

(2012) 02 GUJ CK 0036

In the Gujarat High Court

Case No : Letters Patent Appeal No. 2419 of 2009 in Special Civil Application No. 12295 of 2009 With Civil Application No. 13302 of 2009 in Letters Patent Appeal No. 2419 of 2009

Amrish N Patel, Member - Jan Sangarsh Manch

APPELLANT

Vs

Commission of Inquiry and 1

RESPONDENT

Date of Decision : 01-02-2012

Acts Referred:

Commissions of Inquiry Act, 1952 — Section 8, 8(B), 8(C)

Citation : (2012) 02 GUJ CK 0036

Hon'ble Judges : S.G. Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Mukul Sinhas and Mr Subramaniam Iyers, for the Appellant; None for Respondent(s) : 1, Mr KB Trivedi, Advocate General With Mr PK Janmi, GP Ms. Sangita and Vishen AGP, Government Pleader for Respondent(s) : 2, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Mr. Justice Akil Kureshi

1. Appellant original-petitioner had filed Special Civil Application No.12295 of 2009 challenging order dated 18.9.09 passed by respondent No.1 herein, Commission of Inquiry presided by Hon'ble Mr Justice G.T. Nanavati ("Commission" for short). The petition came to be dismissed by learned Single Judge by judgment dated 27.11.09. This Letters Patent Appeal is, therefore, directed against the said judgment dated 27.11.09. During the pendency of the proceedings, certain further developments took place which have also been brought on record through Civil Application No.12673 of 2010 which application for amendment was allowed by order dated 23.11.2010. Consequential pleadings and prayers have also been added.

2. On 27.2.2002, an incident of setting fire of Sabarmati Express Train near Godhra Railway Station took place resulting into unfortunate death of 58 persons.

This unfortunate incident resulted in spread of communal violence in various parts of the State of Gujarat and loss of human lives and destruction of properties. The State Government by notification dated 6th March 2002, set up a fact-finding Commission under the Commissions of Inquiry Act, 1952 ("the Act" for short). The terms of reference were as follows:

2. The following shall be the terms of reference of the said commission namely:

(1) To inquire into

(a) the facts, circumstances and the course of events of the incidents that led to

(b) the facts, circumstances and the course of events of the subsequent incidents of violence in the State in the aftermath of the Godhra incident; and

(c) the adequacy of administrative measures taken to prevent and deal with disturbances in Godhra and subsequent disturbances in the State.

(2) To ascertain as to whether the incident at Godhra was pre-planned and whether information was available with the agencies, which could have been used to prevent the incident;

(3) To recommend suitable measures to prevent recurrence of such incidents in future.

3. The Commission should complete its inquiry and submit its report to the State Government within three months." By subsequent notification dated 20th July 2004, terms of reference were expanded. This was principally done on the basis that the Government received representations for inquiring into the role and conduct of the Chief Minister, Ministers, Officers of the Government, other individuals and organizations. Additions made in the previous notification dated 6th March 2002 were as follows:-

Now, therefore, in exercise of the powers conferred by section 3 of the commission of Inquiry Act, 1962 (60 of 1952) the Government of Gujarat hereby amend the above referred Government Notification, Legal Department No.:GK/07/2004-COI/102002/797-D dated 6th March 2002, for the aforesaid purpose as follows namely:-

In the notification -

1. After clause (c) in sub-Para (1) of Para-2, following clauses (d) and (e) be added, namely:

(d) Role and conduct of the then Chief Minister and / or any other Minister(s) in his Council of Ministers, Police Officers, other individuals and organizations in both the events referred to in clauses (a) and (b).

(e) Role and conduct of the then Chief Minister and / or any other Minister(s) in his Council of Ministers, Police Officers (i) in dealing with any political or non-political organization which may be founded to have been involved in any

other events referred to herein above,

(ii) in the matter of providing protection, relief and rehabilitation to the victims of communal riots (iii) in the matter of recommendations and directions given by National Human Rights Commissions from time to time.

II. In para 2: in sub-para (1) in clause (b), after the words, "incidence of violence", for the words and figures, "that took place on and from 27th February 2002 to 30th March 2002, the words and figures "that took place on and from 27th February, 2002 to 31st May 2002" be substituted.

III. In para 3, for the words "three months", the words "on or before 5th December, 2005" be substituted.

The Government was, thus, of the opinion that it was necessary to enlarge the scope of reference in public interest so as to look into role and conduct of the Hon'ble Chief Minister as well as other Hon'ble Ministers, Police Officers, other individuals and organizations.

3. The present appellant one Shri Amrish N. Patel is a member of NGO called Jan Sangarsh Manch ("JSM" for short). It is not in dispute that JSM has been actively participating in the proceedings before the Commission presenting evidence and has also been permitted by the Commission to cross-examine the witnesses. JSM filed an application dated 31st August 2007 (Ex.5979) before the Commission praying for summoning several persons named therein for deposing before the Commission. In the application, it was stated that evidence has been produced before the Commission to indicate that several police officers had colluded with the rioters. JSM has produced evidence of the mobile phone calls details before the Commission. There is prima facie evidence to show that violence which took place from 28th February 2002 onwards was as a result of preplan worked out by several Ministers, Police Officials, VHP and BJP leaders. JSM, therefore, prayed that summons be issued to following persons for deposing before the Commission:

- a) Shri Omprakash The then P.A. to the Chief Minister.
- b) Shri Tanmay Mehta PA/OSD to Chief Minister
- c) Shri Sanjay Bhavsar OSD to Chief Minister
- d) Shri Narendra Modi Chief Minister
- e) Ashok Bhatt the then Health Minister
- f) Gordhan Zadafiya the then Home Minister
- g) Shri R.J.Sawani the then DCP Zone V of Ahmedabad.

On 27.11.2007, JSM filed another application (Ex.5998) with a similar prayer. On 29th April 2009, JSM filed yet another application (Ex.6005) before the Commission stating that previous applications were filed on 31.8.2007 and 27.11.07 requesting that the Chief Minister and certain other persons

besummoned for cross-examination. Though such applications were heard, no order was passed. It was reiterated that summons be issued to such persons and JSM be permitted to cross-examine them.

4. The Commission passed its order dated 18.9.09 on the applications dated 31.3.07 (Ex.5979), 27.11.07 (Ex.5998) and 29.4.009 (Ex.6005) filed by JSM. In the said order, with respect to the prayers made by the JSM for summoning the Hon"ble Chief Minister and other persons before the Commission, it was observed that whether there was failure as alleged by the JSM or not can be decided only after all the relevant materials are considered. The Commission does not think it proper to summon the Chief Minister, Home Minister or any other Ministers of the Government and question them regarding those incidents merely on the basis of vague allegations or allegations based upon wrong or unwarranted assumptions. The Commission recorded that "we have carefully considered the judgments relied upon by the learned advocate for the applicant and but we find no justification for issuing summons to the then Chief Minister, the then Home Minister or to DCP Shri Savani, for the purpose stayed by JSM". The Commission, however, accepted the prayers of JSM in part and disposed of the applications in following manner:

27. In this context and for the reasons stated above, we pass this order:

(1) The Secretary to the Commission is directed to write to Shri Omprakash Singh, who was then the PA to the Chief Minister, to submit an affidavit to this Commission stating therein (a) whether the mobile phone number 9825000836 was registered in his name or otherwise belonged to him, (b) whether he had any telephonic talk with Wiltshire Ashok Bhatt or with Shri Gordhan Zada on 27.2.2002 and (c) if he had a talk with either of them, what was the nature of that talk.

(2) The Secretary is also directed to write to Shri Tanmay Mehta, who was then the PA to the Chief Minister to submit an affidavit to this Commission stating therein (a) whether the mobile phone number 9825000837 was registered in his name or otherwise belonged to him, (b) whether he had any telephonic talk with Shri Jaydeep Patel on 28.2.2002 and 1.3.2002 and (c) if he had a talk with him, what was the nature of that talk.

(3) The Secretary is also directed to write to Shri Sanjay Bhavsar, who was then the PA to the Chief Minister to submit an affidavit to this Commission stating therein (a) whether the mobile phone number 9825037432 was registered in his name or otherwise belonged to him, (b) whether he had any telephonic talk with Shri Jaydeep Patel on 27.2.2002, 28.2.2002 and 1.3.2002 and (c) if he had a talk with him, what was the nature of that talk. These applications are disposed of accordingly.

It is this order of the Commission dated 18.9.2009 which the petitioner had challenged before the learned Single Judge in Special Civil Application No.12295 of 2009. The said petition came to be dismissed by the learned Single Judge by

the impugned order dated 27.11.2009. The learned Single Judge was of the opinion that the Commission was still in the process of examining the incidents and it was premature to take the allegations on their face value. The learned Single Judge was of the opinion that the petitioner appeared only as a witness and he had no right to cross-examine any other witness examined before the Commission. Moreover, the proceedings had to be controlled by the Commission and one witness cannot be permitted to cross-examine other witness especially when he has no case that his rights will be prejudicially affected by the report of the Commission. 5. During the pendency of the Letters Patent Appeal, certain developments took place which have been brought on record through amendments. From such additional pleadings, it emerges that on 11.2.2010, JSM filed an application Ex.6018 before the Commission and prayed that Shri Sanjay Bhavsar, Shri Tanmay Mehta and Shri Omprakash Singh be summoned and permitted to be cross-examined by JSM. Such application came to be dismissed by the Commission by an order dated 18.9.2010.

Similarly, JSM also filed another application dated 10.8.2010 (Ex.6048) praying that the Commission be pleased to dispose of earlier applications of JSM, viz. applications Ex.5979, 5998, and 6005. Such applications were previously filed by the JSM for summoning several persons for deposing and permitting cross-examination by the JSM. Commission also disposed of the said applications by the order dated 24.9.2010 in following terms :

8. In view of the aforesaid, it appears to the Commission that the motive of JSM in making applications for summoning persons named in these applications including the present application, is not guided by the consideration of assisting the Commission but by some other consideration. Hence its prayer qua Shri Gordhan Zadafiya is rejected.

9. So far as DCP Savani is concerned, he stands on different footing. He has filed affidavit (Ex.4972) before this Commission which is dated 30.6.2002.

10. The Commission had earlier called certain persons who had given statements or filed this extent.

11. The Secretary to the Commission is directed to issue summons to DCP Savani to appear before this Commission for his examination in respect of affidavit filed by him." affidavits at the instance of the learned advocates appearing for the parties. We therefore, allow JSM's application Exh.6048 to These subsequent orders dated 18.9.2010 and 24.9.2010 passed by the Commission are also challenged by JS Min the Letters Patent Appeal.

6. Learned counsel Shri Sinha for the appellant submitted that the Commission committed a grave error in not summoning the Chief Minister and other persons mentioned in the applications filed by the JSM. Previously, the Commission opined that such issue can be judged after collection of further evidence. However, the Commission at a later stage did not find appropriate to call such persons for their examination before the Commission.

6.1 Counsel submitted that by the very nature of evidence brought on record, as also looking to the terms of reference, the Commission ought to have called such persons before it. He pointed out that various factors relied upon by JSM in support of such prayer were in addition to the main plank on which such prayer was based, namely, that in view of terms of reference as amended by notification dated 6th March 2002, presence of such persons before the Commission was necessary. He pointed out that by such notification, terms of reference of the Commission were enlarged to include even the role and conduct of the Chief Minister and/or any other Ministers, police officers and other individuals and organizations in the event in question. This enlargement of the terms of reference of the Commission was upon representations from various quarters. It was, therefore, incumbent upon the Commission to summon such persons and examine them as witnesses.

6.2 Counsel further submitted that the Commission committed grave error in not treating Shri Omprakash, Shri Tanmay Mehta and Shri Sanjay Bhavsar as witnesses though their affidavits were filed and taken on record before the Commission. In any case such persons ought to have been summoned as witnesses and should have been offered for cross-examination to the appellant.

7.3 Counsel relied on the decision of the Apex Court

in the case of Mohanlal Shamji Soni v. Union of India, 1991 (1) GLH 11 wherein the Apex Court in the context of criminal trial made following observations

:

10. It is cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence "to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the Court can draw a presumption under illustration (g) to In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions whether discretionary or obligatory -according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary

authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

On the basis of the observations made in the said decision, the counsel for the appellant contended that the appellant was denied the valuable right of cross-examination. We may, however, notice that the said decision was rendered in the background of a criminal trial and the observations made in the said decision and in particular those noted above, were in the context of the provisions contained in the Criminal Procedure Code for examination of a witness.

7. On the other hand, learned Advocate General appearing for respondent No.2 State opposed the appeal contending that the Commission is undertaking a fact finding inquiry. No interference is called for even before the Commission submits its report. He contended that the Commission has on its discretion depending on the evidence on record not found it necessary to summon the Chief Minister and other Ministers before it.

7.1 Learned Advocate General further submitted that no person has absolute right to cross-examine any witness. Such right is hedged by statutory provisions contained in section 8C of the Act and is within the domain of discretionary powers of the Commission.

7.2 He relied on the decision of the Supreme Court in the case of State of Jammu and Kashmir Vs. Bakshi Ghulam Mohammad, , wherein the Apex Court examined various aspects pertaining to commission of inquiry under J. & K. Commission of Inquiry Act and in particular with respect to right to cross-examine a witness giving evidence by filing an affidavit before the Commission.

7.3 Reliance was also placed on the decision of the Apex Court in the case of Kehar Singh and Others Vs. State (Delhi Administration), wherein the Apex Court made certain observations with respect to the nature of inquiry before the Commission appointed under the Commission of Inquiry Act.

7.4 Reliance was also placed on the decision of the Apex Court in the case of Dr Baliram Waman Hiray Vs. Justice B. Lentin and Others, wherein it was held that the Commission appointed under the Commission of Inquiry Act is not a court.

7.5 Reliance was placed on a decision in the case of Md. Ibrahim Khan Vs. Susheel Kumar and Another, , wherein a Division Bench of the Andhra Pradesh High Court examined the scope of the inquiry before the Commission under the Commission of Inquiry Act and held that the same is not quasi-judicial in nature.

7.6 Reliance was placed on the decision of the Apex Court in the case of Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another, in

which the Apex Court examined the High Court's power for issuance of mandamus in exercise of writ jurisdiction to contend that in the present case the prayer for writ of mandamus was not maintainable. 8. From the perusal of the materials on record, it emerges that the Commission was appointed by the State Government in exercise of powers u/s 3 of the Act. Such Commission enjoys wide powers of summoning and enforcing attendance of any person and examining him on oath, requiring the discovery and production of any document, receiving evidence on affidavits, requisitioning any public record or copy thereof from any court or office, issuing commissions for the examination of witnesses or documents, etc. as provided in section 4 of the Act. Section 5 of the Act and in particular, sub-section (1) thereof empowers the State Government having regard to the nature of the inquiry to be made and other circumstances, to clothe the Commission with additional powers. Section 8 of the Act pertains to procedure to be followed by the Commission and it provides that the Commission shall, subject to any rules that may be made in this behalf, have power to regulate its own procedure including the fixing of places and times of its sittings. Section 8B requires the Commission to give a reasonable opportunity of being heard to any person if the Commission is of the opinion that his reputation is likely to be affected by the inquiry. Section 8B reads as follows: "8B. Persons likely to be prejudicially affected to be heard - If, at any stage of the inquiry, the Commission -- (a) considers it necessary to inquire into the conduct of any person, or (b) is of the opinion that the reputation of any person is likely to be prejudicially affected by the inquiry, the Commission shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence: Provided that nothing in this section shall apply where the credit of a witness is being impeached." Section 8C of the Act pertains to right of cross-examination and representation by legal practitioner and reads as follows: 8C. Right of cross-examination and representation by legal practitioner. - The appropriate Government, every person referred to in section 8B and, with the permission of the Commission, any other person whose evidence is recorded by the Commission,

(a) may cross-examine a witness other than a witness produced by it or him;

(b) may address the Commission; and

(c) may be represented before the Commission by a legal practitioner or, with the permission of the Commission, by any other person.

9. The controversy arising in the present proceedings centers principally around two sections of the Act, namely, section 8B pertaining to procedure to be adopted in case the Commission considers it necessary to inquire into the conduct of any person and reputation of such person is likely to be prejudicially affected by the inquiry and section 8C which pertains to cross-examination of some of the witnesses.

10. Prayers made in the multiple applications filed by JSM before the Commission

also revolve around these two issues. One part of the prayer pertains to summoning the Chief Minister and other persons before the Commission to inquire into their role in the riots. Such cases would fall u/s 8B of the Act. Second part of the prayer on the part of JSM is that certain persons be called to depose before the Commission and be permitted to be cross-examined by JSM.

11. At the outset, we may record that series of applications on which the Commission has passed orders which have been impugned in these proceedings were filed by JSM. Writ petition was filed by Shri Amrish N. Patel, a member of JSM. The Commission in its order dated 18.9.2010 had observed that application u/s 8C of the Act has been filed by JSM. Section 8C does not contemplate any right in favour of anyone except the right of the appropriate Government. Section 8C refers to persons whose evidence has been recorded. The Commission formed an opinion that JSM cannot be regarded as a person whose evidence has been recorded by the Commission. The contention on behalf of JSM that JSM had examined Shri Mohan Bundela and Shri Amrish Patel, its convener and member respectively as witnesses before the Commission and therefore, the application was maintainable was discarded observing that merely because JSM has examined two witnesses, it cannot be stated to be a person contemplated u/s 8C of the Act. Section 8C contemplates a person whose evidence is recorded and not somebody who examined a person whose evidence was recorded by the Commission. Possibly because of these observations of the Commission, the petition came to be filed by a member of JSM and not JSM itself. Whatever be the reason, fact remains that petition and LPA have been filed by one Shri Amrish N. Patel whereas orders impugned in these proceedings were passed by the Commission in applications filed by JSM. 12. Despite these apparent contradictions, we have adverted our attention also to substantive challenge involved in these proceedings.

13. Before going any further, we may record that it is by now well settled that the Commission is only a fact finding body. The Commission has to record its findings and make recommendations to the Government without having any power to enforce them. In case of *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, , it was observed that: In the first place neither Parliament nor the Government has itself undertaken any inquiry at all. Parliament has made a law with respect to inquiry and has left it to the appropriate Government to set up a Commission of Inquiry under certain circumstances referred to in S. 3 of the Act. The Central Government, in its turn has, in exercise of the powers conferred on it by the Act, set up this Commission. It is, therefore, not correct to say that Parliament or the Government itself has undertaken to hold any inquiry. In the second place the conclusion that the last portion of cl. (10) is bad because it signifies that Parliament or the Government had usurped the functions of the judiciary appears to us, with respect, to be inconsistent with the conclusion arrived at in a later part of the judgment that as the Commission can only make recommendations which are not enforceable *proprio vigore* there can be no question of usurpation of judicial functions. As has

been stated by the High Court itself in the latter part of its judgment, the only power that the Commission has is to inquire and make a report and embody therein its recommendations. The Commission has no power to 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 and consequently the question of usurpation by Parliament or the Government of the powers of the judicial organs of the Union of India cannot arise on the facts of this case and the elaborate discussion of the American authorities founded on the categorical separation of powers expressly provided by and under the American Constitution appears to us, with respect, wholly inappropriate and unnecessary and we do not feel called upon, on the present occasion, to express any opinion on the question whether even in the absence of a specific provision for separation of powers in our Constitution, such as there is under the American Constitution, some such division of powers - legislative, executive and judicial - is, nevertheless implicit in our Constitution.

In case of *Bakshi Gulam Mohammad (supra)*, the Apex Court observed that "we have to remember that we are dealing with a statute which permits a Commission of Inquiry to be set up for fact-finding purposes. The report of the Commission has no force *proprio vigore*. This aspect of the matter is important in deciding the rules of natural justice reasonably applicable in the proceedings of the Commission of Inquiry under the Act

In the case of *P.V. Jagannath Rao and Others Vs. State of Orissa and Others*, , it was observed :

It was pointed out by this Court in *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, that the inquiry cannot be looked upon as a judicial inquiry and the order ultimately passed cannot be enforced *proprio vigore*. The inquiry and the investigation by the Commission do not therefore amount to usurpation of function of the courts of law. The scope of the trial by the Courts of law and the Commission of Inquiry is altogether different. In any case, it cannot be said that the Commission of Inquiry would be liable for contempt of Court if it proceeded to enquire into matters referred to it by the Government Notification. In appointing a Commission of Inquiry under S. 3 of the Act the Orissa Government is exercising a statutory power and in making the inquiry contemplated by the notification, the Commission is performing its statutory duty. We have already held that in the appointment of the Commission of Inquiry the Government was acting *bona fide*. It is therefore not possible to accept the argument of the appellants that the setting up of the Commission of Inquiry by

the State Government or the continuance of the inquiry by the Commission so constituted would be tantamount to contempt of Court. To constitute contempt of court, there must be involved some "act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority" or something "calculated to obstruct or interfere with the due course of justice or the lawful process of the courts", see *Reg v. Gray*, (1900) 2 QB 36; *Arthur Reginald Perera v. The King*, 1951 AC 482 at p. 488. The respondents in this case have done nothing to obstruct or interfere with the lawful powers of the Court by acting bona fide and discharging statutory functions under the Commissions of Inquiry Act. We therefore see no justification for holding that the issue of the notification under S. 3 of the Act or the conduct of the Inquiry by respondents amount to contempt of Court. We accordingly reject the argument of Mr. Asoke sen on this aspect of the case.

13.1 In the case of *Kehar Singh* (supra), the ApexCourt made the following observations:

237. The Commission under our Act is given the power to regulate its own procedure and also to decide whether to sit in camera or in public. A Commission appointed under the Act does not decide any dispute. There are no parties before the Commission. There is no lis. The Commission is not a Court except for a limited purpose. The procedure of the Commission is inquisitorial rather than accusatorial. The Commission more often may have to give assurance to persons giving evidence before it that their statements will not be used in any subsequent proceedings except for perjury. Without such an assurance, the persons may not come forward to give statements. If persons have got lurking fear that their statements given before the Commission are likely to be used against them or utilised for productive use on them in any other proceeding, they may be reluctant to expose themselves before the Commission. Then the Commission would not be able to perform its task. The Commission would not be able to reach the nuggests of truth from the obscure horizon. The purpose for which the Commission is constituted may be defeated.

14. With this background in mind, coming back to the facts of the case, we find that the Commission was of the opinion that there was no material to summon the Chief Minister and other persons u/s 8B of the Act. The Commission was also of the opinion that there was no such material against any of the other Ministers and officers mentioned by JSM in the applications filed before the Commission. A detailed order was passed by the Commission on 18.9.09 which came to be scrutinized by the learned Single Judge in the impugned judgment dated 27.11.09. 15. We do not find any reason to interfere with the proceedings of the Commission even before the same has been concluded. As already recorded, the Commission which is only a fact finding body has to collect the evidence and make its recommendations. It has no power to enforce or implement such recommendations. In its fact finding inquiry, the Commission is empowered to set its own procedure to collect evidence, record statements, examine witnesses

and admit documents on record. At this stage, in facts of the case, even before completion of the proceedings of the Commission, we do not find that its tentative conclusions are open to judicial scrutiny. Particularly, looking to the scope and purpose to set up the Commission, we are not inclined to interfere at least at this stage. We may notice that as recorded by the Commission in its order dated 24.9.2010, learned counsel Shri Sinha for JSM had stated that for the present, he did not press the application Ex.6048 qua the Chief Minister and Shri Ashok Bhatt, the then Health Minister, for the reason that only after examining the subordinate staff and other Ministers, JSM would press the application against such persons. We may further notice that Shri Ashok Bhatt having since expired, issue qua him has been rendered infructuous. In so far as the Chief Minister is concerned, counsel Shri Sinha, however, submitted before us that he would like to press this appeal qua the Chief Minister also. It was on this background that we have made the observations contained in the earlier portion of this paragraph. 16. With respect to the question of summoning certain persons to depose before the Commission and to allow JSM to cross-examine them, we notice that the Commission to the extent found necessary, by taking cognizance of the application of JSM, directed three persons to file their affidavits. Later on certain clarifications which were found necessary were also called for. DCP Savani was also summoned as witness. 16.1 The application was filed by JSM insisting that such persons, viz. Shri Omprakash, Shri Tanmay Mehta and Shri Sanjay Bhavsar be called as witnesses and be permitted to be cross-examined. The stand of the appellant was also that such persons should have been made available for cross-examination on the basis of their affidavits filed before the Commission. 16.2 We do not find any justification to accept such prayers. Firstly, the Act gives wide powers to the Commission to regulate its own procedure. Secondly, any cross-examination under clause (a) of section 8-C of the Act depends on the Commission granting such a permission which essentially is discretionary in its character. In the present case, the Commission discussed the issue at length and did not find necessary to grant any permission to the appellant. 17. To elaborate the above issue, section 4 of the Act provides, inter alia, that the Commission shall have powers of a civil court in respect of summoning and enforcing attendance of any person and examining him on oath, requiring discovery and production of any document, etc. Section 5 of the Act pertains to additional powers of the Commission. Section 8-B, as already noted requires the Commission to give reasonable opportunity of being heard in the inquiry and to produce evidence to any person which the Commission considers necessary to inquire into the conduct or is the opinion that the reputation of such person is likely to be prejudicially affected by the inquiry. Section 8-C pertains to right of cross-examination and representation by legal practitioner. 17.1 Section 8 of the Act, specifically provides that the Commission shall subject to any rules that may be made in that behalf, have power to regulate its own procedure including the fixing of places and times of its sittings and deciding whether to sit in public or in private. Thus barring areas which are already covered by the statutory provisions contained in the Act or the Rules, the Commission has wide

powers to regulate its own procedure. 18. In the case of Bakshi Gulam Mohammad (*supra*), the Apex Court was examining various aspects of the scope of inquiry before the Commission appointed under the J & K Commission of Inquiry Act which contained similar provisions as in the present Act. One of the questions which came up for consideration was with respect to the request of Bakshi Gulam Mohammad, who was before the Commission in the capacity of the person who was likely to be prejudicially affected. On his behalf, request was made before the Commission to cross-examine all the persons who had sworn affidavits supporting the allegations against him. In this regard, the Apex Court observed as under: 20. The next point is as to the right of cross-examination. This claim was first based on the rules of natural justice. It was said that these rules require that Bakshi Ghulam Mohammad should have been given a right to cross-examine all those persons who had sworn affidavits supporting the allegations against him. We are not aware of any such rule of natural justice. No authority has been cited in support of it. Our attention was drawn to *Meenglas Tea Estate Vs. Its Workmen*, , but there all that was said was that when evidence is given *viva voce* against a person he must have the opportunity to hear it and to put the witnesses questions in cross-examination. That is not our case. Furthermore, in *Meenglas Tea Estate Vs. Its Workmen*, , the Court was not dealing with a fact finding body as we are. Rules of natural justice require that a party against whom an allegation is being inquired into should be given a hearing. Bakshi Ghulam Mohammad was certainly given that. It was said that the right to the hearing included a right to cross-examine. We are unable to agree that that is so. The right must depend upon the circumstances of each case and must also depend on the statute under which the allegations are being inquired into. This Court has held *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, at p. 409, that "the rules of natural justice vary with the varying constitution of statutory bodies and the rules prescribed by the Act under which they function and the question whether or not any rules of natural justice had been contravened should be decided not under any pre-conceived notions, but in the light of the statutory rules and provisions." We have to remember that we are dealing with a statute which permits a Commission of Inquiry to be set up for fact-finding purposes. The report of the Commission has no force *proprio vigore*. This aspect of the matter is important in deciding the rules of natural justice reasonably applicable in the proceedings of the Commission of Inquiry under the Act. Then we find that S. 10 to which we have earlier referred, gives a right to be heard but only a restricted right of cross-examination. The latter right is confined only to the witnesses called to depose against the person demanding the right. So the Act did not contemplate a right of hearing to include a right to cross-examine. It will be natural to think that the statute did not intend that in other cases a party appearing before the Commission should have any further right of cross-examination. We, therefore, think that no case has been made out by Bakshi Ghulam Mohammad that the rules of natural justice require that he should have a right to cross-examine all the persons who had sworn affidavits supporting the

allegations made against him. xxxx 22. The contention was accepted by the High Court. We take a different view of the matter. We first observe that the inquiry before the Commission is a fact finding inquiry. Then we note that S. 10 which, in our opinion, applies to a person whose conduct comes up for inquiry by the Commission directly, has a right to cross-examine only those persons who give viva voce evidence before the Commission against him. If S. 4(c) conferred a right to cross-examine every one who swore an affidavit as to the facts involved in the inquiry then S. 10(2) would become superfluous. An interpretation producing such a result cannot be right. It also seems to us that O. 19, R. 1 has to be read with O. 18, R. 4 which states that the evidence of the witnesses in attendance shall be taken orally in open Court. It would appear, therefore, that O. 19, R. 1 is intended as a sort of exception to the provisions contained in O. 18, R. 4. The Act contains no provision similar to O. 18, R. 4. Therefore, when S. 4(c) of the Act gave the Commission the power of receiving evidence on affidavits, it gave that as an independent power and not by way of an exception to the general rule of taking evidence viva voce in open Court. It would be natural in such circumstances to think that what the Act gave was only the power to take evidence by affidavit and did not intend it to be subject to the proviso contained in O. 19, R. 1. If it were not so, then the result really would be to require all evidence before the Commission to be given orally in open Court. If that was intended, it would have been expressly provided for in the Act. We should here refer to *Khandesh SPG. and WVG. Mills Co. Ltd. Vs. The Rashtriya Girni Kamgar Sangh, Jalgaon*, , where this Court dealing with a somewhat similar section like S. 4(c) observed that facts might be proved by an affidavit subject to O. 19, R. 1. The observations appear to have been obiter dicta. In any case that case was dealing with a statute different from the one before us. The observation there made cannot be of much assistance in interpreting the Jammu and Kashmir Inquiry Act. The number of witnesses swearing affidavits on the side of the Government may often be very large. In fact, in this case the number of witnesses swearing affidavits on the side of the Government is, it appears, in the region of four hundred. The statute could not have intended that all of them had to be examined in open Court and subjected to cross-examination, for, then, the proceedings of the Commission would be interminable. We feel no doubt that the Act contemplated a quick disposal of the business before the Commission, for, otherwise, the object behind it might have been defeated. While on this topic, we would impress upon the Commission the desirability of speedy disposal of the inquiry. For these reasons, in our view, S. 4(c) of the Act does not confer a right on a party appearing before the Commission to require a witness giving evidence by an affidavit to be produced for his cross-examination. The Commission would, of course, permit cross-examination in a case where it thinks that necessary. The view that we take should not put any party in any difficulty. He can always file affidavits of his own denying the allegations made in affidavits filed on behalf of the other party. If the evidence on both sides is tendered by affidavits, no one should be at any special disadvantage. We have also to remember that S. 9 of the Act gives the Commission power to regulate its own procedure subject to any

rules made under the Act. We find that the rules provide that evidence may be given by affidavits and the Commission may after reading it, if it finds it necessary to do so, record the evidence of the deponents of the affidavits and also of others; see Rr. 6, 7 and 8. Rule 10 reproduces the restricted right of cross-examination given by S. 10. Rule 11 says that in all matters not provided by the rules, the Commission may decide its own procedure. One of the matters covered by the rules is cross-examination of witnesses. So the rules contemplate cross-examination as a matter of procedure and the Commission is free to decide what cross-examination it will allow provided that in doing so it cannot go behind the rules relating to cross-examination. Section 9 of the Act has to be read in the light of these rules. All this, we think, supports the interpretation we have put on S. 4(c). We also feel that the procedure before a body like the Commission has necessarily to be flexible. We, therefore, reject the last contention.

18.1 In the case of Md.Ibrahim Khan (supra), a Division Bench of the Andhra Pradesh High Court noted that the report of the Commission headed by Justice H.R.Khanna observed that right to cross-examination under the Act or the Rules accrues only when a witness gives oral testimony and proceeded to observe as under: 52. But Combined reading of Sec. 8 of the Act and Rule 9 of the Rules would make it abundantly clear that the Commission is vested with full discretion to regulate its own proceedings in respect of any matter for which no procedure has been made in the Act or the Rules. xxxx

xxxx

55. u/s 8B of the Act, as already held by the Supreme Court in State of Jammu and Kashmir Vs. Bakshi Ghulam Mohammad, the right of cross-examination accrues to the petitioner only if any oral evidence is recorded by the Commission. In the absence of any oral examination of a witness, the petitioner gets no right to summon a witness who has given only affidavit evidence for cross-examination.

19. From the above, it can be seen that quite apart from the statute giving ample powers to the Commission to regulate its own procedure, it is by now well recognized that no one has unlimited right to seek cross-examination of a person whose evidence is not recorded by the Commission as a witness, but who is only required to file an affidavit in terms of section 4 of the Act. 20. Additionally, section 8C of the Act gives limited right to a person whose evidence is recorded by the Commission to cross-examine a witness other than one produced by him. Thus any person whose evidence is recorded by the Commission may with the permission of the Commission cross-examine a witness except one produced by him. Looking to the powers of the Commission under the Act and the procedure which is largely left to the Commission to decide in terms of section 8 of the Act, such powers of the Commission to permit a person who is examined as a witness to cross-examine another witness are necessarily discretionary in nature. In the present case, the Commission has recorded its reasons and exercised its discretion and found not proper to grant such a request for cross-examination.

Considering the totality of the facts and circumstances of the case, we do not find that the appellant has made out any case for interference in this regard also. 21. Before closing, we would like to briefly touch on one aspect. As noted above, one of the grounds on which the Commission rejected the JSM's application Ex.6018 for summoning and permitting crossexamination of some of the witnesses is that JSM is not one of the persons envisaged in section 8C. Only three categories of persons are contemplated therein, namely, the appropriate Government, a person referred to in section 8B and other persons whose evidence is recorded by the Commission. The Commission was of the opinion that JSM would not fall in these categories merely because JSM had examined its convener and member before the Commission. 22. Section 8C of the Act, as already noted, pertains to right of cross-examination and representation by legal practitioner. In particular it envisages that the appropriate Government, every person referred to in section 8B and any other person whose evidence is recorded before the Commission with permission of the Commission may cross-examine a witness other than a witness produced by it or him. JSM is an organization. It is not in dispute that JSM was permitted to participate in the proceedings before the Commission. JSM has led evidence, examined witnesses on its behalf and we are informed, was also permitted to cross-examine by now as many as 80 witnesses. We wonder whether even in such situation, was it the intention of the Legislature to exclude such organization from seeking cross-examination of a witness even with the permission of the Commission ? We however, do not propose to conclude this issue at this interlocutory stage. Further, as already observed, the role of the Commission is one of fact finding and making recommendations. Additionally, we also find that this was not the only ground on which the Commission has rejected the application of JSM. Commission's powers in this regard are also largely discretionary. 23. In the result, Letters Patent Appeal and the Civil Application are dismissed.