

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve : 13.12.2012

Date of Decision : 21.10.2013

+ **W.P. (C) 3704/2012 &**  
**CM APPL.Nos. 7772, 7774, 8894, 9629 & 10289/2012**

UNION OF INDIA

..... Petitioner

Through: Mr. Sudhir Walia with  
Ms. Varsha Juneja and Mr. Akhil Sachar,  
Advocates.

Versus

NISHA PRIYA BHATIA

..... Respondent

Through: Ms. Nisha Priya Bhatia, respondent  
in person.

**CORAM:**

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**

**HON'BLE MR. JUSTICE R.V.EASWAR**

**MR. JUSTICE S. RAVINDRA BHAT**

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1. In this writ petition, the Union Government feels aggrieved by an order of the Principal Bench of the Central Administrative Tribunal (hereafter called "the CAT") in O.A. No. 3613/2011. The CAT allowed the respondent/petitioner's (hereafter called "the respondent" or "Ms. Bhatia") application and directed the regularization of two spells of alleged unauthorized absence and also directed the Union Government to revise the respondent's pension with effect from 19.12.2009 with consequential

benefits.

2. The facts necessary for deciding the case are that the respondent was a 1987 batch Class I Executive cadre officer in the Cabinet Secretariat [also known as the R&AW]. The events which led to her compulsory retirement with effect from 18.12.2009 have to be recapitulated. The respondent had alleged sexual harassment at the workplace sometime in 2007. This led to the constitution of two Committees. Although the reports of these Committees are not the direct subject matter of these proceedings, yet the reports of the Committee (dated 19.05.2008 and subsequent report of another Committee dated 30.09.2008) indicated that the allegations of sexual harassment could not be substantiated. On 08.12.2009, the Union Government, by invoking its powers under Rule 135(1)(a) of the Research & Analysis Wing (Recruitment, Cadre & Service) Rules, 1975, compulsorily retired the respondent on the ground of her being exposed as an Intelligence Officer and thus becoming unemployable in the organization. The respondent in the present case challenged the order of compulsory retirement in O.A. 50/2010. After considering the arguments of the rival contentions, pursuant to notice issued to the respondents, the CAT quashed the said order of compulsory retirement and directed consequential relief to be granted to her. The Union Government, in turn, questioned the decision of the CAT before this Court in W.P.(C) 2735/2010. This Court, by an order dated 03.05.2010, issued notice to show cause to the respondent and in the meanwhile, stayed the order of the CAT, directing the respondent's reinstatement. The Court, however, clarified that,

*“.....This, however, will not prejudice the right of the respondent to claim her compulsory retirement benefits in accordance*

*with law after fulfilling the formalities as contemplated under the rules. In case, the respondent claims her retrial benefits, the same be released to her within one week after fulfilling formalities by her. The claim of such retiral benefits by her shall be without prejudice to her rights and contentions.....”*

3. On 10.05.2010, an order fixing the respondent's provisional pension under Rule 69 of the CCS (Pension) Rules, 1972 ("Pension Rules"), based upon her pay drawn as on 28.08.2008, with effect from 19.12.2009, was issued. This order stated that the provisional pension should be released, *"from 19.12.2009 till her period of unauthorized absence is regularized."* The respondent contested the order of provisional pension to the extent that it treated a substantial period till the date of the order of compulsory retirement as period of unauthorized absence, by filing O.A. 1665/2010 before the CAT. In that proceeding, the respondent argued that the Union Government's submission in W.P. (C) 2735/2010 (hereafter referred to as "the UOI's 2010 petition") about an alleged period of unauthorised absence between 29.08.2008 and 26.11.2009 was not justified. She referred to previous proceedings before the CAT which had dealt with the ongoing proceedings enquiring into the allegations of sexual harassment and certain orders made by the Tribunal and consequently by this Court. The respondent pointed-out that in those proceedings, i.e. O.A. 2687/2008, the Union Government had acknowledged that the respondent joined the office on 06.04.2009. She also contended that she was prevented from attending her office and relied upon an endorsement alleged to have been given by a Commander of the SSB Battalion on 29.08.2008. Prior to filing the said application (O.A. 1665/2010), the respondent had also made a representation

claiming regularization of the period of her absence. That was, however, rejected by the Central Government, through its order of 28.05.2010. She consequently challenged that rejection too, by filing O.A.1967/2010, urging grounds similar and identical to those in O.A.1665/2010.

4. During the pendency of the said applications, O.A.1665/2010 and O.A.1967/2010, an interim/Miscellaneous Application (M.A.) 2115/2010 was moved by the respondent, claiming a direction that all the communications alleged to have been issued from time to time to her to be produced. A reply was filed by the respondents; the CAT disposed of the application on 29.09.2010. In the course of this order, the CAT recorded the statement of counsel for the Union Government in the following terms:

“XXXXXX XXXXXX XXXXXX

*2. Learned counsel for the respondents states at the Bar, under instructions from the respondents, that no letters other than the aforementioned four (letters dated 01.12.2008, 06.04.2009, 18.02.2010 and 28.05.2010) had been addressed by the official respondents to the applicant herein in the context of the controversy about absence for the period under reference.*

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5. The respondent’s original applications, being O.A.s 1665/2010 and 1967/2010, claiming that the treatment of the period between August 2008 and November 2009 as unauthorized absence was not justified – were disposed of by common order dated 28.04.2011. The Tribunal noticed that till the date of its order, no charge sheet had been issued to the respondent and the matter was being dragged on. The Tribunal also noticed that in its previous order dated 15.05.2009, in O.A. 2687/2008, the Union Government

had been directed to permit the respondent to join duties and that their insistence for submission of the certificate of transfer ought to have been waived. The Union Government's contentions too were noticed. The Tribunal was of the opinion that in view of the disputed nature of the facts and allegations, an appropriate effort to regularize such periods of alleged absence due to delay or inaction on the part of the Union Government in issuing the Identity Card or correct posting orders ought to be made and thereafter the Union Government, for the unauthorized absence for the same period, issue a charge sheet to the respondent and give full opportunity to the defendant to defend herself. The operative directions in that regard (in O.A.1665/2010 and O.A.1967/2010 made on 28.04.2011) were as follows:

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*30. In view of above facts, both the OAs can be disposed of by giving following directions:-*

*(i) Respondents shall first make an effort to regularize such period of alleged absence which occurred due to any delay or inaction on their part in issuing the I-Card or correct posting order or due to any court order etc. They shall also consider the attendance register which is stated to have been signed by the applicant, her PA and the Field Officer attached with her.*

*(ii) After considering the above facts, if respondents still feel that applicant was unauthorisedly absent for some period, they shall issue definite charge sheet to the applicant, giving her full opportunity to defend herself and then decide the period in accordance with law.*

*(iii) Respondents shall ensure that none of the officers against whom applicant had filed complaints of sexual harassment or corruption are appointed as Inquiry Officer or Presenting Officer because she has an apprehension, they may be biased*

*against her. This direction has been given because justice should not only be done but seem to have been done also.*

*(iv) In case respondents decided to initiate the enquiry, it shall be completed within 4 months from the date of receipt of a copy of this order subject to co-operation by the applicant.*

*(v) We permit the applicant to accept the cheques prepared by the respondents, if not already collected, within 15 days, from the date of receipt of a copy of this order, which shall of course be without prejudice to her rights.*

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6. On 29.09.2011, Ms. Bhatia filed O.A. 3613/2011, seeking a direction to the Union Government to forbear from proceeding in any manner and to treat the period of alleged unauthorized absence from 29.08.2008 to 26.11.2009 and that the failure to comply with the previous order of the CAT dated 28.04.2011 should result in regularization of the said period of alleged unauthorized absence from duty, and issue consequential orders. The CAT issued notice; the Union Government entered appearance and filed its response on 14.03.2012. In this reply, the Union Government stated that an in-house enquiry was conducted by Joint Secretary, who submitted its report on 29.09.2011 in which he stated that of the total period of alleged unauthorized absence of 29.08.2011 to 26.11.2009, the period of 07.04.2009 to 09.06.2009 could be considered as on duty. The reply also stated that the Union Government had two options, either to regularize the period of unauthorized absence by granting leave, or issuing charge sheet, after obtaining approval from the disciplinary authority under Rule 9 of the CCS (Pension) Rules. The affidavit went on to state that after examining the

issues involved, an order dated 27.02.2012 was issued, leaving it to the Secretary (R) to take appropriate action. The reply *inter alia* stated as follows:

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5. *That the Secretary(R), Government of India, after considering the entire issue and keeping in view the facts and circumstances of the case has only two options in the matter-*

(i) *To regularize the period of her absence from 29.8.2008 to 5.4.2009 and 10.06.2009 to 26.11.2009 (total 390 days) as EL of 226 days and remaining by Half Pay Leave, if any, at the credit of Ms. Bhatia. The period from 6.4.2009 to 9.6.2009 may be treated as duty; or*

(ii) *To get the Departmental Enquiry initiated against Ms. Bhatia under the relevant Pension Rules for the period of her unauthorized absence.*

6. *These are the limited options available to the respondents. The respondents will like to take a lenient view and go for the first option because of the financial difficulties encountered by the petitioner who has two college going daughters. The respondents will prefer that Ms. Bhatia comes forward and agrees to get her leave regularized as above. It would enable the Department to release full pensionary dues to which she is entitled to get as per provisions of Rule 135 of R&AW (RC&S) Rules, 1975. Her pensionary dues to which she would become entitled are as follows:*

*In accordance with the provision of Rule 135 of R&AW (RC&S) Rules, Ms. Bhatia would have drawn Basic Pay of Rs.75,700/- (equivalent to HAG + scale of Rs.75,500 – 80,000/- admissible to DGs in IPS Pay Rules) as on 30.04.2023, i.e., her date of superannuation. Based on that, she is entitled to a basic pension of Rs.37,850/- (50% of Rs.75,700) plus Dearness Relief (DR) thereon w.e.f. 19.12.2009. At present, she has been*

*sanctioned and being paid a provisional pension of Rs.27,770/- plus DR, as admissible. This position will continue as long as the period of unauthorized absence is not settled.*

7. *However, in case this is not acceptable to the petitioner and she refuses to get her absence from duty regularized the respondent will have no other option but to conduct DE against petitioner. If a DE is held for which there is sufficient material on record to do so, it will drag the applicant to a lengthy departmental proceedings to be held under Rule 9 of CCS (Pension) Rules, 1972 which may take time to complete. The applicant will continue to face financial hardships as she would not get the final pension, till the finalization of the Departmental Enquiry.*

8. *It is respectfully submitted that this decision has been taken keeping in view the spirit of the order dated 28.04.2011 passed by this Hon'ble Tribunal.*

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7. Ms. Bhatia had filed a miscellaneous application (M.A.), seeking directions for an early hearing and disposal of her original application. In reply, the UOI, after denying certain allegations and underlining that the respondent's applications contained unwarranted allegations against Judges, stated as follows:

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6.....However, keeping in view the spirit of the order dated 28.04.2011 passed by this Hon'ble Tribunal, the Respondent once again reiterates the averments made in para 5 of the reply dated 14.03.2012. On further consideration of the matter, it is submitted that in furtherance to the offer made earlier in the reply dated 14.03.2012, the Respondent is prepared to treat the period of her absence as “Child Care

*Leave”. In that case, the Applicant (Ms. Nisha Priya Bhatia) shall have no pecuniary loss. As already submitted earlier, the total period of her absence is – 29.08.2008 to 26.11.2009. As per the in-house enquiry conducted by the Jt. Secretary, period from 07.04.2009 to 09.06.2009 (63 days) could be considered as “on duty”, giving her the benefit of doubt, after considering the copy of attendance register. In so far as the remaining period from 29.08.2008 to 05.04.2009 and 10.06.2009 to 26.11.2009 (390 days) can be considered as “Child Care Leave”/“Earned Leave.”*

7. *It may be mentioned here that the Applicant (Ms. Nisha Priya Bhatia) has been paid entire salary for the entire period i.e. 29.08.2008 to 26.11.2009 alongwith all other benefits, which she was entitled to.*

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*The impugned order*

8. The CAT, by its impugned order allowed O.A. 3613/2011 on 11.05.2012. In the course of this order, the CAT noted that the scope of this proceeding was not to decide the veracity or truthfulness of sexual harassment in R&AW or the correctness of certain criminal cases registered against the respondent. It set-out the scope of its jurisdiction as being circumscribed to consider the issue of unauthorized absence for the period 29.08.2008 to 26.11.2009 – minus the period 07.04.2009 to 09.06.2009. The Tribunal observed *inter alia* that its previous orders have noticed that:

*“8... The Tribunal observed that certain spells which were disputed could have been regularized by the respondents on their own, and that the respondents had admitted that the applicant had formally applied for a new identity card on 28.05.2008, which was issued on 10.02.2009, i.e., after a period of over nine and a half months, and that if the respondents had taken so much period in preparing the identity card, and the*

*applicant had not been allowed to join office for want of the identity card, the said period cannot be attributed to the applicant ...”*

9. The CAT, however, held that the respondents were required to make an effort to regularize such period of absence, which could have happened due to delay or inaction on their part in issuing the Identity Card and also issuing Attendance Register. It proceeded to hold that up to 10.02.2009 it could not be alleged that the respondent was on unauthorized absence and that she had valid reasons for not attending office for want of valid Identity Card. It thus accepted the respondent's contentions about her being prevented from joining the duties. The Tribunal also noticed that, *“the applicant also argued that during this period of unauthorised absence she was regularly paid the salary and never during the said period she was called upon to explain as to under what circumstances she had remained absent.....”* After repeating that it was not supposed to enquire into the veracity of allegations regarding sexual harassment, the Tribunal noticed that about nine and a half months were taken in preparing the Identity Card; and that a certificate was obtained from a doctor stating that she was a psychiatric patient. These facts were not disputed by the Union Government. Even while refraining from making adverse comments on these and other facts, the Tribunal felt constrained to hold that the respondent was treated indifferently. It also noticed that no enquiry had been initiated and conducted and that in view of the prolonged delay on the part of the Union Government in deciding the issue, it was not justified in treating such period as having been spent on unauthorized absence, thus disentitling the respondent to full pension. In the light of these findings, the Tribunal allowed O.A. 3613/2011,

and directed that the period of alleged unauthorized absence from 29.08.2008 to 05.04.2009 and 10.06.2009 to 26.11.2009 should be regularized. The Central Government were also directed not to hold any enquiry and that the respondent's basic pension was directed to be revised upwards, and fixed at Rs.37,850/- with Dearness Relief admissible with effect from 19.12.2009.

*The Union Government's contentions*

10. The Union argues, in its pleadings and the submissions of Shri P.P. Malhotra, learned Additional Solicitor General, that the impugned order is in error in finding that the Respondent could not attend to her duties, because she was not issued a new I-Card. It argued that these findings are totally contrary to record, because no official of the Organization was ever prevented from entering the office on the ground that his/her I-Card has not been renewed. The Government had issued Circulars whereby the last date of renewal had been extended from time to time. These records were produced before the Tribunal in previous proceedings [O.A. No. 1665/2010 & 1967/2010], which had directed the Department to hold an inquiry regarding these disputed questions of fact by order dated 28.04.2011.

11. It was argued that even though the Tribunal observed that it was not concerned with issues facts relating to allegations concerning sexual harassment and was only going to decide whether the departmental inquiry should be conducted against the Respondent regarding her unauthorised absence from duty, nevertheless, in its impugned order proceeded to return adverse findings on all these issues without any material to support the same and also without calling for any record in order to decide the truthfulness or otherwise of these allegations.

12. It was contended that the Tribunal overlooked that the Union of India had taken a lenient view in the matter, in view of the spirit of the order dated 28.04.2011, and had therefore made an offer in its affidavits dated 14.03.2012 and 30.04.2012, which was declined by the Respondent. The Tribunal erroneously took an adverse view of the lenient stand taken by the Department with regard to the question of unauthorized absence of the Respondent. It is argued that such observations in the impugned judgment were contrary to the directions issued by another Bench of the Tribunal in para 30 of the order dated 28.04.2011. It was emphasized that the Department had decided to take a lenient view and gave first option, i.e. to regularize the remaining period of unauthorized absence, provided the *Respondent accepted the same by making a formal application in this regard*. It was further submitted that the Union's affidavit before the Tribunal had stated, in its earlier order, that in case the Respondent, did not accept the its proposal, the Department will have no other option, but had to conduct the departmental inquiry against the Respondent. The learned ASG relied on the following ground urged in the writ petition:

*“It is also important to submit here, that the Department filed yet another affidavit on 30.04.2012, in response to the application (M.A. No. 919/2012) filed by the Respondent herein in O.A. No. 3613/2011, wherein yet another option was given to the Respondent herein that the Department in furtherance of its earlier offer made in its affidavit dated 14.03.2012, is prepared to treat the period of her absence as “Child Care Leave”, so that the Respondent does not suffer any financial loss. However, this offer was subject to the Respondent making a formal application to the Department. It is relevant to mention here, that during the course of hearing, the Hon’ble Tribunal had specifically asked the official of the Department, who was present in Court, whether the Department agreed that no departmental inquiry shall be held, in case the Respondent herein made an application for*

*regularizing her period of absence? After obtaining instructions from the Department, the Hon'ble Bench was informed that the Department shall conclude the matter and no departmental inquiry shall be initiated, in case such an application is made by the Respondent herein."*

13. The learned ASG submitted that the question regarding the respondent's unauthorized absence could only be decided in a regular departmental inquiry in view of their being disputed question of facts. The Tribunal could not have inquired into the matter and decided complicated question of facts on the basis of affidavits and without affording any opportunity to the Department to produce the relevant record on these issues.

14. The ASG argued that the impugned order is also untenable because it overlooked that after the Respondent's refusal of the Central Government's offer, the latter had requested that it should be permitted to hold the departmental inquiry in terms of directions contained in para 30(ii) of the order dated 28.04.2011. The Tribunal was also informed that in view of the pendency of the fresh O.A. No. 3613/2011, Union Government was advised not to proceed in the matter. By issuing the impugned directions to regularize the period of unauthorized absence, and at the same time refrain from holding any inquiry, the Tribunal had made an order based on conclusions which were contrary to its previous directions, and based on untenable assumptions. It was contended that a joint reading of the previous order of the Tribunal, and the impugned order clearly revealed that the earlier order nowhere returned findings of fact, contrary to the latter order's underlying assumptions. Furthermore, whether the I-card had been issued

after inordinate delay, or whether the allegations of the respondent's being prevented from joining duty were warranted or justified, clearly did not lie within the domain of the Tribunal's jurisdiction. It could also not injunct or prevent the Central Government from exercising its statutory powers and exercising its discretion to hold an inquiry, in terms of Rule 9 of the Pension Rules.

15. It was contended on behalf of the Union Government that the Tribunal erred in overlooking essential facts, which were apparent from the records, produced in the course of hearings in O.A. No. 1665/2010 & 1967/2010 namely:

(a) The I-Card of Ms. Bhatia was to expire on 31.08.2008. She applied for renewal of her I-Card on 21.08.2008 and her application was received in the office on 25.08.2008;

(b) According to instructions, all the officials had to be photographed at the Headquarters for issuance of new series of I-Card. Ms. Bhatia too was informed about the same by letter dated 15.09.2008. *In this very letter, she was also informed about the latest instructions regarding existing I-Card holders being permitted to use their old I-Cards till 30.11.2008;*

(c) Ms. Bhatia did not come forward to complete the necessary formalities for issuance of new I-Card;

(d) The time for renewal of 31.08.2008 was extended till 30.11.2008 by Circular dated 21.08.2008 – All the officials were allowed to use their old I-Cards for entry and exit in the office;

(e) The time for renewal was further extended up to 31.12.2008 by Circular dated 26.11.2008 – All the officials were allowed to use their old I-Cards for entry and exit in the office;

(f) All officials who could not get their new I-Cards, were permitted to obtain “daily pass” for the purpose of entry and exit in the office. No official was denied entry on account of non-issuance of new I-Card;

(g) A temporary I-Card was issued to Ms. Bhatia on 04.02.2009 after she completed the formalities;

(h) A permanent I-Card was issued to her on 10.02.2009;

16. It is argued that no official was prevented or debarred from entering the office on account of non-issuance of new Identity Card as stated herein above. The security officials had been issuing “daily passes” after 31.12.2008 to all those, whose new I-Cards were not ready due to incomplete formalities. It was therefore contended that Ms. Bhatia did not complete the formalities for issuance of new I-Card, even though the period was extended from time to time. It is further submitted that Ms. Bhatia also did not apply for daily pass like other officials after 31.12.2008. It is stated that during the hearing of O.A. Nos. 1665/2010 & 1967/2010, the Union Government had produced the letter dated 15.09.2008 along with the circulars dated 21.08.2008 and 26.11.2008 to demonstrate, that the Respondent’s averments were factually incorrect. Those facts were disputed by the Respondent and therefore the Tribunal in Paras 29-30 of the previous order dated 28.04.2011, directed the Central Government to resolve the issue of issuance of I-Card, firstly by making an effort to regularize such period of absence, which occurred due to delay or inaction in issuing the I-Card.

17. The learned ASG argued that the Tribunal, besides proceeding on assumptions, could not have precluded the Union Government from exercising its jurisdiction under Rule 9 of the Pension Rules by a virtual preventive order, as it were. The power under the provision was in public

interest, in order to ensure discipline, and no Tribunal or court could substitute its discretion in the matter.

*Respondent's contentions*

18. The respondent, Ms. Bhatia contends that despite lapse of over 5 months the Central Government ignored the directions issued by the CAT; it neither regularized the period of her alleged unauthorized absence (from 29.08.08 to 26.11.09) did it issue any charge sheet to her to decide the matter in accordance with law. The Central Government could not be permitted to sit over the matter endlessly, and harass her (the respondent).

19. It is argued that on 26.10.07, the respondent complained to the competent authority on the subject sexual exploitation of women employees in the R&AW and indifference & involvement of Secretary i.e. Shri Ashok Chaturvedi. Her troubles started thereafter; within a month of the complaint and behind her back, staff officer to Secretary obtained a letter dated 26.11.07 from a doctor (Dr. Rajat Ray) at the AIIMS Hospital which '*suggested presence of a Psychiatric illness in the applicant*'. There was a campaign thereafter by Shri Ashok Chaturvedi to project that Ms. Bhatia was a mentally unstable person and guilty of insubordination as well. It was argued that wherever the respondent went with her grievances – to the PMO, the National Commission for Women, the NHRC, or the police – she was turned away with the allegation that she had complained against Shri Ashok Chaturvedi as she was mentally unstable. It is alleged that surveillance was mounted against her and her phones were tapped. She relies on a letter dated 20.04.2010 written to her by the RTI Cell of the Indian Army in response to an RTI application filed by her to the following effect:

*“As per Mr. N.K. Sharma, Jt. Secretary RAW an FIR has been filed*

*against Mrs. Nisha Priya Bhatia for harassing colleagues, destruction of Govt. property and obstruction of work. CCTV's have been installed around her residence to keep a check on her movement as she had in the past, tried to commit suicide in from of the PM's office".*

20. Ms. Bhatia submits that efforts by her seniors to keep her out of work started in November, 2007 – within less than a month of her complaint dated 26.10.07. Shri Ashok Chaturvedi, by an order dated 08.11.07, posted her as Director (Trg) and another officer, Shri S.S. Mohapatra, the then Director (Trg) as Director (PR) Hqrs. However, a week later, by another order dated 16.11.07, the posting of Shri S.S. Mohapatra as Director (PR) was cancelled. This meant two officers were posted against once sanctioned post of Director (Trg) and since Shri Mohapatra was the sitting Director (Trg), the respondent was left, without any work charge. There is only one sanctioned post of Director (Trg) in the R&AW; for this, the respondent relied on a noting dated 08.04.08 by Accounts Officer, ( B & F). The respondent, in an institute of which she had been Head, was given a shabby cubicle next to a toilet to sit in. She was compelled to first proceed on leave and then to struggle, complain and represent to the PMO to reclaim her charge of Director (Trg).

21. Ms. Bhatia states that the restraint imposed upon her due to the posting orders was duly noted by the committee which enquired into her complaint against Shri Ashok Chaturvedi. The committee completed its deliberations on 23.01.09. However, the Cabinet Secretariat, Rashtrapati Bhawan – under whose aegis the said enquiry was conducted – for reasons best known to it – did not supply to her a copy of its report. This compelled

her to file court cases. These culminated in a contempt petition in the Supreme Court, i.e. SLP (C) No. 1257/2010. In partial compliance of the interim order dated 04.07.11 in the Special Leave Petition, the Cabinet Secretariat supplied to her 18 pages of enquiry report – after deleting from it names of all witnesses. The respondent relies on the following extract of the report (page 64) that:

*“Ms. Nisha Priya Bhatia was posted back to Gurgaon as Director (Trg) vide order No. 4/SPS/2007(2)8657 dated 08.11.2007. This order also indicated in Gurgaon would take charge as in Delhi. The order was revised vide order No. 4/SPS/2007 (2)- 864 dated 16<sup>th</sup> November 2007 to cancel the posting of So, the exchange of charges, as envisaged in the first order dated 8.11.2007 was not effected.*

*Therefore, when Ms. Nisha Priya Bhatia was posted back to the Training Institute, she was not able to take charge as Director (Trg) as directed in the order dated 08.11.2007 continued as she therefore became a second officer of director level there. The situation must have been certainly awkward for her as she no longer had the power and perquisites enjoyed by her in her earlier stint as Director (Trg) She proceeded on leave on 21 November 2007 this situation was rectified only after was posted out of the Training Institute and she resumed charge of Director (Trg) in Gurgaon on 17 December, 2007. The entire situation did create a hostile environment at the work place at a point of time when the complaint of sexual harassment against Shri Ashok Chaturvedi had not even been referred to the Departmental complaints committee. The respondent should have considered these aspects carefully and accorded Ms. Nisha Priya Bhatia a proper environment to work in. The Respondent should have ensured that the order of 8<sup>th</sup> November 2007 was complied with and that Ms. Nisha Priya Bhatia was given the charge of the Training Institute as Director (Trg) as per this Order”.*

It is submitted that the allegation about the respondent’s complaint against

Shri Ashok Chatuvedi because she was mentally unstable had started appearing in major newspapers. Her seniors also attempted to initiate enquiries against her for flimsy reasons. Late in the evening 23.07.08, her office was raided. The enquiry report notes this incident in the following words:

*“Complaint*

1. *“That in the evening of July 23, 2008, the complainant’s office premises were raided by the Department Security Officials from New Delhi, the July 23 raid was a clear attempt by the department to intimate the complainant and humiliate her in front of her colleagues in an institute of which she had been the head for three years. The August 25, 2008 memo by was a cover up for the raid following the complainant complaint to the PM through the ACPR (Appointment Cell Prime Minister’s Residence)”*

*Finding*

*This incident was indicated by as a security check and not a raid. However, the fact that the information about the check was available to the staff at the institute and not to the Director (Trg) was perhaps not called for. “*

22. The respondent characterizes the raid as an act of criminal intimidation directed against her. She began to be increasingly concerned and her harassment was aggravated. On 29-08-08, she went to her office in Gurgaon as usual; while lunching in the afternoon, her official car and driver, were suddenly withdrawn by Shri Ashok Chaturvedi. The driver informed her that he had been asked to leave her there and then and report at Hqrs with the vehicle. She hired a taxi to return to her office at the department’s Training Institute in Gurgaon. There, counter intelligence officials and jawans of the SSB platoon guard this campus physically

prevented her from entering her office premises. She found that counter intelligence officials had entered her office room and established control over her belongings. These were acts of criminal trespass and wrongful restraint. The enquiry report at Annexure A/10 (page 69) notes the subject of her official status henceforth in the following words

*“Complaint*

*2. The complaint Committee considered that there were several questions with regard to Ms. Bhatia’s official status. This issue was raised when Shri Ashok Chaturvedi appeared before the committee on December 6, 2008.*

*Finding*

*When asked whether Ms. Nisha Priya Bhatia was put on compulsory wait in August 2008, Shri Ashok Chaturvedi informed the Complaints committee that the system of compulsory wait is not in vogue in R&AW. Ms. Nisha Priya Bhatia posting as Director attached to additional Secretary (Trg) was a posting like any other normal posting in the Department. She was entitled to all the usual facilities, room, staff etc., which was given to her. It is entirely a different matter that she did not avail them by deciding to stay away from office.*

*Subsequent to the discussion with Shri Ashok Chaturvedi on 06.12.2008 the committee learnt vide communication No. 501/28/2/2008- CA.V dated 18.12.2008 from the Cabinet Secretariat that Ms. Nisha Priya Bhatia was issued an order No. 1/63/2007-T.L 5594 dated 1-12-2008 which was delivered to her by hand on 7-12-2008. As per her letter dated 8-12-2008, Ms. Bhatia indicates that the letter under reference alleges her absence from duty since 29-08-2008 is unauthorized.*

*It is not clear why the department had taken more than 3 months to seek the explanation of Ms. Nisha Priya Bhatia for unauthorized absence from duty.”*

Ms. Bhatia submits that this finding is evidence that the Government issued the letter of 1<sup>st</sup> December 2008 in regard to her absence from duty only after

it was queried on the subject by the enquiry committee. She also states that no state agency took cognizance of any complaint, and relies on copies of telegrams dated 30<sup>th</sup> August, 2008 to the Secretary and Additional Secretary regarding the acts of intimidation and trespass; she also relies on the letter of 31.08.2008 issued by the Commander of the SSB platoon guarding the Training Campus that her office had been locked by counter intelligence officers. She also relies on a complaint dated 11.09.2008 to the police against such acts of intimidation and an RTI application to CPIO, Delhi Police, of 2010 seeking action taken information.

23. Ms. Bhatia argues that the Central Government's allegations on her absence from duty were baseless, which is also evident from the fact that it was unsure of the period of absence. Though in the order dated 10.05.10 sanctioned her pension, the period of absence was alleged to be 29.08.08 to 26.11.09. In its writ petition dated 24.04.10 before the Court, challenging the CAT's order dated 16.03.10 quashing the order of compulsory retirement, the Union Government contended submits that the period of her absence was 29.08.08 – 09.06.09. Both the said periods of alleged absence from duty conflict with the Government's statement, in its affidavit dated 06.07.09 before CAT, that she joined duties on 06.04.09. It was argued by Ms. Bhatia that she availed all remedies available to her in law to work at her office – and to demand, from law enforcement agencies – that action be taken for wrongfully restraining her from performing her duties as a public servant. Contesting the department's allegation that she was absent from duty from 29.08.08 to 26.11.08, it was argued that the Government would have taken action against the applicant under the CCS (CCA) Rules 1964. The Union Government did not take any action in this context even after the order dated

28.04.2011 of the CAT in O.A. Nos. 1665/10 & 1967/10 directing that it should (i) either regularize the period of her alleged absence or (ii) it should issue a definite charge sheet to her and decide the period of her absence in accordance with law – in case it believed that she had indeed been unauthorizedly absent from duty. The Union Government’s reluctance to hold inquiry was remarkable as it had otherwise spared no effort in registering FIR’s against her in various police stations – under various provisions of law. It was argued, lastly, that Rule 9 of the Pension Rules authorize inquiries into allegations of misconduct of retired public servants *after* superannuation in exceptional cases, i.e. where there are grave allegations. Ms. Bhatia stressed that the expression “grave” misconduct have to be interpreted as applicable to rare category of cases where the public servant’s conduct is reprehensible, and involves moral turpitude. She submitted that it cannot possibly extent to cases like the present one, where the Central Government is aware of the alleged misconduct right through the period of service, grants full salary and allowances, issues a compulsory retirement order and does nothing to hold an inquiry thereafter. She emphasized that in this case the Central Government has gone on record, in affidavits to say that no inquiry would be held if she were to apply for leave, which would be granted as a matter of course. Such conduct rules out the possibility of the public servant’s action being “grave misconduct”, she submitted.

*Analysis and conclusions*

24. As evident, the scope of the present proceeding is with respect to the correctness of the Tribunal’s order, enjoining the Union Government from initiating disciplinary proceedings against Ms. Bhatia, and its direction to

release all retirement and terminal benefits.

25. The factual narrative in the preceding part of this order would reveal that Ms. Bhatia had levelled allegations of sexual harassment at the workplace in November 2007. During the course of hearings in the present writ petition, the Union Government had, in compliance with directions made by this Court, produced copies of the two enquiry reports and certain other related documents, in sealed cover. They were opened in court and later, copies of those reports and documents were made available to the court for its consideration.

26. The first committee (the Shashi Prabha Committee) comprised of Shashi Prabha, (Chairperson), MS. Anita Menon M/s P.C. Sethi; Ms. Nirmala Malla; A.K. Chaturvedi; Ms. Anjali Pandey and Ms. Tara Kartha. The conclusions of this committee, in its report, are as follows:

*“There is lack of evidence to support Ms. Nisha Priya Bhatia’s complaint against Shri Sunil Uke regarding sexual harassment. Moreover, in her letter dated 24.12.2007 (Annexure –J) Ms. Bhatia has herself withdrawn the complaint against Shri. Sunil Uke. The Department has already repatriated Shri Uke on 30.08.2007 to his parent cadre. While Ms. Bhatia’s complainant regarding harassment against Shri Uke could not be substantiated due to lack of any evidence for the same, the statements/ depositions in the CD (Annexure –Q-1 to Q8) of six witnesses indicate strained relations between the two officers. Shri Sunil Uke’s own submission to the committee (copy enclosed at Annexure – W) reflects a bias against Ms. Bhatia from the beginning based on his earlier posting as Director, CIS and hearsay about Ms. Bhatia as learnt from other officers. His statement that Ms. Bhatia’s reputation is well known to one and all in the department”. Reveals a prejudiced attitude towards a female Junior colleague.*

2. *While there is no proof to substantiate Ms. Bhatia's complaint of sexual harassment against Shri Sunil Uke, circumstantial evidence including Shri Sunil Uke's own submission before the Committee points to Shri Uke's discriminatory attitude towards a junior female colleague which itself violates the spirit of the right to gender equality as laid down by the Hon'ble Supreme Court's guidelines on the issue.*

3. *Ms. Bhatia threat to take her own life, allegation of threats to her from other quarters and her behavior on subsequent occasions (Annexure –C) appear to indicate a disturbed state of mind. As such counseling may benefit her.*

4. *The Committee tried to go into all further issues raised by Ms. Nisha Priya Bhatia to the limits of its mandate. While the committee acknowledged the difficulties in providing "proof" of sexual harassment at the work place. It was felt that Ms. Nisha Priya Bhatia repeated refusal to appear before the committee despite as many as seven notices to her constrained the committee from making any meaningful assessment of these issues."*

27. The Union Government apparently constituted another committee, to enquire into the same allegations levelled by Ms. Bhatia. This committee was tasked with the duty of enquiring into allegations levelled against Shri Ashok Chaturvedi. The committee was comprised of very senior high-ranking retired bureaucrats, and chaired by Ms. Rathi Vinay Jha, (IAS retired). The report did not find evidence to support the allegations of Ms. Bhatia. However the comments made in the course of its report, of 23-01-2009 are damaging. They are extracted below:

“xxxx

xxx

xxx

*(b) The Rules/ Regulations of Government and public sector bodies relating to conduct and discipline should include rule/ regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.*

*(c) 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.*

*(d) 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 work places and no employee women should have reasonable grounds to believe that she is disadvantaged in connection with her employment.*

*In view of these requirements Shri Ashok Chaturvedi should have taken serious and immediate note of the complaint by Ms. Nisha Priya Bhatia and had formally enquired into. The remarks reflect his indifferent attitude towards such complaints and situations.*

*(ii) The said complaint received in early August 2007 was not referred to the Committee on Sexual harassment in the department immediately. There was a delay in referring to the Committee till December 2007.*

*(iii) The Departmental Committee on sexual harassment was also not properly constituted as per the Visakha guidelines. As per this requirements, the complaints committee should have had a third party as a representative on an NGO or other body who is a familiar with the issue of sexual harassment while the committee sexual harassment was reconstituted on 01.11.2007. Ms. Tara Kartha, National Security Council Secretariat was appointed as a member of this committee only in April 2008. It is not clear in what manner Ms. Tara Kartha qualified to represent an NGO or anybody familiar with the issue of sexual harassment so even at this stage, it was not a committee constituted in accordance with the Visakha guidelines.*

(iv) *The Complaints Committee noted that despite receiving many notices from the Departmental Committee. Ms. Nisha Priya Bhatia did not appear before them citing the following grounds :*

- *Need to constitute the Departmental Committee as per Visakha guidelines.*
- *That her complaint of sexual harassment is also against Shri Ashok Chaturvedi, Secretary (R)*
- *That the chairperson of the complaints committee is not senior enough to enquire into allegations against Shri Sunil Uke, Joint Secretary and Shri Ashok Chaturvedi, Secretary (R),*

*In April 2008, she sent to notes to indicate that since the Cabinet Secretariat was inquiring into the matter, she was satisfied with this action.*

(v) *The Complaints Committee also observed that the Departmental committee on sexual harassment should have questioned the delay in the reference of the complaint of Ms. Nisha Priya Bhatia to them.*

*Stated that she did not know about the complaint till such as it was referred to the committee headed by her. However as per the admission of one of its members, everyone in the office knew about this incident.*

(vi) *The Complaints committee also considered that it was necessary for R&AW to have examined the allegations of sexual harassment by Ms. Nisha Priya Bhatia against Shri Sunil Uke while he was still in the department. The Statement by Shri Ashok Chaturvedi that repatriation of Shri Uke to his parent department was in the form of 'punitive action' even before any enquiry was formally held to investigate the veracity of Ms. Nisha Priya Bhatia allegations of sexual harassment reflects non-compliance with the Visakha Guidelines calling for proper*

*formal procedure in enquiry into such cases. Transfer or repatriation of an officer cannot be defined in any way as punitive action, if there was any need to punish Shri Uke after a formal enquiry. If Shri Ashok Chaturvedi held that this transfer/ repatriation was punitive action, it implies that the charge of sexual harassment made by Ms. Nisha Priya Bhatia was correct / established.*

*An Examination of the report of the Departmental Committee on sexual harassment submitted in May 2008 established that the complaint By Ms. Nisha Priya Bhatia was not given timely attention or proper inquiry and redressal.*

*The written comments by Shri Ashok Chaturvedi on file reflect his lack of concern or respect for ensuring immediate attention to the complaint. It also reflects Sh. Ashok Chatuvedi lack of knowledge of the requirements in the visakha guidelines.*

*Further even when the complaint was referred to the departmental committee on sexual harassment, the secretary (R) did not pay heed to the constitution of the committee as required in the Visakha Guidelines ‘*

*This act was, therefore, in gross violation of the Visakha Guidelines.”*

28. The Additional Solicitor General argues – we think rightly – that the reports pertaining to allegations of sexual harassment at the workplace are in respect of the previous period; The Union Government's contention here is upon the fact that the misconduct of unauthorized absence pertains to a later period i.e. 29.08.2008 to 26.11.2009. Whilst there is undeniable merit in this argument, the court at the same time would not completely undermine the relevance of those facts. As is often said, coming events cast their shadows. In

this case, the observations of the committee-particularly the Rathi Vinay Jha committee in its report of January, 2009, are damaging to the Union Government which in no uncertain terms stands indicted or not taking timely and adequate action to redress and establish the grievance committee mandated by the *Vishaka* guidelines (mandated in the Supreme Court judgment in *Vishakha v State of Rajasthan* [1997(7) SCC 323].

29. The objective of putting in place guidelines in *Vishaka* was to ensure that the workplace was rendered safe, and assure female employees that in the event of similar future behavior, the employer would take prompt and serious action. In that sense, the requirement of taking action is not merely subjective to the incident, or facts of a case, it is to comply with, and subserve a wider societal purpose. It also signifies the employer's willingness to take remedial action that would assure the female employees and officials that their workplace is safe from harassment and discrimination. The Supreme Court's later decision in *Medha Kotwal Lele v Union of India* added another dimension to the *Vishaka* judgment; its directions are far reaching. They are reproduced here:

*“16. In what we have discussed above, we are of the considered view that guidelines in Vishaka should not remain symbolic and the following further directions are necessary until legislative enactment on the subject is in place.*

*(i) The States and Union Territories which have not yet carried out adequate and appropriate amendments in their respective Civil Services Conduct Rules (By whatever name these Rules are called) shall do so within two months from today by providing that the report of the Complaints Committee shall be deemed to be an inquiry report in a disciplinary action under such Civil Services Conduct Rules. In*

*other words, the disciplinary authority shall treat the report/findings etc. of the Complaints Committee as the findings in a disciplinary inquiry against the delinquent employee and shall act on such report accordingly. The findings and the report of the Complaints Committee shall not be treated as a mere preliminary investigation or inquiry leading to a disciplinary action but shall be treated as a finding/report in an inquiry into the misconduct of the delinquent.*

*(ii) The States and Union Territories which have not carried out amendments in the Industrial Employment (Standing Orders) Rules shall now carry out amendments on the same lines, as noted above in clause (i) within two months.*

*(iii) The States and Union Territories shall form adequate number of Complaints Committees so as to ensure that they function at taluka level, district level and state level. Those States and/or Union Territories which have formed only one Committee for the entire State shall now form adequate number of Complaints Committees within two months from today. Each of such Complaints Committees shall be headed by a woman and as far as possible in such Committees an independent member shall be associated.*

*(iv) The State functionaries and private and public sector undertakings/ organisations/ bodies/institutions etc. shall put in place sufficient mechanism to ensure full implementation of the Vishaka guidelines and further provide that if the alleged harasser is found guilty, the complainant – victim is not forced to work with/under such harasser and where appropriate and possible the alleged harasser should be transferred. Further provision should be made that harassment and intimidation of witnesses and the complainants shall be met with severe disciplinary action.*

*(v) The Bar Council of India shall ensure that all bar associations in the country and persons registered with the State Bar Councils follow the Vishaka guidelines. Similarly, Medical Council of India, Council of Architecture, Institute of Chartered Accountants, Institute of Company Secretaries and other statutory Institutes shall ensure that the organisations, bodies, associations, institutions and persons registered/affiliated with them follow the guidelines laid down by Vishaka. To achieve this, necessary instructions/circulars shall be*

*issued by all the statutory bodies such as Bar Council of India, Medical Council of India, Council of Architecture, Institute of Company Secretaries within two months from today. On receipt of any complaint of sexual harassment at any of the places referred to above the same shall be dealt with by the statutory bodies in accordance with the Vishaka guidelines and the guidelines in the present order.*

*17. We are of the view that if there is any non-compliance or non-adherence to the Vishaka guidelines, orders of this Court following Vishaka and the above directions, it will be open to the aggrieved persons to approach the respective High Courts. The High Court of such State would be in a better position to effectively consider the grievances raised in that regard.”*

Earlier, during the pendency of the proceedings in *Medha Kotwal Lele*, the Supreme Court had issued directions; these were quoted in the final judgment:

*“On 26.4.2004, after hearing the learned Attorney General and learned counsel for the States, this Court directed as follows :*

*“Complaints Committee as envisaged by the Supreme Court in its judgment in Vishaka’s case will be deemed to be an inquiry authority for the purposes of Central Civil Services (Conduct) Rules, 1964 (hereinafter called CCS Rules) and the report of the complaints Committee shall be deemed to be an inquiry report under the CCS Rules. Thereafter the disciplinary authority will act on the report in accordance with the rules.”*

30. This Court repeatedly emphasizes and underlines the above aspect because though not directly relevant to decide whether the impugned directions of the CAT were justified, they provided a contextual backdrop which could not be ignored at all. The context was that Ms. Bhatia was perceived as “difficult” and that her relations with a colleague were strained (to put it mildly) and that his views about her were derogatory – a conclusion drawn by the Shashi Prabha committee. Likewise, the conclusions of the

Rathi Vinay Jha committee are no less an indictment of the inadequacy – in terms of timeliness of the response – of the Union Government. The latter committee went to the extent of stating that the transfer of Mr. Uke was a vindication of Ms. Bhatia's allegations.

31. These facts and circumstances, when Ms. Bhatia was in a hostile work environment that she was subjected to a posting order which sought to transfer on 08.11.07 as Director (Trg). There is no denial by the Union Government that another officer, the then Director was initially posted out as Director (PR) Hqrs. That transfer order was, a week later, by another order dated 16.11.07, cancelled. The result was that two officers were posted against one sanctioned post of Director (Trg). Ms. Bhatia's allegation that as Shri Mohapatra was the sitting Director (Trg), she was without any work charge. Only one sanctioned post of Director (Trg) in the R&AW undeniably exists. This is established by a noting dated 08.04.08 of the Accounts Officer (B & F). Ms. Bhatia also alleges that as Head of an Institute, was given a shabby cubicle next to a toilet to work from. She, under these circumstances proceeded on leave and then complained and represented to the PMO to claim her charge of post of Director (Trg). These facts culminate in the alleged misconduct of unauthorized absence; however they are also linked with her allegations of harassment at the workplace. There cannot be any doubt that what is an act of harassment may be one incident, or a series of incidents; omissions to respond appropriately (as has been commented by the Jha committee) can also constitute harassment. The events, after November 2007 are thus a live link with the allegations of misconduct levelled against Ms. Bhatia and therefore, acquire some relevance.

31. It is a matter of record that Ms. Bhatia approached the CAT in 2008

itself (through OA No. 2687/08) sometime in November (2008) claiming that she ought to be given a posting commensurate with her rank and status. In this, she had alleged that her office had been trespassed, and also made serious allegations. The Central Government's affidavit refuted the allegations stating that: *"The Applicant can collect whatever was found in her almirah [by officers of the petitioner organization]. Which is lying safe. Nothing belonging to the applicant has been kept in sealed custody."* It was in this proceeding that the CAT ordered, on 15.05.2009, the Union Government to permit Ms. Bhatia to join duties and that their insistence for submission of the certificate of transfer ought to be waived. In the same proceedings, while disposing of an miscellaneous application (MA No. 1089/2009 in OA No. 2687/08), the CAT directed on 26.11.09 that:

*"the learned counsel has further stated that the respondents (officers of the petitioner organization) would consider re-posting the applicant back to the executive cadre after six months when tempers have cooled down."*

On 08.12.2009, the order compulsorily retiring Ms. Bhatia was issued. The Central Government did not settle her terminal dues; provisional pension was sought to be paid to her. Her applications to the CAT (O.A.s 1665/2010 and 1967/2010) against this move- as also the Central Government's stand that between 29.08.2008 and 26.11.2009 she was unauthorizedly absent- were disposed of, with a direction to the Union to first scrutinize its records to find out if any period or periods could be treated as on duty, and then hold a factual inquiry. The Union Government did not complete its task with the time allocated by CAT; this led Ms. Bhatia to file another application OA 3613/2011. In this proceeding, the Central Government filed an affidavit, in

reply to a miscellaneous application for directions. It was stated, importantly, in the said affidavit, that:

*“the total period of her absence is – 29.08.2008 to 26.11.2009. As per the in-house enquiry conducted by the Jt. Secretary, period from 07.04.2009 to 09.06.2009 (63 days) could be considered as “on duty”, giving her the benefit of doubt, after considering the copy of attendance register. In so far as the remaining period from 29.08.2008 to 05.04.2009 and 10.06.2009 to 26.11.2009 (390 days) can be considered as “Child Care Leave”/“Earned Leave.”*

7. *It may be mentioned here that the Applicant (Ms. Nisha Priya Bhatia) has been paid entire salary for the entire period i.e. 29.08.2008 to 26.11.2009 alongwith all other benefits, which she was entitled to.”*

It is significant to note that the affidavit of one Shri Vinod Kumar, Deputy Secretary, in reply to Ms. Bhatia’s application (in OA No. 2687/08) admitted that she had joined duties on 06-04-2009:

*“Para 3 – It is admitted that the applicant had joined office on 06.04.09. It is also reiterated that despite her being absent since 29.08.08 another posting order of the applicant was issued on 27.11.08 and she was never debarred from attending office. Her absence from duty w.e.f. 29.08.08 was of her own volition. Further, it is submitted that whether the order of her posting is half type written and half computerized is immaterial as long as it is signed by the competent authority.”*

Crucially, this affidavit nowhere stated that Ms. Bhatia continued to be absent unauthorizedly.

32. The relevant provisions of the Pension Rules (1972) are Explanation (b) to Rule 8 (5), and Rule 9. The former (explanation (b) to Rule 8 (5)) reads as follows:

*“(b) the expression ‘grave misconduct’ includes the communication or disclosure of any secret official code or password or any sketch, plan, model, article, note, document or information, such as is mentioned in Section 5 of the Official Secrets Act, 1923 (19 of 1923) (which was obtained while holding office under the Government) so as to prejudicially affect the interests of the general public or the security of the State.”*

Rule 9, to the extent it is relevant, is reproduced below:

*“9. Right of President to withhold or withdraw pension*

*<sup>1</sup>[(1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement :*

*(2).....(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement, or during his re-employment, -*

- (i) shall not be instituted save with the sanction of the President,*
- (ii) shall not be in respect of any event which took place more than four years before such institution, and*
- (iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.”*

33. It is a matter of law that public employment arises out of status (i.e the law governs the tenure and terms of employment, rather than contract-Ref. *Roshanlal Tandon v Union of India* AIR 1968 SC ). Equally, pension is neither bounty nor largesse, but deferred salary, which the public employee cannot be deprived of, except in accordance with law (*D.S. Nakara v Union*

of India 1983 (2) SCR 165). It is in consonance with this principle, that the Union Government framed Rule 9 of the Pension Rules. It visualizes a situation where a public employee, drawing pension, can be deprived of a part of that pension, provided a prescribed procedure is followed and preconditions are met with. These are not only procedures, but also safeguards. Unlike a serving public employee, who can be indicted for every kind of lapse, misconduct or negligence, (minor or major) and visited with an entire range of penalties, the severest one being dismissal from service, a retired public employee's pension can be deprived only if she (or he) is found guilty of grave misconduct or negligence. The expression "grave" injects a degree, an element of seriousness. Furthermore, that enquiry should be completed and the retired public servant should be found guilty of such grave misconduct within four years of his (or her) retirement. The expression "institution" refers to issuance of a charge sheet proposing the departmental inquiry. In *D.V. Kapoor v Union of India* AIR 1990 SC 1923, the Supreme Court had occasion to deal with Rule 9; the Court observed as follows:

*"It is seen that the President has reserved to himself the right withhold pension in whole or in part therefore whether permanently or for a specified period or he can recover from pension of the whole or part of any pecuniary loss caused by the Government employee to the Government subject to the minimum. The condition precedent is that in any departmental enquiry or the judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service of the original or on re-employment. The condition precedent thereto is that there should be a finding that the delinquent is guilty of grave misconduct or negligence in the discharge of public duty in office, as defined in Rule 8(5), explanation (b) which is an inclusive definition, i.e. the scope is wide of mark dependent on the facts or circumstances in a given case. Myriad situation may arise depending on the ingenuity with which misconduct or irregularity*

*was committed. It is not necessary to further probe into the scope and meaning of the words 'grave misconduct or negligence' and under what circumstances the findings in this regard are held proved....*

*6. As seen the exercise of the power by the President is hedged with a condition precedent that a finding should be recorded either in departmental enquiry or judicial proceedings that the pensioner committed grave misconduct or negligence in the discharge of his duty while in office, subject of the charge. In the absence of such a finding the President is without authority of law to impose penalty of withholding pension as a measure of punishment either in whole or in part permanently or for a specified period, or to order recovery of the pecuniary loss in whole or in part from the pension of the employee, subject to minimum of Rs.60.*

*7. Rule 9 of the rules empowers the President only to with- hold or withdraw pension permanently or for a specified period in whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part subject to minimum. The employee's right to pension is a statutory right. The measure of deprivation therefore, must be correlative to or commensurate with the gravity of the grave misconduct or irregularity as it offends the right to assistance at the evening of his life as assured under Art. 41 of the Constitution."*

34. Apart from the disclosure made by the Union Government in its affidavits before it, what persuaded the CAT to hold that there ought to be no further inquiry into the matter was that the said Government itself changed the position, stating in an affidavit that 63 days period could be treated as "in service". Yet its most contemporaneous affidavit (of Shri Vinod Kumar, adverted to above) nowhere mentioned in June, 2009 that Ms. Bhatia continued to absent herself. It was filed after 12<sup>th</sup> June, 2009. According to the later affidavit – filed in 2012, Ms. Bhatia had lapsed into unauthorized absence. The second aspect was that there were conflicting versions as to whether the lack of an identity card (which had been applied by Ms. Bhatia on 21.08.2008) amounted to a hindrance to her joining the service. Though

the Central Government stated that no such hindrance existed, Ms. Bhatia disputed it. As a matter of fact, the I-card was issued only in February 2009. Having regard to the previous accusations levelled against some officials and the senior most officer of the organization, and the underlying hostility that was faced by Ms. Bhatia, her statements cannot be brushed aside. If other facts, such as the opinion of Dr. Ray (who had not even examined Ms. Bhatia, but ventured to comment on her mental health) which was given some publicity and the First Information Report lodged against her (as per the information given to her under the Right to Information Act) are taken into consideration, the possibility of her being subjected to continued hostile treatment and obstructed cannot be ruled out.

35. This Court has no difficulty in accepting the general proposition that “grave misconduct” or grave negligence can, in given cases included unauthorized absence of a public servant from duties, or his or her refusal to discharge the functions assigned or attached to his office. However, whether every omission to report for duties is “grave” misconduct or negligence, would depend on the circumstances appearing from the record. *D.V. Kapoor*’s case is one instance where such continued absence was held not to be “grave” misconduct warranting withholding of pension under Rule 9. In the present case, neither was any inquiry initiated, nor even contemplated at the time the respondent, Ms. Bhatia, was served with the compulsory retirement order. It was only when the Central Government prevaricated in the release of her terminal dues, and she demanded proper orders, that a provisional pension fixation order was made on 10.05.2010, after this court made an order on 03.05.2010 in the Central Government’s 2010 Petition (challenging the striking down of the compulsory retirement order). The

provisional pension fixation order stated that it was for the period “*from 19.12.2009 till her period of unauthorized absence is regularized.*” The allegations regarding unauthorized absence were made by the Union Government in O.A.1665/2010 and O.A.1967/2010. Yet, no attempt or effort to issue a charge sheet or consider that such absence amounted to “grave misconduct” was made. Even after disposal of those proceedings, till the new application – OA 3613/2011 was filed in September, 2011, no attempt to examine whether the omission or conduct was worthy of inquiry under Rule 9 was undertaken. In this context, the affidavit of the Union Government, stating that certain periods (of Ms. Bhatia’s absence) could be considered to be on duty, is extremely relevant. In that affidavit, it was submitted that:

*“In so far as the remaining period from 29.08.2008 to 05.04.2009 and 10.06.2009 to 26.11.2009 (390 days) can be considered as “Child Care Leave”/“Earned Leave.”*

36. The position of the Central Government is curious indeed. Before this court, it argues that the entire period of absence is unauthorized, and amounts to “grave” misconduct, warranting Rule 9 inquiry. At the same time, it expresses willingness to condone the lapse, as it were and treat the period as if Ms. Bhatia were on leave, provided she applies for it. This approach, is conflicting and inconsistent. There can be no question of condoning a “grave” misconduct, - a category of unacceptable behaviour of public servants, which includes allegations of embezzlement and defalcation which can lead to forfeiture of pension, permanently or for some period. The mere fact that the Central Government is in a position to state that the conduct is “condonable” and the period capable of “regularization” implies

that it is not “grave misconduct” having regard to the overall circumstances of the case.

37. It has been said that power, wherever vested, in a public authority or agency, must be exercised fairly and justly:

*“Any law made or action taken by the employer, corporate statutory or instrumentality under Article 12 must act fairly, justly and reasonably. Right to fair treatment is an essential inbuilt of natural justice. Exercise of unbridled and uncanalised discretionary power impinges upon the right of the citizen; vesting of discretion is no wrong provided it is exercised purposively judiciously and without prejudice. ...” (Delhi Transport Corporation v DTC Mazdoor Congress AIR 1990 SC 101).*

Every public authority is also under a duty to act within the bounds of the power conferred or vested in him, to further the objectives for which such powers are created and take into consideration only relevant circumstances, *bona fide* and reasonably. *Sans* any of these, the exercise of power is colourable, as held in *State of Punjab v Gurdial Singh*, AIR 1979 SC 319:

*“considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impel the action, mala fides or fraud on power, vitiates the acquisition or other official act.”*

The matter was put even more forcefully in *Ravi Yashwant Bhoir v. District Collector, Raigad & Ors.*, AIR 2012 SC 1339, as follows:

*"37... Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill-feeling and spite. Mala fide exercise of power does not imply any moral turpitude.*

*It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law."*

38. Having regard to the entire conspectus of circumstances which have been unravelled to this court in these proceedings, i.e. the previous history of grievances articulated by Ms. Bhatia, concerning her sexual harassment at the workplace and the several adverse remarks made against the Union Government officials with respect to the lack of any action in tune with the *Vishaka* guidelines (which amount to an indictment of culpable omission on their part); their intrinsic connection with Ms. Bhatia's transfer and the charges and counter charges levelled by and against her; the affidavits filed by the Union Government; its unexplained inaction in regard to any proposal to hold inquiry under Rule 9 any time after the compulsory retirement order or even its omission to issue charge sheet for a long time, its willingness to condone the allegations provided Ms. Bhatia applies for leave- this Court has no doubt that the CAT's impugned order directing the Union Government to not hold any inquiry into allegations of Ms. Bhatia's period of absence, was justified and calls for no interference. Similarly, its direction to fix her pension with effect from 19.12.2009, *without treating such periods as unauthorized absence and take consequential action*, and without requiring her to apply for leave, and to release differential amounts, are hereby affirmed. The amounts which are to be paid to Ms. Bhatia, shall be released within 4 weeks. All consequential terminal benefits shall be revised within the same period and paid to her. All such amounts shall carry interest @ 9

per cent per annum from 19.12.2009 till date of payment. The writ petition is dismissed, in terms of the above directions. All pending applications also stand dismissed. The Petitioner shall pay Rs.25,000/- costs to the respondent.

**S. RAVINDRA BHAT, J**

**R.V.EASWAR, J**

**OCTOBER 21, 2012**