NATIONAL HUMAN RIGHTS COMMISSION FARIDKOT HOUSE NEW DELHI

Name of the complainant	:	Suo motu
Case No.	:	426/6/18-07-08
Date	:	5th March, 2008

CORAM

Justice Shri S. Rajendra Babu, Chairperson
Justice Shri Y. Bhaskar Rao, Member
Shri R.S. Kalha, Member
Shri P.C. Sharma, Member

PROCEEDINGS

The ghosts of post-Godhra violence in Gujarat never seem to die. On 25th October, 2007, a T.V. Channel "Aaj Tak" telecast a programme captioned "Opertaion Kalank" which brought out more skeletons. The programme included confessions of some persons who implicated themselves and also many state functionaries of Gujarat in the unleashing of violence on the minority community. The revelations bode ill for the future of human rights in the country. Therefore, the Commission which is already seized of the unfortunate episode since 1st March, 2002 in Case No. 1150/6/2001-2002, decided to direct a CBI investigation regarding the authenticity of the tapes and the allegations made therein and vide proceedings dated 5th November, 2007 advised the State Government of Gujarat to communicate its consent for CBI investigation to the Central Government and the Commission within two weeks.

The Government Gujarat, vide letter No. SBII/COM/1007/337/SPL TEAM dated 22.11.2007 expressed inability to give its consent for CBI investigation. It submitted that "the aspects under consideration of the Hon'ble Commission are very much in seisin before the Justice Nanavati and Justice Shah Commission and because of that also, the Hon'ble Commission would not like to invite the intervention of CBI even as per the provisions of the Protection of Human Rights Act, 1993." The State Government also pointed out that National Human Rights Commission had filed petitions before the Supreme Court seeking transfer of nine cases for trial outside Gujarat and after the telecast of 'Operation Kalank' Ms.

Teesta Setalvad had moved a petition for early hearing of all the petitions pending in the Supreme Court and the Supreme Court did not entertain the said request of early hearing. It has also been contended on behalf of the State Government that no investigation by an agency like CBI into the alleged exposure by the telecast of "Operation Kalank" is necessary in-as-much as in respect of various incidents and offences reflected in the said telecast, necessary actions have already been taken and the trials are pending and in the meantime, if any further material is made available, the same can very well be placed before the concerned courts as per the provisions of Section 173 (8) of Cr. P.C.

The Commission has thoroughly deliberated on the submissions made by the State Government of Gujarat and it had bestowed careful thought on all aspects of the issue.

Section 12 (1) of the Protection of Human Rights Act, 1993 (for short 'the Act') mandates the Commission to enquire into any violation of human rights or negligence in preventing such violation. The status of the Commission conducting the enquiry under the Act is that of a Civil Court (Section 13 of the Act). It is not an administrative or fact-finding Commission such as those constituted under the Commission of Enquiry Act 1952, but a quasi-judicial body whose jurisdiction cannot be easily ousted. The bar to the exercise of jurisdiction by NHRC is provided by Section 36 (1) of the Act which lays down as follows :-

> "The Commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force."

The phrase 'any other Commission' used in Section 36 (1) of the Act has its contextual meaning which may be deduced from the parent Statute. When particular words pertaining to a class, category or genus are followed by general words, the general words construed are limited to the things of the same kind as those specified. This rule commonly known as the rule ejusdem generis reflects an attempt to reconcile the incompatibility between general and specific words. Under Section 36 (1) of the Act the phrase 'any other Commission' follows the words 'State Commission'. This scheme of the Section makes the intention of the Legislature clear. 'Any other Commission' contemplated by Section 36 (1) has to be akin to State Commission or National Human Rights Commission and it must have functions and powers similar to the State Commission or NHRC. A Commission constituted under the Commission of Enquiry Action shall obviously not fall in that category because such Commission is in the nature of an

administrative body and its role is not that of a quasi judicial body as in the case of NHRC or State Commission.

There is fundamental difference between the National Human Rights Commission and a Commission appointed under the Commission of Enquiry Act (for short "the Enquiry Commission") in the matter of constitution, tenure, functions and powers. While the constitution and functions of an Enquiry Commission are to be decided by the appropriate Government in its discretion, the constitution and functions of the Human Rights Commission are defined in the Statute itself and no deviation there-from can be made. The tenure of an Enquiry Commission comes to an end as soon as the appropriate Government in exercise of its power u/s 7 of the Commission of Enquiry Act declares that the Enquiry Commission shall cease to exist. Human Rights Commission is, on the other hand, a creature of the Statute and its life is not at the mercy of any Government. Enquiry Commission operates in a limited sphere and the scope of its enquiry is restricted to the terms of reference formulated by the appropriate Government but the Human Rights Commission can examine all facets of any incident which results in violation of human rights. The powers enumerated in Sub-section 2, 3, 4 and 5 of Section 13 of the Protection of Human Rights Act, 1993 inherently vest in the Human Rights Commission but in the case of an "Enquiry Commission' such ------ have to be additionally conferred by the appropriate --------- by notification in the Official Gazette u/s of the Commission of Enquiry Act. An 'Enquiry Commission' becomes functus officio as soon as it concludes the enquiry assigned to it by the Government. It cannto go public with its conclusions and recommendations. Nor the appropriate Government which appoints it, is accountable to it in any manner. The Human Rights Commission is on the other hand empowered by law to pursue it recommendations. Sub-section (e) to Section 18 of the Protection of Human Rights Act obligates the concerned Government to forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission within a period of one month after the Commission sends a copy of its report to it. Not only this, the Commission can also go public with its enquiry report together with the comments and action taken report of the concerned Government. Thus, the Human Rights Commission is vested with a moral authority to secure the compliance of its recommendations with the aid of public opinion. Thus, we are convinced that the jurisdiction of NHRC is not ousted merely because the Justice Nanavati and Justice Shah Commission is seized of cognate issues.

The pendency of criminal cases in the Courts and transfer petitions in the Supreme Court can also not operate as bar to the jurisdiction of the Commission. No doubt, Regulation 8 (1) (b) of the National Human Rights Commission (Procedure) Regulations 1994 provides that 'ordinarily' complaints are not

entertainable by the Commission with regard to matters which are sub-judice. It is, however, a rule of caution and does not necessarily exclude matters which are sub-judice. The use of the word 'ordinarily' in Regulation 8 is significant and it means 'in the large majority of case' on the basis of the situation. In the instant case, the very nature of the incidents and persons involved merit a departure from the ordinary rule.

NHRC has a discretion whether or not to assume jurisdiction when a matter is sub judice. It may well be that after investigation or enquiry into the matter, the Commission may decide to intervene in a judicial proceeding u/s 12(b) of the Act.

As stated above Section 12 (a) of the Act casts a duty on the Commission to enquire into complaints of violation of human rights or abetment thereof or negligence in the prevention of such violation by a public servant. To facilitate such enquiry, the Central Government is required to make available to the Commission such police and investigative staff under an officer not below the rank of DGP as may be necessary for the purpose of enquiry (Section 11). Section 14 of the Act recognizes the NHRC's need for additional resources to aid in the performance of its functions u/s 12. It lays down as follows:-

"14 (1) The Commission may, for the purpose of conducting investigation pertaining to the inquiry, utilize the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case may be."

The term 'investigation' u/s 14 (1) of the Act is different from police investigation under Cr. P.C. It is an investigation in aid of the enquiry u/s 12 of the Act. An investigation contemplated by Section 14 (1) of the Act does not result in an FR or a challan as in the case of police investigation but yields a report which is subject to scrutiny of NHRC.

CBI is an independent investigative agency under the Delhi Special Police Establishment Act. While investigating criminal offences under Delhi Special Police Establishment Act, CBI discharges the investigative functions of police and it exercises powers and jurisdiction under Cr. P.C. Since the police or policing is within the exclusive jurisdiction of the State (Entry 2, List II, Schedule VIIth of the Constitution of India), Section 6 of the Delhi Special Police Establishment Act provides that the consent of the Government of the State, in which the investigation is to be conducted, shall be necessarily obtained before commencement of CBI investigation in that State. the position is, however, different when CBI conducts investigation under the provisions of Section 14 of Protection of Human Rights Act, 1993. While making investigation u/s 14 of the

Act CBI works under the direction of NHRC and it exercises limited powers enumerated in Subsection 2 of Section 14. Therefore, the term 'concurrence' in Section 14 (1) of the Act has a different connotation. It simply means concurrence in respect of borrowing and utilizing the services of any officer or investigation agency. If the Officer or investigation agency is under the control of the Central Government, the concurrence of the Central Government is required and if it is under the control of the State Government the concurrence of the State Government has to be asked for.

Since CBI is an investigation agency of the Central Government, the Commission was only required to ask the Central Government to give its concurrence to lend services of CBI and it was not legally bound to obtain the concurrence of the State Government of Gujarat before requisitioning the services of CBI for investigating the authenticiy of the tapes of 'Operation Kalank" and the allegations contained therein. In the proceedings dated 5th November, 2007 the concurrence of the State Government was requested as a matter of courtesy only. as mentioned above, the State Government had some reservations on the aspect of jurisdiction of the Commission. The objections regarding jurisdiction have been found to be untenable and misplaced. Therefore, the decision to direct a CBI investigation is hereby reiterated.

The Government of India be asked to communicate its concurrence to lend the services of CBI for investigating the authenticity of the tapes of the sting operation telecast by 'Aaj Tak' under the caption 'Operation Kalank' on 25.10.2007 and the revelations made therein. The Commission earnestly hopes that the State Government of Gujarat will render all cooperation required of it for the purpose of investigation.

The Government of India shall communicate its response within four weeks.

(Justice S. Rajendra Babu)
Chairperson

(Justice Y. Bhaskar Rao)
Member

(R.S. Kalha)
Member

(P.C. Sharma)
Member