

(2022) 11 CAL CK 0023
In the Calcutta High Court
Case No : WPA No. 4176 Of 2019

Banani Chattopadhyay

APPELLANT

Vs

Union Of India & Ors.

RESPONDENT

Date of Decision : 11-11-2022

Acts Referred:

Constitution Of India, 1950 — Article 226
Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal)
Act, 2013 — Section 2(g), 2(g)(i), 2(m), 4, 4(2), 4(2)(a), 4(2)(b), 4(2)(c), 6, 9,
13(3), 18

Citation : (2022) 11 CAL CK 0023

Hon'ble Judges : Hiranmay Bhattacharyya, J

Bench : Single Bench

Advocate : Somnath Ganguly, Nabankur Paul, Sukalpa Seal, Priyamvada Singh,
Soumya Majumder, S. Ghosh, S. Bhattacharya

Final Decision : Dismissed

Judgement

Hiranmay Bhattacharyya, J

1. The complainant of sexual harassment has filed this writ petition praying for a writ of mandamus to command the respondents to dispose of her complaint afresh after constituting a committee comprising of neutral persons upon quashing the report of the Internal Complaint Committee and to reinstate her to the post of advisory assignment.

2. Shorn of unnecessary details, the facts relevant for the purpose of disposal of this writ petition are as follows-

3. The writ petitioner was the Deputy Manager (technical and co-ordination) of Hindustan Cables Ltd. (for short "HCL") and was posted at its corporate office. Following a decision of the cabinet to close down the company, a voluntary retirement scheme was floated by HCL and the writ petitioner applied under said scheme and was allowed to retire from service on January 31, 2017. Thereafter,

she was engaged on temporary basis against consolidated consultancy fees from time to time. She was ultimately released from her temporary engagement as Advisor (Accounts) on April 30, 2018. Immediately, thereafter she lodged a complaint to the Department of Heavy Industries (for short "DHI") as well as before other authorities vide letter dated May 9, 2018 stating that she had been subjected to sexual harassment by the respondent no. 9 since the beginning of the last quarter of 2016. It was categorically stated in the said letter that there is no Internal Complaint Committee (for short "ICC") where she can lodge a complaint and as such she by the said letter requested the authorities to investigate her complaint through a committee consisting of neutral members as per law. DHI forwarded the complaint to HCL and the ICC constituted by HCL directed the petitioner to attend the proceeding.

4. ICC submitted its report dated June 19, 2018 holding that the allegation against the respondent no. 9 has not been proved and accordingly made a recommendation to the company that no action is required to be taken against the respondent no. 9.

5. Being aggrieved, the complainant filed this writ petition.

6. Mr. Ganguly, learned advocate for the petitioner contended that the respondent no. 9, being the head of HCL is the "employer" under Section 2(g) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (for short "the 2013 Act") and therefore only the Local Committee constituted in terms of Section 6 of the 2013 Act has jurisdiction to inquire into the complaint of the writ petitioner. In other words, according to Mr. Ganguly, the Internal Complaints Committee (for short "the ICC") do not have jurisdiction to inquire into the aforesaid allegation of sexual harassment and the impugned report is non est in the eye of law. He further contended that even the ICC was not constituted in accordance with the provisions laid down under Section 4(2) of the said Act. Mr. Ganguly submitted that one Riya De signed the ICC report though she was not a member of the ICC. He contended that the internal members of the ICC had to report to the respondent no. 9 as he was the head of HCL and the external members were also controlled by the said respondent. Thus, according to Mr. Ganguly, the inquiry got vitiated as the members of the ICC cannot be said to be impartial.

7. Mr. Ganguly relied upon a judgment and order dated March 23, 2021 passed by a Hon'ble Single Judge of Andhra Pradesh High Court at Amaravathi in WP No. 24885 of 2020 in the case of Nagaram Balakrishna vs. State of AP in support of his contention that if the complaint is against the employer, such complaint is to be referred to the LCC. On the same issue that a complaint of sexual harassment against employer has to be referred to the LCC, Mr. Ganguly relied upon another judgment delivered on October 25, 2021 by the Hon'ble Single Judge of the High Court of Delhi in a batch of Writ Petitions in the case of Akademi Through Its Authorised Representative vs. GNCTD and ors. He also referred to a decision of the Hon'ble Supreme Court of India in the case of Additional District and

Sessions Judge "X" vs. Registrar General, High Court of Madhya Pradesh and ors. reported at (2015) 4 SCC 91 to highlight the manner in which the committee for investigating the complaint on sexual harassment is to be constituted.

8. Mr. Majumder learned advocate appearing for the respondent seriously disputed the contentions raised by Mr. Ganguly. He contended that the writ petition has become infructuous as the respondent no. 9 has since retired. He further contended that the writ petitioner cannot advance any argument on personal malice or personal bias as the ICC members have not been impleaded as parties in their personal capacities. Mr. Majumder also raised an objection as to the maintainability of the instant writ petition as an appeal under Section 18 of the 2013 Act lies against the recommendation of the ICC. He, thus, submitted that in view of existence of alternative efficacious appellate remedy, this writ petition is not maintainable. He further submitted that since HCL is a public sector enterprise and is managed by the Board of Directors, the definition of "employer" under Section 2(g)(i) cannot be applied in the instant case. He submitted that the respondent no. 9 did not take part in the constitution of the ICC. He contended that Mrs. Riya De attended all the hearings fixed by the ICC and the allegation of the writ petitioner that she signed the report without attending the hearing is without any basis.

9. In reply Mr. Ganguly contended that since the writ petitioner has challenged the constitution of the ICC which goes to the root of the jurisdiction of such committee to enquire into the allegation of sexual harassment made by the petitioner, this writ petition is maintainable and the petitioner should not be relegated to the statutory appellate forum.

10. Heard the learned advocates for the parties and perused the materials placed.

11. Writ petitioner as an aggrieved woman lodged the complaint of sexual harassment against the respondent no. 9 vide letter dated 09.05.2018. The writ petitioner was asked to appear before the ICC and the Committee submitted its report on 19.06.2018. The respondent no. 9 retired from service on 30.06.2018. The complaint was made and the inquiry was completed during the service tenure of the respondent no. 9.

12. In this writ petition the complainant has challenged the manner in which the inquiry was conducted as well as the jurisdiction of the ICC to conduct such inquiry. Section 2(m) of the 2013 Act defines the term "respondent" to mean a person against whom the aggrieved woman has made a complaint under Section 9. Section 13(3) of the said Act empowers the ICC or the Local Committee to direct payment of monetary compensation to the aggrieved woman in addition to other reliefs as provided therein where the ICC or the Local Committee arrives at a conclusion that the allegation against the respondent has been proved. Proviso to Section 13(3) states that in case of cessation of employment, the respondent can be directed to pay the compensation. Therefore, continuation in service cannot be a condition precedent for making a recommendation under Section

13(3) of the Act. For all the aforesaid reasons, this Court is unable to accept the contention of Mr. Majumdar that this writ petition has become infructuous upon retirement of the respondent no. 9.

13. The writ petitioner has also challenged the constitution of the ICC which submitted the report which is the subject matter of this writ petition. Since the issue of jurisdiction has been raised in this writ petition and the same goes to the root of the inquiry and also that this writ petition is pending since 2019, this Court is inclined to try and decide this writ petition instead of relegating the petitioner to the appellate remedy provided under the 2013 Act.

14. The principal argument of Mr. Ganguly is that ICC lacks jurisdiction to inquire into the complaint of the writ petitioner as the person against whom such complaint was made is the employer himself.

15. Record reveals that HCL is a public Sector enterprise and is managed by its Board of Directors. The term "employer" has been defined under Section 2(g)(i) of the said Act to mean the head of the department, organization, undertaking, establishment, enterprise, institution, office, branch or unit of the appropriate government or a local authority or such other officer as the appropriate government or the local authority may by an order specify in that behalf. In respect of work place not covered under Subsection (i) of Section 2(g), the term "employer" has been defined in subsection (ii) thereof to mean any person responsible for the management, supervision and control of the work place. The explanation appended to Sub-clause (ii) of Section 2(g) states that the term "management" shall include the person or board or committee responsible for formulation and administration of policy for such organization.

16. The appropriate Government cannot appoint a person in a company managed by its Board of Directors to be the employer as per Section 2(g)(i) of 2013 Act.

17. The Board of Directors is responsible for formulation and administration of policies for an organisation like HCL. The Chairman cum Managing Director is answerable to the Board of Directors. Therefore, this Court is of the considered view that the Board of Directors, being the ultimate authority, is the employer as defined under Section 2(g) of the 2013 Act. This Court further holds that respondent no. 9 cannot be said to be employer for the purpose of this Act.

18. Section 9 of the 2013 Act provides that an aggrieved woman may make a written complaint of sexual harassment at work place to the internal committee if so constituted or the local committee in case the internal committee is not so constituted. In the case on hand the internal committee was duly constituted. The complaint also cannot be said to be against the employer. This Court is, therefore, of the considered view that the internal complaints committee as contemplated under Section 4 of the 2013 Act and not the local committee under Section 6 of the said Act has jurisdiction to enquire into the complaint of the writ petitioner. As such the submission of the learned advocate for the writ petitioner that the complaint made by the writ petitioner ought to have been forwarded to

the local committee instead of the same being enquired into by the internal committee cannot be accepted.

19. In *Akademi* (supra) the President of the Executive Board in a letter admitted that the complaint being against the Secretary of the Akademy, the internal complaints committee was not competent to enquire into the allegations of sexual harassment against him. The aggrieved woman in *Akademi* (supra) approached the LCC. On such factual background the Hon'ble High Court of Delhi after taking note of the admitted position that the President is not based on Delhi and the day to day affairs of the office where the aggrieved woman is employed are managed and controlled by the Secretary held that the Secretary of the Akademy is the employer and the complaint against the Secretary shall lie to the local committee.

20. In the case on hand the writ petitioner/ aggrieved woman did not approach the local committee and this Court after considering the rival contentions of the parties have already held that the respondent no. 9 is not the employer for the purpose of the 2013 Act. The decision of the Hon'ble High Court of Delhi being distinguishable on facts is, therefore, not applicable to the case on hand.

21. In the case of Additional District and Sessions Judge "X" (supra) the Hon'ble Supreme Court after examining the facts and circumstances of the said case was of the view that by not strictly abiding by the procedure contemplated under the "In House Procedure" evolved by the Hon'ble Supreme Court, the Chief Justice of the concerned High Court introduced serious infirmities in the investigative process. The said reported decision is distinguishable on facts and, therefore, do not have any manner of application to the facts of the case on hand.

22. Now the question arises as to whether the ICC, which enquired into the complaint of the writ petitioner, was constituted in accordance with the provisions laid down under Section 4 of the said Act.

23. After perusing the materials on record, this Court finds that the internal committee was constituted which consisted of the Presiding Officer who happened to be the consultant (SK) of HCL. It is further evident from the materials on record that two members from amongst the employees as provided under Section 4(2)(b) of the 2013 Act was also included in the committee. One member from a non-governmental organization who is familiar with the issues of sexual harassment of women at workplace as contemplated under Section 4(2)(c) of the said Act was also included. The chairperson of the Institute of Chartered Accountants of India, Kolkata was included as a working woman in senior position in other organization. An ex lady teacher of a girls high school was also included as the member secretary of the ICC. Out of six members constituting the ICC, four members were women and as such it satisfies the proviso to sub-section 2 of Section 4 of the 2013 Act that at least one half of the total members so nominated shall be women.

24. Mr. Ganguly would contend that the Presiding Officer having experience of

less than one year cannot be said to be a workman at the senior level as laid down under Article 4(2)(a) of the 2013 Act. Section 4(2)(a) speaks of a workman employed at a senior level at workplace from amongst the employees. It is not disputed that HCL was undergoing the process of winding up its operation activities with skeleton staffs and employees. Therefore the appointment of the Presiding Officer of the ICC in the facts of the instant case cannot be said to be in violation of the provisions laid down under Section 4(2)(a) of the 2013 Act.

25. The argument of Mr. Ganguly that the members constituting the ICC should be of a rank higher than that of the respondent under Section 2(m) of the 2013 Act cannot be accepted in view of the fact that there is no such stipulation in Section 4(2) of the 2013 Act. Moreover, the composition of the internal committee as provided under Section 4(2) of the said Act goes to show that the same consists of internal and external members for facilitating an enquiry under the said Act. In contrary interpretation thereto would lead to disastrous consequences as in that event the ICC would be denuded of its jurisdiction to conduct an enquiry against high officials of an organisation.

26. The other allegation of the writ petitioner is that the members of the ICC were heavily biased and not impartial as the respondent no. 9 occupied a high position in the company. From the constitution of the ICC it is evident that the members were selected as per the provisions laid down under Section 4(2) of the said Act. Many external members were also included in the ICC. The allegation of the personal bias is a vague one. Furthermore, this Court is not inclined to accept such contention of the writ petitioner as the ICC members have not been impleaded in their personal capacities.

27. Mr. Ganguly would contend that one Riya De signed the ICC report as a representative from SLARTC whereas one Smt. Jaba Guha was nominated to be a representative of SLARTC.

28. Record reveals that the Executive Director of SLARTC by a letter dated June 14, 2008 informed the Presiding Officer of the ICC that Professor Jaba Guha suddenly reported on that date that she cannot move for a few days as she is suffering from health problem and in view thereof Smt. Riya De, Project Manager of SLARTC was deputed in place of Smt. Jaba Guha. It further appears from record that Smt. Riya De attended the hearings fixed by the ICC. Therefore, Smt. Riya De conducted the hearing as a member of the ICC and was thus competent to sign the Report.

29. For the reasons as aforesaid, this Court is, of the considered view that the ICC was constituted in accordance with the provisions laid down under the 2013 Act.

30. In *Nagaram Balakrishna* (supra) no internal complaint committee was constituted as contemplated under Section 4 of the Act. Instead a special committee was constituted and one of the member of such special committee was facing allegation of harassing the scheduled castes. On such factual

background the Hon'ble Andhra Pradesh High Court held that in the absence of any internal complaint committee, a complaint can be made to local complaint committee. The observations in paragraph 32 of the said decision was made as to how a special Committee may be constituted which has no relevance to the constitution of ICC as per 2013 Act.

31. Since this Court has already held that the internal complaint committee constituted by HCL was properly constituted, the decision in the case of Nagaram Balakrishna (supra) do not have any manner of application to the facts of this case.

32. Mr. Ganguly would further contend that the principles of natural justice has been violated in the instant case as the writ petitioner did not get sufficient opportunity to prove her allegations.

33. It is evident from the record that the ICC issued a letter directing the writ petitioner to appear for the hearing on May 26, 2018. The writ petitioner informed the ICC that she is unable to attend the hearing on 26.05.2018 as her lawyer was out of station. Thereafter the writ petitioner was again asked to appear before the ICC on 16.06.2018. The writ petitioner by a letter dated 11.06.2018 raised several questions challenging the authority of the committee, qualifications of the members , experience of members, designation of members and how much fees is payable to ICC members etc. The petitioner was given a further opportunity to appear before the committee on 18.06.2018. On 18.06.2018 the writ petitioner/complainant appeared before the ICC along with her husband but did not make any attempt to prove the allegations made by her. On the contrary in the course of hearing on 18.06.2018 she submitted a letter challenging the constitution and authority of the ICC.

34. It is evident from the records that the writ petitioner appeared before the ICC on 18.06.2018 along with her husband. The husband of the petitioner, however, admitted before the Committee that he was not a witness to any of the alleged incidents. No other witness was also produced by the writ petitioner nor did she adduce evidence to prove her allegations. To the mind of this Court, the ICC cannot be faulted for arriving at a conclusion that the allegations against the respondent no. 9 were not proved.

35. The contention of the petitioner is that the alleged incidents started since the beginning of the last quarter of 2016. Thereafter, the petitioner's prayer for Voluntary Retirement was accepted and she was allowed to retire on 31.01.2017. She subsequently accepted the temporary assignments offered by HCL which were for a specific purpose. After she was released from such temporary assignment on 30.04.2018, the complaint was lodged on 09.05.2018. The delay in filing the complaint, however, remains unexplained. The aforesaid events coupled with the fact that the writ petitioner was only interested in challenging the authority of ICC on frivolous grounds rather than making any attempt to prove her allegations casts a doubt in the mind of the Court as to the veracity of

such allegations.

36. It is well settled that judicial review is not directed against the decision but against the decision making process. This Court holds that there is no infirmity in the decision making process warranting interference under Article 226 of the Constitution of India.

37. It is evident from the materials on record that the petitioner was released from the services of the company on January 31, 2017 upon acceptance of her application under the voluntary retirement scheme. Thereafter the management decided to engage the petitioner on purely temporary basis with contractual terms with effect from 02.02.2017 for a period of six months or till the completion of respective work for which she was engaged, whichever is earlier. In the letter of engagement dated 31.01.2017 the petitioner was designated as consultant (BC). The management decided to engage the petitioner as Advisor (Accounts) on temporary basis with effect from 02.08.2017 with monthly consolidated consultancy fee and the period of such engagement was for six months or completion of respective work for which she was engaged. The company by a letter dated 30.04.2018 released the petitioner from temporary engagement of HCL with effect from 30.04.2018 as her service was no longer required in the company.

38. The appointment of the petitioner after she was granted voluntary retirement was purely on temporary basis and the company released her from such temporary assignment on the ground that her service is no longer required by the company. A writ of mandamus cannot be issued under such circumstances directing the employer to reinstate her to the post of advisory assignment which was purely on temporary basis.

39. The writ petition accordingly fails and the same is dismissed without however any order as to costs.

40. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties on priority basis.