

Are Information Commissioners in India barred from sitting on small and large benches?

June 11, 2010

Dear all,

Are Information Commissioners in India barred from sitting on small and large benches while deciding a matter? Of course individuals who are members of various Information Commissions in India will have to sit on benches, whatever be their size, if those are the only pieces of furniture in the room. Or they may opt to remain standing. That pun notwithstanding, I would like to share with readers my understanding of the jurisprudence till date on the controversy regards benches of Information Commissions. [Its a good thing that chairs and tables are not so controversial. No disrespect meant to any member of any Information Commission either :-)]

1. What is this controversy about benches?

The recent controversy about benches of the Information Commission follows from the judgement of the Hon'ble Delhi High Court (from a double bench) in the matter of *Delhi Development Authority v Central Information Commission* delivered on 21 May 2010. The complete text of this judgement is accessible at: <http://lobis.nic.in/dhc/BDA/judgement/21-05-2010/BDA21052010CW127142009.pdf> However the controversy about benches is older than this case and we will discuss some of those cases below after looking at the crux of this judgement.

Delhi Development Authority (DDA), a public authority in charge of land and urban planning-related matters has been repeatedly accused of poor performance with its obligations of proactive disclosure under India's Right to Information Act (RTI Act). The first case came up in February 2006 and the Central Information Commission (CIC) directed the DDA to upload all the Rules that it uses to conduct its work. Over the years in several other matters similar directives were issued by the CIC. I had also litigated before the CIC in a similar matter in 2009 and orders were issued for the umpteenth time requiring DDA to upload its Rules and Regulations on its website. The DDA with its army of 70+ public information officers was unable to comply with these orders fully at that point of time. In later cases of similar complaints/appeals against the DDA, the CIC was told by the DDA's own staff in charge of the RTI Cell, that they have done their best, but could not get hold of all the Rules and Regulations as they are with units other than the RTI Cell. The CIC hearing the most recent case on a double bench ordered the constitution of a three member committee to inquire into the big mystery of where all the notifications relating to the Rules and Regulations used by the DDA lie within its sprawling office complex. DDA challenged this order on several grounds. The most important one was that the CIC's constitution of benches to hear cases was illegal as it was done under the CIC Management Regulations of 2007. DDA argued that CIC did not have the power to issue such regulations. So, the constitution of benches was illegal. So the constitution of the inquiry committee to look for the rules and regulations book was also illegal. Further, because the CIC summoned the DDA Vice Chairman to explain why the numerous orders of the CIC regards proactive disclosure were not complied with, they argued before the Hon'ble Delhi High Court that the CIC did not have such powers to summon any officer as they wish.

The Hon'ble Delhi High said that section 12(4) does not give the CIC the power to issue Regulations. So the Hon'ble High Court struck down the CIC Management Regulations, 2007 as being *ultra vires* of the Act. The Hon'ble Court also said that the CIC had no power to delegate the job of conducting inquiries to other persons. In an admonishing tone of voice, it also said that the CIC could not behave like a court of plenary power and summon any officer from DDA who is not a officer with designated duties under the RTI Act. There are several issues that one can react to but I will restrict myself to the issue of legality of benches of the CIC or of any other Information Commission in India for that matter. Other issues arising from this judgement will be taken up in later emails. The legality of the Regulations was an issue framed for determination in this case but it must be noted that the legality of benches of the CIC was not an issue framed by the Hon'ble Court for determination. Nevertheless while striking down the Regulations the Court also held that the CIC had no powers to constitute benches on its own.

The biggest concern here is whether the Hon'ble Delhi High Court was apprised of the entire gamut of the law and jurisprudence in this matter, by either party to the case, before it found that the CIC did not have the power to constitute benches.

2. What did the Hon'ble Bombay High Court say in the matter of *Shri Lokesh Chandra IAS and Anr. v State of Maharashtra* AIR 2009 Bom147? (Click [here](#) to view)

In 2006 a citizen resident of the state of Maharashtra sought the immovable property returns filed by two officers of the Indian Administrative Service from the General Administration Department of the State Government. Both the public information officer and the first appellate authority rejected the request on the ground of the officers' right to privacy. The citizen challenged the orders before the State Information Commission. The State Information Commissioner (SIC) based in Nagpur directed that the information be supplied. The aggrieved officers moved the Nagpur bench of the Bombay High Court. The Hon'ble Court remanded the case back to the SIC requiring the SIC to hear the objections of the officers. The officers contended that the State Chief Information Commissioner alone had the power to hear such matters. The SIC heard them again and rejected their objections. The officers moved the Bombay High Court again.

A single judge bench while deciding this matter in 2009 compared the State Chief Information Commissioner (SCIC) to the Chief Justice of a court as follows:

"13. The Supreme Court in State of Rajasthan v. Prakash Chand 1998 CriLJ 2012 has held that on the judicial side Chief Justice is the first amongst equals and on administrative side the Chief Justice is the master of the roster. It is, therefore, clear that though the Chief Justice is the first amongst equals on judicial side, he is in fact unequal on the administrative side. He alone can decide, who should sit in the Division Bench and who should sit in single and what type of work a puisne judge should deal with. Such type of power is certainly conferred on Chief Information Commissioner alone by Section 15(4) of the Right to Information Act.

14. Shri Bhuibhar, learned Counsel for respondent No. 3, submits that powers of all Commissioners are equal and other Commissioners are not subordinate to the Chief. There can not be two opinions with regard to the proposition that neither of the Commissioner is subordinate to the Chief Information Commissioner. Similar is the case of Chief Justice and the puisne judges. They are equal but on administrative side the Chief Justice wields more power. By virtue of Section 15(4), I find that the Chief Information Commissioner has the statutory authority to manage the affairs of the Commission and to issue direction etc. Respondent No. 3 has tried to mix up the quasi judicial powers to administrative. The quasi or judicial powers are certainly equal but not the administrative...

15. It must, therefore, be held that the Chief Information Commissioner has right to decide which appeals are to be heard by whom. That is his statutory right and his prerogative under the statute."
[emphasis supplied]

This decision is not cited in the judgement of the Hon'ble Delhi High Court. Perhaps neither party presented this bit of jurisprudence for the consideration of the judges on the bench. I could not find the complete text of the judgement of the Bombay High Court on their website, so the text is attached to this email.

3. What did the Hon'ble Patna High Court say in the matter of *Syed Abbas Hussain Rizvi v the State Information Commission and Others?*

In 2009 Mr. Rizvi, a citizen residing in Bihar sought information relating to a recruitment process from the Bihar Public Service Commission. He sought the details of marks obtained by candidates who took the written examination and the names and addresses of officials who were on the interview panel. Marks were disclosed but names and contacts of officials were refused on grounds of privacy under section 8(1)(j) of the RTI Act. One of the grounds of the appellant was that the order in his case was given by a single SIC. This according to the appellant was *coram non judge* because the RTI Act contemplated that the State Information Commission shall dispose of all appeals and complaints as a body. The Hon'ble Patna High Court rejected this argument and stated as follows:

"I am afraid that learned counsel fails to take note of Section 15(4), which is quoted hereunder:-

"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."

A plain reading of the provision of Section 15(4) shows that the general superintendence, direction and management of the affairs of the State Information Commission vests in the State Chief Information Commissioner. Thus, the power to manage the affairs of the Commission is entrusted to the State Chief Information Commissioner. Affairs of the State Information Commission would include the very object for which the Commission has been created, that is, to entertain appeals and decide the same. Thus, how the affairs of the Commission would be managed is as per the discretion of the State Chief Information Commissioner. To clear any ambiguity as to the status of the other State Information Commissioners, who are members of the Commission as well, it is stipulated that they shall assist the Chief Information Commissioner. The Section further provides that they, the State Information Commissioner shall have all such powers and would be competent to do all such things which could be done by the State Information Commission. Thus, it is clear that the Commission is constituted of the State Chief Information Commissioner and State Information Commissioners. It does not necessarily follow that in all its functions all members of the Commission must jointly participate. That is left to the State Chief Information Commissioner, to decide.

Here, it may be pertinent to notice that in view of the provisions of Section 15 (4) of the Right to Information Act, 2005, the State Chief Information Commissioner has made regulations known as the Bihar State Information Commission (Management) Regulation, 2007, in which elaborate provisions has been made with regard to how appeal would be filed listed, who would deal with them and how they will be dealt with. It permits State Information Commissioner to sit singly. Nothing has been shown that the appeal preferred by the petitioner was heard and decided in contravention of these regulations." [emphasis supplied]

This decision is also not cited in the judgement of the Hon'ble Delhi High Court. Perhaps neither party presented this bit of jurisprudence for the consideration of the judges on the bench.

The complete text of the order is accessible at: <http://phc.gov.in/judgment/pdf.aspx?ord=2&noc=15&caseno1=14486&yr=2009>

The Hon'ble Patna High Court upheld the rejection order on grounds of privacy. With due respect to the wisdom of the Patna High Court it must be said that the Hon'ble Court has not explained how the privacy of officials would be violated if information about them on account of performing public duties such as interviewing candidates for a public service, is disclosed. This is an issue that may be taken up for discussion in another email.

4. What did the Hon'ble Karnataka high court say in the matter of Bangalore International Airport Authority Ltd. v Karnataka Information Commission and Others?

In 2007 Mr. Benson Isaac a citizen residing in Bengaluru (then Bangalore) sought information from the Bangalore International Airport Authority Ltd. (BIAL) regards its compliance with section 4(1)(b) of the RTI Act. BIAL replied that it was not a public authority as defined in the RTI Act. Mr. Isaac filed a direct complaint before the Karnataka Information Commission. The State Information Commissioner (SIC) who was assigned the case ordered that the case be referred to the full bench as it involved substantial questions of law. However the State Chief Information Commissioner (SCIC) held a hearing in this matter on his own and issued an order holding that BIAL was a public authority. BIAL challenged this order before the Hon'ble Karnataka High Court. One of the grounds was that the SCIC had no power to hear the case on his own when the SIC had ordered that the matter be referred to the full bench of the Commission. The Court agreed with this contention and held that the SCIC had erred in deciding the case himself. Instead the case ought to have been heard by the full bench. The reference to the *Karnataka Right to Information (Constitution of Bench) Rules, 2006* in this judgement is interesting. There was no provision for the constitution of benches in the original set of RTI Rules notified by the Government of Karnataka. So in 2006 rules were made for the constitution of benches. The relevant portions of the Rules read as follows:

"3. Constitution of Benches: (1) The State Chief Information Commissioner shall be competent to constitute Benches consisting of the State Chief Information Commissioner with one or more State Information Commissioners or consisting of two or more State Information Commissioners.

(2) It shall also be competent for the State Chief Information Commissioner or any other State Information Commissioner authorised by State Chief Information Commissioner in this behalf to function as a Bench consisting of a single member and exercise the jurisdiction, power and authority of the Karnataka Information Commission in respect of such classes of cases or such matters pertaining to such classes of cases as the State Chief Information Commissioner may by general or special order specify:..." [emphasis supplied]

This decision is also not cited in the judgement of the Hon'ble Delhi High Court. Perhaps neither party presented this bit of jurisprudence for the consideration of the judges on the bench. The complete text of this judgement is accessible at: <http://164.100.80.145:8080/dspace/bitstream/123456789/99218/1/WP8127-08-21-07-2008.pdf>

5. What are the implications of these judgements and orders of the three High Courts?

Plainly speaking the following implications arise from a combined reading of the judgements in the three cases discussed above:

- **The opinion of the Honb'le Delhi High Court that section 12(4) [which is the equivalent of section 15(4) of the RTI Act in the context of the State Information Commissions] does not empower the CIC to issue Management Regulations is not shared by at least two other High Courts (Bombay and Patna).**
- **The opinion of the High Court that section 12(4) [which is the equivalent of section 15(4) of the RTI Act in the context of the State Information Commissions] does not empower the CIC to constitute benches is not shared by at least two other High Courts (Bombay and Patna).**
- **The Government of Karnataka's Rules regards Constitution of benches implies that the SCIC can constitute benches. Surely this power cannot be created only by subordinate legislation. The settled law is that the Rules may be made only to carry out the provisions of the principal Act not negate them or create new rights or powers or take away what is given by the principal Act. So the power to constitute benches must lie somewhere in the RTI Act. It cannot lie only in section 28(10) which states that the Information Commissions shall dispose appeals according to the procedure prescribed. Constitution of benches is not just a 'procedure'. It also recognises the power of the Chief Information Commissioners of the Central Information Commission and the State Information Commission to perform the act of constituting benches. Ergo that power must lie in some other provision.**

To my mind that power lies in section 12(4) for the Chief Information Commissioner, CIC and section 15(4) for the SCIC in the case of State Information Commissions.

Perhaps the Hon'ble Delhi High Court was not asked to consider any of these issues in its while deciding the matter of DDA V CIC. It comes as no surprise that the Hon'ble Court has stated as follows:

" In this case, the ostensible source of power for framing the said Regulations is indicated to be section 12(4) of the RTI Act. But, that provision only relates to the superintendence, direction and management of the affairs of the Central Information Commission. Section 12(4) cannot be regarded as the fountain-head of the power to make regulations' whether expressly or by implication. The scope and ambit of Section 12(4) is limited to the management of the affairs of the Central Information Commission. The words superintendence, direction and management are all used in a synonymous sense and concerns the internal affairs of the Commission. The power which vests in the Chief Information Commissioner by virtue of Section 12(4) does not extend to the subject matter of the rule making powers of the appropriate government' or the competent authority' under Sections 27 and 28, respectively."

As the views of the three High Courts mentioned above have not been considered and rejected on the basis of sound reasoning in my opinion the finding of the Hon'ble Delhi High Court regards the scope and amplitude of section 12(4) may qualify to be treated as being per incuriam even though its has come from a higher court. I say this with the deepest respect to the wisdom of the Hon'ble Delhi High Court. Only a higher court's view on this matter shall be considered to be an authoritative pronouncement on the subject for ending this controversy.

The para cited immediately above from *DDA v CIC* reminds me of a similar statement made by the then Addl. Solicitor General Mr. Gopal Subramaniam while arguing in the matter of *Pyarelal Varma v Ministry of Railways and Anr.* (for the complete text of this decision see: http://cic.gov.in/CIC-Orders/Decision_29012007_6.pdf). The CIC's order issued in 2007 summarises his arguments as follows:

"On a specific question raised by Chief Information Commissioner, he also submitted that the scope of Section 12 (4) of the Right to Information Act was limited and it was meant only for the purpose of carrying out different executive functions associated with the affairs of the Commission. Giving illustrations, he submitted that such executive functions may include fitting of coolers and air-conditioners or buying of furniture or stationery, but it cannot be expanded so as to include assigning judicial or quasi judicial cases to individual Information Commissioners in the name of the Commission." [emphasis supplied]

If terms and phrases such as "exercise all such powers", "do all such acts and things which may be exercised or done", "autonomously" and "without being subjected to directions by any authority" mentioned in sections 12(4) and 15(4) are to be interpreted as implying only the freedom to decide where water coolers and airconditioners are to be fitted in the office of the CIC then why do we need Information Commissioners at all? Only Section Officers and Under Secretaries would be sufficient to man the Central and State Information Commissions. Surely this is not the kind of autonomy that some of us in the RTI campaign wanted the Information Commissions to have. Such restrictive positions are clearly oblivious of the debates that happened at the time of the drafting of the RTI Act outside Parliament and later within the Parliamentary Standing Committee that vetted the Bill.

6. In Conclusion:

There is sufficient ground to challenge the decision in the matter of *DDA v CIC* on grounds of law and interpretation that remains unconsidered. Perhaps a bench of a higher court must be pressed to resolve this controversy.

In order to access our previous email alerts please click on: <http://www.humanrightsinitiative.org/programs/ai/rti/india/national.htm> You will find the links at the top of this web page. If you do not wish to receive email alerts please send an email to this address indicating your refusal to receive email alerts.

Thanks,

Venkatesh Nayak
Programme Coordinator
Access to Information Programme
Commonwealth Human Rights Initiative
B-117, I Floor, Sarvodaya Enclave
New Delhi- 110 017
tel: 91-11- 43180212/ 2686 4678/ 2685 0523
fax: 91-11- 2686 4688
website: www.humanrightsinitiative.org
alternate email: nayak.venkatesh@gmail.com