

Hon'ble Chair/Person.

**REPLY TO NOTES OF HON'BLE CHAIRMAN**

**Background :**

- (i) The Hon'ble Chairman passed certain orders vide note dated 06.08.2020 through constitution of three benches out of which two of them were Division Bench and One Single Bench was headed by the Hon'ble Chairman himself.
- (ii) Subsequently, the Member vide his notes dated 12.08.2020 requested for a discussion on the subject. The Hon'ble Chairman refused to hold discussion on the grounds that his powers were absolute in these matters and asked the member to submit his written views or objections before taking up the matter any further.
- (iii) Further, in terms of the said order of the Hon'ble Chairman, two types of benches for dealing with complaints from Presidency and Calcutta divisions has been formed, - in respect of Suo-motu complaints two-member bench would take cognizance, but in respect of complaints by petitioner/complainant or someone on his behalf cognizance would be taken by single bench of Chairman himself.

**Submission :**

Hence, in view of Hon'ble Chairman's desire and direction the Member is submitting his views and/or objections to order dated 06.08.2020 asunder:

1. As the word 'Bench' has been repeatedly used in the said order. Laying down the meaning of the term according to Black's Law Dictionary (P175; Ninth Edition), 'Bench' has been defined as - *'The court considered in its official capacity, judges collectively bench and the bar.'*
2. Section 20 of the Indian Penal Code defines "Court" as a judge who is empowered by law to act judicially alone or a body of judge which is empowered by law to act judicially as a body when such judge or body of judges is acting judicially'. In Section 19 of the Indian Penal Code, a "Judge" has been defined as- judge denotes not only every person who is officially designated as a judge but also every person who is empowered by law in civil or criminal proceedings, a definitive judgement, which if not appealed against would be definitive or a judgement which if confirmed by any other authority would be definitive or who is one of the body of persons is empowered by law to give a judgement.'

Authenticated  
 23/9/20  
 S.C. HIRA, WBCS (Exc.)  
 Joint Secretary  
 Govt. of West Bengal  
 W.B. Human Rights Commission

3. On the other hand, 'Commission' is defined as the body of persons acting under lawful authority to perform certain public service. Black's Law Dictionary P.306 ninth edition West Bengal Human Rights Commission (WBHRC) is a three-member body, constituted under Protection Of Human Rights Act 1993 as amended from time to time, for the object described in the act and primarily for protection of human rights of public at large and as such it a "Commission" and not a "Court" in view of the discussions below.
4. As a convention and customarily, no advocates are allowed for any hearings before the West Bengal Hyman Rights Commission, be it admission or final. Thus, considering the very character and constitution of WBHRC, it is a commission and not a court.
5. In terms of the Protection of Human Rights Act, 1993, the Commission is empowered to give recommendations to government which are non-binding in nature whereas Courts give full and final judgements, orders, and directions which are binding on the parties.
6. A commission is merely a fact finding body by the government for its information. In the words of the Supreme Court in *Ram Krishna Dalmia V. Justice S.R. Tendolkar* : AIR 1958 SC538:

The Commission has no power of adjudication in the sense of passing an order which can be enforced *proprio vigore*. A clear distinction must, on the authorities, be drawn between a decision which, by itself, has no force and no penal effect and a decision which becomes enforceable immediately or which may become enforceable by some action being taken. Therefore, as the Commission we are concerned with is merely to investigate and record its findings and recommendations without having any power to enforce them, the inquiry or report cannot be looked upon as a judicial inquiry in the sense of its being an exercise of judicial function properly so called ....

The findings and recommendations can as well be rejected by the government.

The power conferred to the Commission under Section 13 can only be exercised while carrying out enquiry and it does not confer power to pass an order, rather in terms of Section 18, the outcome of the enquiry is recommendation to the concerned Government or authority.

7. In view of the above discussions, it is amply clear that neither the Chairman nor the Members of the Human Rights Commission are judges as they are not officially designated as a judge or even empowered by law in to act as

*Ushantika Chakrabarti*  
*P. Hira*  
 23/9/20  
**S.C. HIRA, WBCS (Ext)**  
 Joint Secretary  
 Govt. of West Bengal  
 W.B. Human Rights Commission

Judges. The Member is strongly of the view that there is no scope to form a 'Bench' per se in the Commission since it is a multi-member body constituted to act collectively and not as a court. Thus, forming a 'Bench' is illegal and ultra vires of the Act.

8. West Bengal Human Rights Commission (WBHRC) has been constituted under Section 21 of The Protection of Human Rights Act, 1993 which lays down the basis and conditions of Constitution of a State Human Rights Commission. Also, under Sub-section (2) (a)(b)(c) of Section 21 in the Act, it is clearly stated that a Commission is a three-body setup. Further, in accordance with the 2019 Amendment of The Protection of Human Rights Act, 1993, Sub-section (3) of Section 21 of the Act vests certain powers with the Chairman which he/she can exercise to delegate administrative and financial powers of the State Commission as it may deem fit. All the remainder of functions remains with the Commission in totality wherein the Commission will act as body as a whole and not an individual member.
9. Section 22 of The Protection of Human Rights Act, provides for the procedure, terms and conditions, criteria of 'Appointment of Chairperson and Members of the State Commission. Post the Amendment in 2019, a Chief Justice or a Judge of High Court can be appointed as Chairperson which was not so earlier. Thus the position of Chairperson and Member are the same.
10. Section 25 of The Protection of Human Rights Act empowers a member to act as a Chairperson or discharge his functions in certain circumstances where the Chairman fails to perform his duties by reason of death, retirement, absence due to leave or any other reason whatsoever. This provision displays the transparent intent of the legislature that was to treat the Members and the Chairperson on equal grounds rather than intending to create a superior-subordinate relationship.
11. Under Section 12 of Chapter III in The Protection of Human Rights Act, a detailed description of the 'Functions of the Commission' is laid down. The Section 12(a) empowers the Commission to inquire Suo-motu or on a petition presented to it by a victim or any person on his behalf [or on a direction or order of any court], into complaint of-
  - (i) violation of human rights or abetment thereof; or
  - (ii) negligence in the prevention of such violation, by a public servant

In the above provision, two substantial points must be noted-

- (a) The Commission possesses the exclusive power to admit complaints of any kind, be it Suo moto, complaint by a Petitioner or someone on his

*Authentic copy*  
*S.C. HIRA, WBCS (Exc.)*  
 Joint Secretary  
 Govt. of West Bengal  
 W.B. Human Rights Commission

behalf or by any court direction.

(b) There is no proper and logical basis or scope gathered thereby for insisting upon forming different types of benches for Suo-moto complaints or Complaint by Petitioner or by any Court as has been done by Chairman vide his orders dated 06.08.2020.

12. With reference to Regulation 2(f) of the Regulation of WBHRC which pertains to be of importance with the present matter as its inter-alia states 'Chairperson' means 'Chairperson of the Commission and includes a Member who is authorized to act as the Chairperson of the Commission under Section 25 of the Act.' This gives a clear indication that any person holding the position of a Chairperson is inclusive of the Members of the Commission.
13. The general law is that a Commission must act jointly, unless the Act gives the Chairman power to take a decision unilaterally or decide by majority (ordinary or special). Since the Act does not specifically provides for exercise of power by the Commission, the Commission has to take a decision jointly and on the basis of consensus.
14. Regulation 13 of the Regulation of WBHRC provides for constitution of Benches by the Commissions. However, Member is of the opinion that this Regulation is ultra-vires of the Act. West Bengal Human Rights Commission (WBHRC) is a Commission constituted under The Protection of Human Rights Act, hence, it does not possess a character of the court thereby needing an immediate amendment and/or modification of this relevant provisions of the Regulation of WBHRC. A Regulation cannot override the provisions or principles of the Act, under which it was made.
15. Rule making power of the Commission in terms of Section 10(2) read with Section 29 of Protection of Human Rights Act, 1993 is subject to the provisions of the Act and Rules made thereunder. In terms of Section 41(1) & (3) of the Act the State Government has power to make Rules by notification to carry out the provisions of the Act and to lay it before State Legislature. Unfortunately, till date no rules have been framed by State Government. In absence of any Rule made by the State Government, regulation contrary to the provisions of the Act is ultra vires and invalid.
16. The Act requires the Commission to act as a body as a whole and not through its Chairman or individual member or benches formed by the Chairman and as such the Regulation 13 is ultra vires of the Act and should not be given effect to. To clarify the matter further Section 9 of Regulations requires that complaints of following nature shall not be entertained by

*21/08/2020*  
*A m*  
*23/9/20*  
**S.C. HIRA, WBCS (Exe.)**  
Joint Secretary  
Govt. of West Bengal  
W.B. Human Rights Commission

Commission and shall be dismissed in limine [Section 9(a) to 9(l) Regulations]. Therefore, constituting such Benches u/s 13 of Regulations are meaningless and contradictory of Section 9.

17. The Member draws attention to the decision of the Hon'ble High Court at Calcutta in) Justice D.P. Sarkar versus State Of West Bengal & Others, (W.P.1895 [W]of 2003 , wherein the Hon'ble High Court struck down Rule 6 of service conditions of Chairperson, Members. The Court held that

*'there was no intelligible differentia for making chairperson the leave granting authority and by reason of framing such rule the object sought to be achieved by the act in question has been frustrated. It was never the intention of legislature that the state commission should perform its duty through the Chairperson with the assistance of subordinate members.'*

18. Thus, the said Judgment made it clear that the position of Chairperson vis-à-vis Member which is not a superior -subordinate relationship with Chairperson having absolute powers.
19. Another important case law in this respect is **T.N.Seshan versus Union Of India**, W.P.[CIVIL]805 OF 1993, which states that :

*"18. It is further an acknowledged rule of transacting business in a multi-member body that when there is no express provision to the contrary, the business must be carried on unanimously. The rule to the contrary such as the decision by majority, must be laid down specifically by spelling out the kind of majority -- whether simple, special, of all the members or of the members present and voting etc. In a case such as that of the Election Commission which is not merely an advisory body but an executive one, it is difficult to carry on its affairs by insisting on unanimous decisions in all matters."*

.....

*"It would be wrong to project the individual (the CEC) and eclipse the Election Commission. Nobody can be above the institution which he is supposed to serve. He is merely the creature of the institution; he can exist only if the institution exists. To project the individual as mightier than the institution would be a grave mistake. Therefore, even if the Election Commission is a single-member body, the CEC is merely a functionary of that body; to put it differently, the alter ego of the Commission, and no more."*

.....

According to Concise Oxford Dictionary, 'Chairman' means a person who presides over meetings. For example- Board of Directors. The function of

*Amhenti' catas*  
*P. Hira*  
 23/9/20  
**S.C. HIRA, WBCS (Exc.)**  
 Joint Secretary  
 Govt. of West Bengal  
 W.B. Human Rights Commission

chairman would therefore be to preside over meetings, preserve order, conduct business of the day, correctly record and do such activities for smooth transaction of business as may be deemed fit. He must so conduct himself at the meetings chaired by him that he is able to win confidence of his colleagues on the commission and carry them with him.

.....  
 Shakelton on Law and Practice of meetings (Edition compilation of pg Page 116) states that the principle has long been established stating that the will of a corporation or body can only be expressed by whole or a majority of principles and act of majority is regarded as act of whole.

.....  
 Same principle was re-iterated in 'Grindley versus Barker' (126 English Reporter 875,879,882),

'Apart from Election Commission there are many multi-member bodies. These also function by rule of majority, so we find it difficult to accept the broad conception that a multi member commission is unworkable. It depends on the attitude of chairman and its members. If they work in cooperation, appreciate and respect each other point of view there would be no difficulty, but if they decide from the very outset to pull in opposite direction, they would by their conduct make the commission unworkable and thus fail the system'.

20. From this judgement it is crystal-clear that the Commission must function unanimously and in cooperation between Chairman and Members, there being no superior- subordinate relationship. Thus position of the Chairman if the WBHRC is nothing but 'First among Equals', with no superior- subordinate relationship and decisions being taken collectively. The Commission is collectively responsible for all its actions commencing with accepting all types of complaints vide Section 12[a] of Protection of Human Rights Act to its final culmination u/s 18 of the Protection of Human Rights Act which ends with the commission, as a whole, submitting its recommendations to government. The Act has not given any exclusive powers to the chairperson over-riding other members.

21. It is also important to mention that formation of a Bench, whether Single or Division, [consisting of two members leaving the third commission member in limbo] has its inherent legal problem. As stated in Para 2, the concept of Benches is not applicable to Commissions, which is merely a fact finding body, which can give recommendation to the State. Referring to the case of State of Karnataka v. Union of India (1978 AIR 68), wherein it is evident that Commissions are understood to have a collective responsibility. In this case it is explained as under- "The object of collective responsibility is to make the whole body of persons holding Ministerial office collectively, or, one may so put it, 'vicariously' responsible for such acts of the others as

Authenticated  
 23/9/20

S.C. HIRA, WBCS (Exec)  
 Joint Secretary  
 Govt. of West Bengal  
 W.B. Human Rights Commission

are preferable to their collective volition so that, even if an individual may not be personally responsible for it, yet, he will be deemed to share the responsibility with those who may have actually committed some wrong."

22. There are many other difficulties associated with it. Once a bench is formed, especially a single bench, the Single Bench is solely responsible for all actions and functions mentioned from Section 12 to Section 18 of The Protection of Human Rights Act. Now the major question that arises here is that whether these functions are to be performed by the Commission as per the provisions of the Act 'collectively' or not? The Member of the Commission finds no legal basis for acting single-handedly in the Commission.
23. In view of the above submission, Member considers that the order passed by Chairman forming three types of Benches for three categories of complaints is ultra vires of The Protection of Human Rights Act in view of the various Judgments of the Hon'ble Supreme Court and High Court.
24. The Member reaffirms and reiterates that there is no scope of benches in a Commission, which under the existing law requires to act collectively and take its decision unanimously or by majority, wherein the latter situation arises when there is an existing law to that effect.
25. Furthermore, the Member is of the view that Section 12(a) envisages all four types of complaints received by the Commission to be dealt with in same manner like the inquiry by the Commission as a whole. There is absolutely no scope to treat the Suo moto complaints in a totally different category by putting it in division bench. This order is totally silent on fourth type of complaint, those received on direction or order of any Court and has not addressed this situation.

Therefore, the Member urges upon the Chairperson to take steps to withdraw the order of August 6 2020 since the same is ultra vires of the provisions of the Act.

Hon'ble Chairperson

*(Nafarajit Mukherjee)*  
28/9/2020

Authenticated  
23/9/2020  
S.C. HIRA, WBCS (Exc.)  
Joint Secretary  
Govt. of West Bengal  
W.B. Human Rights Commission