
(2014) 08 CAL CK 0060
In the Calcutta High Court
Case No : W.P. 24935 and 25931 (W) of 2013

Rina Mukerjee

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 14-08-2014

Acts Referred:

Constitution of India, 1950 — Article 227
Industrial Disputes Act, 1947 — Section 29

Citation : (2014) 4 CALLT 190 : (2015) 3 CHN 602 : (2014) 143 FLR 51

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : Prabal Mukherjee and Puspall Chakraborty, Advocate for the Appellant; Debashis Banerjee, Adv., Narayan Ch. Bhattachariya and Manas Kumar Sadhu, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

Soumen Sen, J.—The employer, The Statesman Ltd., has filed the writ application being W.P. No. 25931 (W) of 2013 for setting aside of an award dated 6th February, 2013, passed by the 4th Industrial Tribunal at Calcutta, in reference case No (VIII)-01/2004 in favour of Rina Mukherjee an employee of the Statesman Ltd. directing reinstatement with back wages.

2. W.P. No. 24935 (W) of 2013 is an application filed by Rina Mukherjee for a direction upon the Deputy Labour Commissioner, Government of West Bengal to prosecute the employer u/s 29 of the Industrial Disputes Act, 1947, for violation of the Award passed on February 6, 2013.

3. Both the applications are taken up for hearing and disposed of by this common judgment and order.

4. The Statesman Ltd. by a letter dated 3rd June, 2002, appointed Rina Mukherjee as senior reporter and place her in executive level-2 (EL-2) of the Company's Grade at a remuneration of Rs. 13,157/-. She was appointed on

probation for a period of 6 months from the date of her joining which period, however, could be extended at the sole discretion of the Company. The employee holds a Post Graduate Degree in Politics and Physics. She has also specialized in African Studies. She had been working as a Journalist for the last 18 years before her appointment at the Statesman Ltd. She was working as a Senior Correspondent at Business Standard Calcutta Bureau, U.N.I. Bombay and Indian Express, Bombay. The nature of the job at Statesman was to lookout for stories.

5. The employee before the Tribunal, during her evidence stated that she submitted about 70 stories. In the first two months the average stories submitted by her were about 28 to 30 and later on the average became three to four per month, which, however, were not allowed to be published. She further stated that at no point of time the Management of the Statesman ever complained about her poor performance or inform her that the performance was not up to the mark. She used to report to the Chief Reporter. During her cross-examination, she stated that in Indian Express she used to edit as well as write stories and later she became in-charge of the Science supplement of the Indian Express. At Business Standard, she worked as a Senior Correspondent. The employee alleged that her service was terminated since she alleged sexual and professional harassment at the work place by one Mr. Ishan Joshi, who was the News Coordinator and the in-charge of Editorial of the Statesman. She stated during her evidence that professional harassment took the form of stopping her stories from getting published. She claimed that there were more than 20 stories that got her byline and 8 of them were Breaking News stories.

6. The Statesman Ltd., however, contended that her service was not continued due to poor unsatisfactory performance. She was warned time and again but she had failed to improve her performance. The bogey of allegations of sexual and professional harassment at workplace are clearly motivated and without any basis. She did not raise any complaint contemporaneously with the management about such alleged sexual harassment. Her performance as Senior Reporter was never satisfactory and drafting was of very poor quality. Her termination was based on her performance during her probation period. Mr. Ishan Joshi has denied during his evidence that he had sexually harassed the Journalist during her duty hours or at any point of time. Mr. Ravindra Kumar, the then a Managing Director of the Statesman in his evidence stated that during probation Smt. Rina Mukherjee was informed about her short-comings from time to time. Finally, in terms of Clause 15 of the appointment letter her service was terminated. She was appointed as a Senior Reporter on the basis of her experience. She was expected to file report of a certain quality. She had failed to file sufficient number of Breaking News stories. The witnesses deposed on behalf of the Management, however, admitted that no written communication was made to the lady Journalist regarding her poor performance. None of the witnesses deny or could deny that she had not contributed stories that were published during her short tenure. The witnesses on behalf of the Management and more particularly Ms. Soma Mukherjee who was a special representative in the Statesman also

admitted that the Guideline as laid down by the Hon''ble Supreme Court in *Iswarlal Mohanlal Thakkar Vs. Paschim Gujarat Vij Co. Ltd. and Another*, was not implemented by the Statesman although, it was long over due.

7. The basis of the termination of service of Smt. Rina Mukherjee, is the letter dated, 25th September, 2002, purported to have been written by Mr. Tanmay Chatterjee, the then Chief Reporter to Mr. Ravindra Kumar Managing Editor with a copy addressed to Mr. Ishan Joshi, News Coordinator. It is claimed that the Chief Reporter in the said letter expressed his dissatisfaction about the quality and the standard of the stories prepared by Smt. Mukherjee and according to the Chief Reporter those stories were not of the standard that was expected from a Senior Reporter with considerable experience. This letter was purported to have been issued since the probation period was coming to an end. The Statesman Ltd., terminated service of Smt. Rina Mukherjee on 12th October, 2002. During her evidence the employee relied upon a letter dated 1st February, 2003, written by Ravindra Kumar Editor and Managing Director to Ms. Rina Mukherjee, on the basis of her representation made with regard to her termination. The said letter records meetings having taken place between the Managing Editor and Ms. Mukherjee at least in September, 2002. The evidence of Ms. Mukherjee was that in September, 2002, she complained about her sexual and professional harassment. Such meeting was not denied. The Tribunal while dealing with the management's version of the termination in my view on proper appreciation of evidence held that the company had failed to substantiate that the articles written by the Journalist was of substandard quality. It cannot be disputed that she is highly qualified and had past experience of 18 years before she joined The Statesman. She was given the appointment after interview. The evidence of the employee with regard to the quantity and quality of the stories has remained unshaken. The management did not produce Mr. Tanmay Chatterjee in support of the letter dated 25th September, 2002 or independently could prove the contents of the said letter. None of the articles which the Statesman Ltd. found to be of substandard or of inferior quality has been produced before the Tribunal. The Tribunal has correctly posed the question as to why the author of the said very important letter forming the basis of letter of termination was not examined as witness. The Tribunal had also expressed its doubt with regard to the motive of the Company in issuing the said letter dated 25th September, 2002, which not only is quite unusual but there is something more than it meets the eyes. The said Journalist has considerable experience prior to joining the Company and it is only reasonable to expect that she should be informed in writing about her poor performance during her probationary period. The purpose and motive behind issuance of the purported letter dated 25th September, 2002, followed by termination shortly, thereafter, without giving any opportunity to her to improve the quality of her stories (as it was alleged that they were of poor quality) raises serious doubts about the bona fide of such letter and the order of termination. Moreover, the Vishaka Guideline was not implemented by the Statesman Ltd. as a result whereof the employee could not have lodged any complaint of sexual

harassment with the appropriate authority. There is no committee constituted to look into the complaint of sexual harassment.

8. In *Vishaka & Ors. (supra)* the Hon"ble Supreme Court stated that working woman have right to gender equality, to work with dignity and to a working environment safe and protected from sexual harassment or abuse. The guidelines and norms prescribed in *Vishaka (supra)* includes:

All employers or persons in charge of workplace whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the workplace should be notified, published and circulated in appropriate ways.

.....

(b) As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(c) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

9. Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

10. The complaint mechanism, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

11. The Complaints Committee should be headed by a woman and not less than half of its members should be women. Further to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

12. The Complaints Committee must make an annual report to the Government Department concerned of the complaints and action taken by them.

13. The employers and persons-in-charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government Department.

14. Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in employer-employee meetings.

15. Admittedly no complaint committee was constituted by the employer. It has to be remembered that although we may speak of gender equality it has remained a myth and many organizations in spite of the guidelines laid down in Vishaka (supra) has failed to implement such guidelines. A self respecting lady would not normally raise an allegation of sexual and professional harassment unless she felt that her modesty has been outraged or she is being sexually harassed.

16. Sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as :

- a) Physical contact and advances;
- b) A demand for request for sexual favours;
- c) Sexually-coloured remarks;
- d) Showing pornography;
- e) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

17. Where any of these acts is committed in circumstances whereunder the victim of such conduct has a reasonable appreciation that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in Government, Public or Private Enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the women has reasonable ground to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

18. These guidelines which the employer is bound to follow has not been implemented. It has to be remembered that no self respecting woman would allow her dignity and modesty to be compromised. The delay in lodging the complaint with the police would not make much difference in the face of complaint she lodged with the managing editor in September, 2012. No one usually would like such issues to be publicized and lodge complain with the police. In house solution to such problem was preferred by her. The employee wanted a dignified solution and redressal of her grievance. It was only when the employer behaved indifferently that the employee lodged complaint with the police authorities. Even if one accept that the allegation of sexual harassment was an after thought the reason for dismissal during the probationary period was not established.

19. The complaint made by the employee with the police as it would appear from evidence had remained ineffective and the police had proceeded with the matter at a snail's pace.

20. Mr. Prabal Mukherjee the learned Counsel appearing on behalf of the

employer submits that the letter of appointment would show that she was on probation for six months and since her performance during the probation was unsatisfactory her service was terminated within the probationary period. Such termination not being stigmatic the said termination cannot be challenged. Mr. Mukherjee has referred to Muir Mills Unit of N.T.C. (U.P) Ltd. Vs. Swayam Prakash Srivastava and Another, and Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others, and submitted that it has been held in such decisions that service of probationer can be terminated any time before confirmation provided that such termination is not stigmatic. In case of a non-stigmatic termination principles of audi alteram partem are not applicable.

21. Probation by very nature of employment is, normally, co-terminus with the expiry of probationary period unless automatic confirmation is provided in the letter of appointment. It implies period during which fitness and suitability of a probationer would be reviewed and the probationer is on trial. There is no concept of automatic confirmation.

22. However, in the given case, service of the probationer was terminated, prior to the expiry the probation period.

23. The Industrial Tribunal is a fact finding authority.

24. The Industrial Tribunal has held that the termination of the probationer was not bona fide and in colourable exercise of power. In absence of any evidence to show that the performance of the probationer was unsatisfactory inasmuch as the management has failed to establish the validity, loyalty, existence and contents of the letter dated 25th September, 2002 which terms the basis of the formation of opinion, the findings arrived at by Tribunal cannot be said to be perverse. Moreover the management employee did not constitute a committee in terms of the judgment of the Hon'ble Supreme Court in Vishaka (supra).

25. The Tribunal is of the view that the employee suffers termination in view of her protest against sexual and professional harassment. The tribunal can always go into the question to find out if such order is actuated by motives of victimization or other ulterior motives. The Tribunal can always examine the grounds on which the management terminated the service as also other facts only for the purpose of seeing whether it was actuated by ulterior motive in terminating the service and in not confirming her. The Tribunal found such termination punitive and/or stigmatic. Such findings are arrived at on careful consideration of the materials on record and appreciation of evidence. The Employer could not adduce any evidence to show that the performance of the employee was unsatisfactory raising a grave and serious doubt about the bona fide of the discharge order and makes one to feel that she was victimized. In Management Utkal Machinery Ltd. Vs. Workmen, Miss Shanti Patnaik, the Hon'ble Supreme Court set aside the order of discharge of the probationer during the period of probation since the employer could not produce evidence of

unsatisfactory performance of the employee at the factory. Such order of discharge was held to be punitive.

26. The scope of judicial review in interfering with an award is extremely limited. The High Court cannot act as an Appellate Court or reappreciate evidence and records its findings on the contentious points.

27. Only if there is a serious error of law or the findings recorded suffer from error apparent on the face of record the High Court can set aside an award.

28. In *Iswarlal Mohanlal Thakkar Vs. Paschim Gujarat Vij Co. Ltd. and Another*, the Hon"ble Supreme Court quoted with the approval of its earlier decision in *Shalini Shyam Shetty Vs. Rajendra Shankar Patil*. It was held in Para 49 of the said report that:

"The power of interference under Article 227 is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to the High Courts."

"High Courts cannot, at the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or courts inferior to it. Nor can it, in exercise of this power, act as a court of appeal over the orders of the court or tribunal subordinate to it."

29 In Paragraph 18 of *Iswarlal Mohanlal Thakkar (supra)* it was held:

The power of judicial review of the High Court has to be alluded to decide whether or not the High Court has erred in setting aside the judgment and order of the Labour Court has erred in setting aside the U.P. this Court referred to the position held on the power of judicial review in *Reid Vs. Secy. of State of Scotland* wherein it is stated that (*Heinz India (P) Ltd. case*, SCC pp. 470-71.)

"Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law departed from the procedures which either by statute or at common law as a matter of fairness it out to have observed. As regards the decision itself it may be found to be perverse, or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly

clear that in case of review, as distinct from an ordinary appeal, the Court may not set about forming its own preferred view of the evidence. (Reid case, AC pp. 541 F-542A).

29. The Tribunal, in the instant case, on proper appreciation of facts and evidence on record by a well-reasoned order answered the points in favour of the employee.

30. However, the award so far as reinstatement is concerned needs to be modified. The order of reinstatement would be only for the remaining period of probation and the question of confirmation beyond the said period solely rests with the employer. In the instant case, this Court instead of allowing reinstatement with backwages grants compensation to the employee for a sum of Rs. 1,00,000/-(one lac) to be paid by the Statesman Ltd. to the employee within three weeks from date.

31. The award is modified only to the aforesaid extent.

32. The writ petition being W.P. 25931(W) of 2013 is allowed in part. This order also disposes of W.P. No. 24935(W) of 2013.