority as mentioned in Section 19 of the Act and, therefore, the State Information Commission was thoroughly unjustified in considering his grievance arising out of the State Public Information Officer's refusal to grant access to information, as asked for. It is true that the ninth respondent approached the State Information Commission on 29th August, 2008 i.e. more than 1½ years after filing of the first appeal on 8th December, 2006. No order having been passed by the first appellate authority on the appeal, the question that naturally arises is whether a second appeal would lie before the State Information Commission? Right to file a second appeal is traceable in sub-section (3) of Section 19 of the Act which reads as follows :

"19 (3). A second appeal against the decision under sub-section (1) shall lie within ninety days from the date on which the decision should have been made or was actually received, with the Central Information Commission or the State Information Commission: Provided that the Central Information Commission or the State Information Commission, as the case may be, may admit the appeal after the expiry of the period of ninety days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time."

Although the concerned provision uses the expression "within 90 days from the date on which the decision should have been made", sub-section (3) of Section 19 does not provide the period within which the appeal is to be decided. The time limit for disposal of appeal, however, is provided for in sub-section (6) of Section 19. Sub-section (6) reads as follows : "19 (6). An appeal under sub-section (1) or sub-section (2) shall be disposed of within thirty days of the receipt of the appeal or within such extended period not exceeding a total of forty-five days from the date of filing thereof, as the case may be, for reasons to be recorded in writing."

It is, therefore clear that the statutory mandate for disposal of an appeal filed under sub- section (1) of Section 19 is not more than 30 days from date of receipt thereof. In my considered view, having regard to the provisions contained in Section 7 of the Act providing that the request has to be disposed of not later than 30 days of receipt thereof and provisions contained in sub-section (6) of Section 19 to the effect that an appeal under sub- section (1) thereof has to be disposed of, also within 30 days from date of its receipt, the legislative intent is clear that the original and the appellate authorities are not authorized to sit on a request for information under Section 6 of the Act or on an appeal under Section 19 (1) thereof, as the case may be, for an indefinite time without giving a decision. The State Public Information Officer, for not providing information as asked for within the time limit mentioned in Section 7, is liable to face penal consequences (see Section 20 of the Act). However, like provision is not to be found in the Act in respect of inaction of the Appellate Authority to decide the appeal within the time frame fixed by sub-section (6) of Section 19. Normally, provisions containing a time-frame for a particular action are considered directory. But having regard to the various provisions of the Act, the time limit in Section 7(1) has to be held to be mandatory. I need not decide on this petition whether the time limit prescribed by Section 19(6) is also mandatory or not but there can be no doubt that the provision of law has to be substantially complied with. Once 24

sub-section (3) of Section 19 provides that a second appeal against the decision under sub- section (1) thereof would lie "within ninety days from the date on which the decision should have been made", the right to prefer a second appeal would have to be read in the statute as having accrued in a case where the first appellate authority refuses to give his decision and in such case refusal to give the decision would have to be treated as the decision liable to be appealed against in terms of sub-section (3) of Section 19. The second appeal filed by the ninth respondent cannot, therefore, be said to be not in order only because no decision was given by the first appellate authority.

However, having regard to the fact that the second appeal was filed by the ninth respondent more than ninety days after the decision ought to have been made by the first appellate authority in terms of sub-sections (1) and (6) of Section 19, the State Information Commission may admit the appeal after being satisfied that the ninth respondent, being the appellant, was prevented by sufficient cause from filing the appeal on time. It does not appear from the records that any such order had been passed by the Chief Commissioner. Even if such an order has been passed, it is a nullity. Therefore, after the formality of publication of notification in the Official Gazette is complied with, the State Information Commission shall proceed to consider whether the ninth respondent furnished proper explanation or not in respect of belated filing of the appeal before it considers the same on merits. For the purpose of a decision in so far as the tenth respondent's grievance is concerned, sub-section (1) of Section 18 of the Act together with clause (b) thereof has to be read. It reads : "18. Powers and functions of Information Commissions.--(1) Subject to the provisions of this Act, it shall be the duty of the Central Information Commission or State Information Commission, as the case may be, to receive and inquire into a complaint from any person,--

(b) who has been refused access to any information requested under this Act;" Mr. Chowdhury is correct in his submission that once a State Public Information Officer rejects an application for information or refuses to act on such application within the time limit prescribed therefor, the aggrieved information seeker has two remedies under the Act. One of 25

these is to approach the Appellate Authority under Section 19(1). The other is to bring it to the notice of the State Information Commission by filing a complaint that request for information under the Act has been refused. The refusal may arise out of inaction; it may also arise out of rejection of an application. There is also substance in the submission of Mr. Chowdhury that in case of refusal to give access to information, the statute provides a choice to the information seeker and that in exercise of such choice, he approached the State Information Commission with a complaint. Filing of such complaint is provided for in law and the same having been filed on 2nd February, 2007 i.e. well within 30 days from the date of the order dated 11th January, 2007 passed by the State Public Information Officer rejecting the application under Section 6, the State Information Commission had acted in terms of power conferred by Section 18 to enquire into such complaint. It is settled law that if statute provides more than one remedy, the aggrieved person has the right to choose the forum competent to remedy his grievance [see *Dhannalal Vs. Kalawati Bai*, reported in (2002) 6 SCC 16 and *LIC of India vs. R. Suresh*, reported in AIR 2008 SCW 2793]. A complaint against refusal to furnish information being statutorily recognised, the State Information Commission would be perfectly justified in enquiring into it as part of its duty as mandated by Section 18(1) of the Act. The complaint filed by the tenth respondent is, therefore, held to be maintainable.

The issue is answered accordingly.

Issue Nos. 6 & 8

These issues are taken up for consideration together.

At this stage, I consider it inappropriate to give any decision on these issues. If not already notified, as and when constitution of the State Information Commission is duly notified by publication in the Official Gazette, it shall be open to it in terms of provisions contained in the Act to decide the issues raised before it by the parties. The preliminary issue raised by the petitioners as to whether or not on abandonment of the project and consequent relocation of the factory from Singur to Sanand the ninth and tenth respondents can continue to assert their rights to seek information ought to be decided by the State Information Commission first. If the preliminary 26

issue is decided against the petitioners and in favour of the information seekers, the State Information Commission would be entitled to determine whether the information sought for by the information seekers is exempt from disclosure in terms of provisions contained in Section 8(1)(d) of the Act or not.

Although extensive arguments had been advanced on these issues, I have refrained myself from deciding the same based on the authority of the decision of the Apex Court in *State of West Bengal vs. Nuruddin Mullick*, (1998) 8 SCC 143. There, the Court ruled that a Writ Court would interfere where the statutory authority has not exercised its discretion; it may also interfere in a case where discretion has been exercised by such authority for ascertaining whether the discretion has been validly exercised or not, but it would be inappropriate for the Court to substitute itself for the statutory authorities to decide the matter. Since proceedings before the State Information Commission that have been carried by the ninth and tenth respondents are yet to be duly considered by the duly constituted State Information Commission, in all fairness, it should be allowed to discharge its duties as envisaged in the Act.

The fact that at one particular point of time I had expressed interest to ascertain from the petitioners' representative as to how disclosure of the annexures to the MOA would result in disclosure of matters pertaining to commercial confidence and trade secret is no longer of any relevance having regard to the

changed circumstances brought about by induction of Mr. Sarkar as the State Information Commissioner. That apart, the representative of the petitioners was given an audience for a short span of 10 (ten) to 12 (twelve) minutes. I do not claim to have understood how manufacturing cost of 'Nano' could be assessed from the figures given in annexure 2 by applying costing principles, not having any expertise in the matter. This, however, is not to be construed as any inability on the part of the petitioners to substantiate their claim of exemption. I had, on hearing the representative, simply directed disclosure of only those parts of annexure-2 of the MOA, which he conceded, would not harm the interest of the petitioners, if disclosed. Whether or not the portion of the annexures not disclosed should continue to be 27

undisclosed is a matter which must exercise the consideration of the State Information Commission when it hears the appeal/complaint afresh in terms of this order. No final opinion is expressed on these issues and the same are left open to be decided by the State Information Commission.

Issue nos. 7 & 9

By order dated 26th September, 2008 passed on the earlier writ petition of the petitioners, I had directed the Chief Commissioner to proceed in the light of the observations made therein. The State Information Commission not being validly constituted, the direction to the Chief Commissioner, for all practical purposes, was not proper. Whatever proceedings were initiated by him in pursuance of such order being illegal are inoperative. The impugned order by which the petitioners were directed to furnish the annexures to the MOA cannot sustain and, therefore, stands set aside.

The writ petition, together with the application, stands disposed of with the direction on the State Information Commission to now proceed in accordance with law and in the light of the above observations/directions. Parties before it shall be entitled to raise all points as are available to them in law and those shall be decided, also according to law. There shall be no order for costs.

Urgent Xerox certified copy of this judgment, if applied for, be furnished to the parties within four days from the date of putting in requisite therefor. (DIPANKAR DATTA, J.)