

(2023) 09 CAL CK 0033
In the Calcutta High Court
Case No : W.P.A. No. 18829 Of 2023

Sukalyan Haldar

APPELLANT

Vs

State Of West Bengal And Others

RESPONDENT

Date of Decision : 08-09-2023

Acts Referred:

Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 — Section 2(b), 2(b)(ii), 2(g), 2(g)(ii), 2(k), 2(o), 4, 4(1), 4(2)(c), 6, 6(1), 9, 13, 18, 18(1), 26, 26(1)(a), 29
Industrial Employment (Standing Orders) Act, 1946 — Section 2(a)

Citation : (2023) 09 CAL CK 0033

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Protik Dhar, Siddharth Banerjee, S. Dasgupta, Ananth Nath Naskar, Sk. Md. Galib, S. Dewan, Rahul Karmakar, Arkadeb Biswas, Sutirtha Nayek, Debashis Banerjee, Rakesh Jana

Final Decision : Partly Allowed

Judgement

Sabyasachi Bhattacharyya, J

1. The petitioner is a honorary Secretary of the Managing Committee in the St. Stephen's School, Dum Dum governed by the Barrackpore Diocesan Education Society, functioning within the Diocese of Barrackpore under the Church of North India.

2. By the impugned order, the Local Complaints Committee (LCC), District- North 24 Parganas has recommended, on the ground of alleged sexual harassment, that the petitioner be removed from the post of Secretary of the said School with immediate effect and should not be a member of the Executive Committee of the School in future. Certain other directions were also given regarding an Internal Complaints Committee (ICC) being made functional in the School.

3. Learned senior counsel appearing for the petitioner submits that the LCC acted without jurisdiction in making the said recommendation.

4. It is submitted that under the relevant statute, that is, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter referred to as, "the 2013 Act"), it is the ICC which is to deal with allegations of the nature as made against the petitioner. Hence, the LCC usurped jurisdiction. Learned senior counsel places Section 4 of the 2013 Act which pertains to constitution of ICC as well as Section 6, relating to constitution and jurisdiction of LCC.

5. It is contended that the LCC proceeded to assume jurisdiction on the premise that there was no proper constitution of ICC in the concerned School. However, nothing in the Act confers jurisdiction on the LCC to decide complaints of sexual harassment if there is an ICC in place. In support of such proposition, learned senior counsel cites Section 9 of the 2013 Act, which provides that any aggrieved woman may make in writing a complaint of sexual harassment at workplace to the ICC, if so constituted, or the Local Committee, in case it is not so constituted.

Even if the LCC was of the opinion that the ICC was not "properly" constituted, the same did not confer an authority on the LCC to decide the issue.

6. In any event, it is argued that the LCC does not have jurisdiction to adjudicate on the propriety of formation of the ICC. Section 26 of the 2013 Act provides for penalty for non-compliance of the provisions of the Act and envisages penalty to be imposed on the concerned employer if he fails to constitute an ICC under Section 4(1).

7. It is next argued that Section 2(g) of the 2013 Act contemplates an employer to mean, within sub-clause (i), in relation to any institution, the head of that institution or such other officer as the appropriate government or the local authority, as the case may be, may by order specify in this behalf.

8. Sub-section (ii) of Section 2(g) provides that in any workplace not covered under sub-section (i), any person responsible for the management, supervision and control of the workplace, is the employer. Section 6(1) of the 2013 Act, it is argued, provides that the LCC shall receive complaints of sexual harassment from establishments where the ICC has not been constituted due to having less than 10 workers or if the complaint is against the employer himself.

9. As per the hierarchy of the Diocese, the Bishop is the head, thus, being the employer. There are several rungs in hierarchy under the Bishop. The Bishop, as the President, has under him the Vice President, under whom the Managing Committee functions, of which the petitioner is the Secretary. Hence, the petitioner cannot be said to be the "employer" for the purpose of invoking Section 6 and hearing by the LCC. Insofar as the direction of removal of the petitioner is concerned, the same, it is argued, is also de hors the law.

10. In Section 13 of the 2013 Act, it is provided under sub-section (3) that where the ICC or the LCC arrives at the conclusion that the allegation against the respondent has been proved, it shall recommend to the employer or the District

Officer, as the case may be, inter alia to take action on sexual harassment as a misconduct in accordance with the provisions of the Service Rules applicable to the respondent or, where no Service Rules have been made, in such manner as may be prescribed. The work "prescribed" has been defined in Section 2(k) to mean prescribed by Rules made under the Act.

11. Section 29 of the 2013 Act confers power on the appropriate government to make rules. The term "appropriate government" within Section 2(b), it is contended, in sub-clause (i) is the Central Government or the Union Territory Administration or the State Government, depending on who provides the funds to finance the workplace. Under sub-clause (ii), in relation to any workplace not covered under sub-clause (i) and falling within its territory, the State Government is the appropriate government.

12. The only Rules framed under Section 29 of the 2013 Act are the Rules of 2013. Rule 9 of the said Rules contemplates termination of the respondent from service as one of the penalties for sexual harassment. However, learned senior counsel for the petitioner argues that as the 2013 Rules have been framed by the Central Government, but the appropriate government in the present context is the State Government, by application of Section 2(b)(ii), the said Rules are not applicable in the present case and, as such, the punishment of termination from service does not apply to the present petitioner.

13. On merits, learned senior counsel argues that the expression "faltu meye" has been construed to be "cheap woman" and as a lewd remark, whereas under the dictionary meaning in the well accepted Bengali dictionary of A.T. Dev, the expression "faltu" has been defined as extra, spare, excessive, much, unnecessary, useless. Hence, there is no lewd context to the same.

14. It is argued that the petitioner was not given access to the documents relied on by the LCC and, as such, its findings are vitiated by the violation of principles of natural justice.

15. Learned counsel appearing for the alleged victim, that is, respondent no.15, argues that irrespective of existence of an ICC, proper or improper, the LCC rightly assumed jurisdiction, since the allegation was against the employer himself.

16. Under Section 6(1), if the complaint is against the employer, it is the LCC and not the ICC which has to decide.

17. By exploring the concept of "employer" in Section 2(g) of the 2013 Act, it is submitted that sub-clause (ii) and not (i) applies. As per the same, employer means in any workplace any person responsible for the management, supervision and control of the workplace. The explanation provides that it includes the person responsible for formulation and administration of policies for the organization.

18. Learned counsel for the respondent no.15 places reliance on several

documents annexed to the writ petition to argue that the petitioner, being the Secretary, is an employer for all practical purposes. Learned counsel places reliance on a document annexed at page 148 of the writ petition, to argue that the letter of appointment of the present respondent no.15/victim was also signed by the Secretary/petitioner. From the document annexed at page 163, it is also clear that the designation of the respondent no.15 was changed by the petitioner.

19. At page 164, it is argued, a file note shows that transfer of the respondent no.15 is also in the hands of the petitioner. Thus, it is argued that the LCC had exclusive jurisdiction to hear the matter.

20. Learned counsel also places reliance on the enquiry report annexed at page 76 to show that there was a long antecedent of incidents preceding the actual verbal abuse which was cited in the impugned decision, which chain of events goes on to show that each and every allegation made by the respondent no.15 was correct and the remarks by the respondent no.15 were indeed in a lewd context.

21. Learned counsel also places reliance on the actual complaint of the respondent no.15 annexed to the writ petition.

22. Learned counsel appearing for the School Authority submits that the victim/respondent no.15 herself approached the ICC first and made her complaint before the said Authority, thereby submitting to its jurisdiction. Subsequently, the victim thereafter challenged the jurisdiction of the ICC and moved the LCC.

23. Thus, such afterthought on the part of the respondent no.15 ought to be deprecated and, in view of the prior submission of the respondent no.15 herself to the jurisdiction of the ICC, it should be construed that the ICC and not the LCC had jurisdiction.

24. It is further submitted that the school was never given any opportunity of hearing. Hence, the recommendation against the school on the premise that there was no properly constituted ICC ought to be struck down. It is further argued that as per the provisions in the 2013 Act, failure of an institution to constitute the ICC may be visited by penalty under Section 26 of the said Act which, however, cannot be imposed by the LCC. Hence, the directions against the school are palpably de hors the law.

25. Upon hearing learned counsel for the parties, the primary basis of the arguments of the parties is the 2013 Act.

26. The act of sexual harassment alleged and taken note of by the LCC is the passing of a particular remark within the hearing of the victim which may, at best, come within the broad purview of Section 2(n)(iii) that is making sexually coloured remarks. Whether the remark was lewd or not has to be determined totally in the context in which it was made, since the expression "faltu" may have different shades of connotations in the colloquial usage of the Bengali language and may not always be restricted to its dictionary meanings. The interpretation

applicable in the present case would entirely depend on the backdrop.

27. However, the jurisdictional issues are to be decided first.

28. The scope of functioning of the ICC and the LCC respectively, as well as their constitution, has been clearly delineated in Sections 4 and 6 of the 2013 Act. The LCC, in the present case, has proceeded to make certain observations to the effect that the ICC has not been properly constituted in the concerned school.

29. However, the broader question is whether the LCC had jurisdiction in law at all to take up the complaint of the victim.

30. Section 6(1) of the 2013 Act clearly provides that the LCC shall receive complaints of sexual harassment in two cases – where the ICC has not been constituted due to having less than 10 workers or if the complaint is against the employer himself.

31. The petitioner has argued that the employer of the Diocese is the Bishop, and not the Secretary of the Managing Committee.

32. However, a “Diocese” is a territorial division based on ecclesiastical lines under the Church of North India. The concept of “Diocese” has nothing to do with the idea of “workplace” in the 2013 Act.

33. In Section 2(o), various institutions have been defined as workplace. The most apt is provided in sub-clause (ii) thereof, which includes “any private sector institution carrying on educational services” to be included within the definition of “workplace”. It is the concerned school, and not the entire Diocese, which is the “workplace” under the 2013 Act vis-à-vis the alleged victim.

34. Seen in such context, the Secretary of the Managing Committee of the school can undoubtedly be classified as “employer”. Section 2(g)(ii) defines “employer” as any person responsible for the management, supervision and control of the workplace. The explanation is inclusive and contemplates the person responsible for formulation and administration of policies for the organization

35. It cannot be in doubt that, by definition, the Secretary of the Managing Committee is responsible for “management”. Supervision and control obviously lies with the petitioner as well, as evident from the documents annexed to the writ petition itself. As rightly pointed out by the respondent no.15, it is the Secretary (petitioner) who was a signatory authority of the letter of appointment to the petitioner along with the Principal.

36. Again, it is the petitioner who has the power to change designation of the employees and did so in case of the victim in the present case vide communication dated June 27, 2016, annexed to the writ petition as well.

37. In the file note dated June 27, 2016 signed by the petitioner, the victim was designated as a primary teacher of the particular department as mentioned therein.

38. Again, at page 168 it is seen that the Secretary of the Managing Committee is one of the signatories in the contractual appointment of the victim. There are several documents galore, annexed to the writ petition, to show the supervision and control exercised by the petitioner as the Secretary of the Managing Committee in the workplace, that is, the school.

39. Hence, the respondent no.15 is justified that it is not the ICC but the LCC which exercises jurisdiction to receive and decide on complaints of sexual harassment against the petitioner, who is the employer himself vis-a-vis the school, under Section 6 of the said Act.

40. The respondents have cited an unreported coordinate Bench judgment in *Sumana Bhowmick Vs. Union of India and others and Balmer Lawrie & Co. Ltd. Vs. The Deputy Chief Labour Commissioner (Central) and Ors.* [WPO 177 of 2019 and WPA 11842 of 2019][MANU/WB/0152/2023], where the learned Single Judge observed that whether or not a particular respondent was an employer within the meaning of the Act would require a fact-finding exercise in terms of the victim and the accused person's nature of duty, the role of the accused in the management of the company and control over the members of the ICC. Such a fact-finding exercise, it was held, cannot be done by the writ court.

41. However, the context of the present circumstances is different insofar as the said ascertainment does not require any fact-finding enquiry necessitating evidence to be taken. The admitted documents annexed to the writ petition are sufficient.

42. Hence, the LCC had the jurisdiction, on such score, to take up the complaint against the petitioner/Secretary who is the employer.

43. Moving on to the next issue, it been argued by the respondent no.15 that there is a provision for appeal under Section 18 of the 2013 Act against recommendations made under Section 13 of the said Act.

44. The appellate authority as provided under the Rules of 2013 (Rule 11) provides that the appellate authority notified under Clause (a) of Section 2 of the Industrial Employment (Standing Orders) Act, 1946 shall function as the appellate authority under Section 18. Section 18(1) stipulates that the person aggrieved may prefer an appeal in such manner as may be prescribed.

45. "Prescribed", as defined in Section 2(k), is prescribed by Rules under the Act.

46. Since the State Government has not made any Rules, the 2013 Rules shall prevail within the definition of "prescribed" under Section 2(k) of the 2013 Act, since those are Rules made "under the Act", as defined in Section 2 (k). The distinction sought to be made by learned senior counsel for the petitioner regarding "appropriate government" is not strictly applicable to Section 2(k), since the said provision does not mention that the Rules are to be made by the "appropriate government", but merely provides that the Rules are to be made under the Act. Hence, the requirement of law is fulfilled by the appellate forum

as stipulated in Rule 13 of the 2013 Act.

47. Yet, despite the availability of an alternative remedy by way of an appeal, the petitioner challenges the decision of the LCC on various jurisdictional issues which go to the root of the assailed exercise.

Hence, it cannot be said that the writ court's jurisdiction is barred.

48. Insofar as the merits of the case are concerned, the LCC proceeded only on the basis of a particular comment allegedly made by the petitioner, the context of which was not discussed at all by the LCC.

The expression "faltu meye" can be used in various contexts. The backdrop of the usage would lend colour and texture to the comment, thus making it necessary for the adjudicatory authority to explore the antecedents and backdrop of such usage.

49. I find nothing in the impugned order to indicate that the appropriate context and backdrop in which the said expression was used by the petitioner, if at all, was discussed by the LCC.

50. That apart, the LCC failed to take into consideration the entire gamut of the complaints made in detail by the victim against the present petitioner.

51. Moreover, an opportunity ought to have been given to the parties to peruse the documents, if any, relied on by the LCC in passing the impugned order.

52. Such conditions having not been satisfied, it cannot be said that the tenets of Natural Justice have been duly complied with by the LCC. There are ingredients of perversity and lack of opportunity of informed hearing to the parties, particularly the petitioner, in the decision of the LCC, which vitiates the impugned decision on the ground of violation of principles of Natural Justice.

53. The third aspect of the matter is the LCC's directions to the respondent-school regarding formation of the ICC.

54. The observations and directions of the LCC regarding the allegedly improper constitution of the ICC in the concerned institution were passed by the LCC patently without jurisdiction. Under the 2013 Act, penalty can be imposed under Section 26 for non-compliance with the provisions of the Act. Sub-section 1(a) of Section 26 also contemplates the failure of the employer to constitute an internal committee under sub-section (1) of Section 4, to attract punishment with fine which may extend to 50 thousand rupees.

55. However, nothing in the statute confers jurisdiction on the LCC to adjudicate upon the propriety and legality of the constitution of the ICC and/or pass directions on the institution to take steps regarding constitution of the ICC. At best, the LCC or any concerned person or employee of the institution may approach the appropriate authorities for imposition of penalty under Section 26 to enforce the mandate of the statute.

56. Moreover, the interplay between the qualifications of members of the ICC and the requirement of their being neutral persons, who are not employed in the institution, are required to be considered on a case-to-case basis. The mere fact that the fourth member as contemplated in Section 4(2)(c) of the 2013 Act is also an employee of the institution-in-question or the concerned Diocese per se does not vitiate his credentials to be a member of the ICC if he is otherwise eligible for the post. The statute does not stipulate in so many words that the members of the ICC cannot be employees of the institution as well.

57. As such, the impugned order cannot be sustained on the grounds as indicated above.

58. Accordingly, WPA No.18829 of 2023 is partially allowed, thereby setting aside the impugned decision/recommendation of the Local Complaints Committee, North 24 Parganas. The LCC is directed to rehear the complaint of the respondent no.15 against the petitioner in accordance with law. While doing so, the LCC shall give adequate opportunity of hearing to the parties and shall serve prior copies of all documents which are relied on by the parties to their respective opponents before hearing the matter.

59. While considering the issues afresh, the LCC shall advert to all the components of the written complaint made by the respondent no.15 and give ample opportunity to the petitioner/accused to present his version of the case with relevant documents, if necessary. Upon such adjudication afresh, the LCC shall come to a reasoned decision and communicate the same to all concerned. If the LCC's decision refers to or is based on any expression, the entire context and backdrop of the usage of such expression shall be considered on the basis of the materials on record to ascertain whether there was any sexual overtone to such usage.

60. Upon arriving at its decision, the LCC shall communicate the same in writing to the complainant as well as the accused within a week thereafter.

61. The entire exercise shall be concluded by the LCC within two months from date.

62. It is made clear that depending on the outcome of the said exercise, it will be open to the LCC to take all necessary steps and measures consequential to its decision and commensurate with the alleged offence in accordance with law.

63. Till the complaint is so decided, the petitioner will be entitled to pursue his profession in the institution-in-question. However, the petitioner shall not influence or seek to influence the fresh adjudication by the LCC or the concerned witnesses and/or tamper with the relevant documents in any manner whatsoever. The petitioner shall also not have any interaction with the petitioner and/or be a part of any major decision regarding the alleged victim/respondent no. 15 during the entire tenure of the adjudication.

64. It will be open to the LCC and/or the respondent no.15 and/or any other

employee of the institution-in-question, if they so feel, to approach the State Government for imposition of penalty for non-compliance with the provisions of the Act regarding proper formation of an ICC, if any. Upon such complaint being lodged, the State Government shall decide such question in accordance with law upon giving adequate opportunity of representation and/or hearing to all concerned and pass appropriate orders in that regard.

65. There will be no order as to costs.

66. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.