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

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Decided on: 01.12.2015

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W.P.(C) 4237/2012

A.K.SINGH

..... Petitioner

Through: Ms.Garima Sachdeva, Adv.

versus

THE UNION OF INDIA AND ORS.

..... Respondents

Through: Mr.Rajesh Gogna, CGSC for R-1 to R-5.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

C.M.No.28824/2015

In the interest of justice, the application is allowed.

W.P.(C) 4237/2012

1. The petition is being heard with the consent of counsels for both the parties.
2. The petitioner is aggrieved by the order-dated 31.01.2011 whereby the penalty of reduction of pay by three stages from ₹ 8550+2400 to ₹ 7340+2000 in time scale of pay for a period of three years was ordered. It was directed that the petitioner would not earn any increment of pay during the period of reduction and that on expiry of this period the reduction would have the effect of postponing his future increments of pay.
3. Briefly the facts of the case are that the petitioner joined the Central Industrial Security Force (CISF) as Constable on 25.03.1996. Whilst

discharging his duties as Constable he was posted to the CISF unit, ASG, Kolkata on 10.09.2005. In relation to an incident, which occurred on 26.12.2009, the CISF issued a charge-sheet alleging misconduct by him. The charge was that one lady constable had complained on 31.12.2009 that the petitioner – on 26.12.2009 at 12.25 a.m., knocked on her door and tried to forcibly enter the room. He also allegedly made indecent suggestions, which amounted to sexual harassment.

4. The disciplinary authority had ordered an enquiry in the course of which the complainant and four other witnesses were examined. The complainant stuck to the version given by her in writing against the petitioner, alleging that he tried to make indecent suggestions to her. The other witnesses especially PW1, PW2, PW4 & PW5, though were not eye witnesses to the incident, stated that the petitioner tried to express remorse later and tried to apologize by even touching the complainant's feet. In the complaint, the complainant stated that the petitioner's wife expressed apologies on his behalf to her. The enquiry officer in his report felt that

“.....The contention of the complainant appears to be quite weird and quite unbelievable because in a reply to a cross question by the alleged person, she herself has stated that her physiotherapist whose name is Rupa was present in her quarters during the time of incident. Any sane person who is aware that some other person/witness is present, would not dare to commit any such thing in front of that person who can testify against him as an eye witness. On the contrary, the alleged person has deposed in his statement during the course of enquiry that the complainant on 26.12.2009 at 0930 hrs pressed the call bell of his door and requested him to open the door. On opening of the door she requested either for gas cylinder or to allow

her to prepare her food at his place. The contention of the charged person appears to be quite genuine. There is every possibility that the complainant might have approached the alleged person on that day for gas cylinder. However, whatever may be the reason, and keeping aside who has gone to whose quarters first, it cannot be ruled out that the charged person has misbehaved with the complainant and uttered sexually loaded language/words.....”

5. The Inquiry officer concluded that the charged official i.e. the petitioner did misbehave and that the incident alleged by the complainant could not be ruled out. Based upon the findings, the disciplinary authority, after issuing show cause notice and furnishing the enquiry report imposed the penalty of withholding of one increment for one year without cumulative effect by an order dated 13.10.2010. While so, on 02.12.2010, the superior authority i.e. the Deputy Inspector General issued a *suo motu* show cause notice stating that the penalty was too lenient; the show cause notice also proposed a graver penalty of reduction of pay by three stages followed by postponing all future increments of pay after the expiry of the said period of three years.

6. The petitioner replied to the show cause notice that there was really no cause to impose a harsh penalty given the nature of the findings recorded by the enquiry committee during the enquiry and that the graver penalty would not be in the interest of justice. After considering the reply, the superior authority while exercising its *suo motu* power under Rule 54 of CISF Rules imposed the impugned penalty.

7. It is argued that considering the elaborate discussion by the enquiry committee (which has been set up pursuant to *Vishakha vs. State of*

Rajasthan (1997) 6 SCC 241 guidelines and was composed of outsiders including a female representative from an NGO/Social worker) which had concluded that it was unsafe to rely upon the testimony of the complainant, imposition of a graver penalty was utterly unwarranted. Learned counsel submitted that the enquiry officer recorded that the petitioner appears to have merely verbally misbehaved with the complainant and that it concluded the charge of harassment on the basis that “*it could not be ruled out*”. Such being the case and the enquiry committee itself having recorded its skepticism as to the complainant’s narration, the imposition of withholding of increment cumulatively for three years amounted to an arbitrary punishment in the circumstances. Learned counsel also points out that the complainant was in the habit of leveling allegations against her male colleagues and appears to have taken an undue advantage of being a widow. Her conduct had led to an enquiry against her because two male members had been assaulted and eventually she was removed from service. Learned counsel also submitted that the petitioner had an unblemished record of service in her entire career and therefore, imposition of the penalty in question was unwarranted.

8. Counsel for the respondent, on the other hand, resisted the petition and alleged that this court should consider the entire conspectus of circumstances. The complainant’s version was cogent; she was consistent with the details that she had alleged in her written complaint. Furthermore, during the enquiry, the petitioner did not meaningfully cross-examine her on material particulars. Such being the case, the complainant’s version went virtually unchallenged as far as the challenge of sexual harassment or utterances of indecent words were concerned. So far as

deposition/statements of other witnesses was concerned, counsel submitted that they had clearly stated that the petitioner admitted to apologize after the event and even touched the complainant's feet. This would not have entirely necessary if the petitioner was not guilty of what he was charged with.

9. This court has considered the submissions. The enquiry committee, no doubt, expressed certain doubts as to the circumstances in which the petitioner allegedly used indecent expressions. However, in this regard, the main reason for that doubt is that the petitioner appears to have alleged that the complainant went to his house initially with the request to use his utensils and gas cylinder, which he did not permit. Taking that as a pretext it was alleged that she leveled a false complaint. The most crucial witness in this regard was the complainant herself. In her statement before the enquiry committee she completely supported and corroborated all material particulars in the written complaint made by her. The statement before the enquiry officer spelt out in clear terms what the petitioner sought and desired. There can be no ambiguity about the nature of what he said and meant – the statements attributed to him by the complainant. Such being the case when the petitioner was permitted to cross-examine the complainant, there was no attempt on his part to allege that what she stated was untrue.

10. The other aspect which the enquiry committee took note of was that the complainant during her statement had mentioned about the presence of one Rupa (a physiotherapist). Were that correct and as important a consideration as the enquiry committee felt it was, nothing prevented either the petitioner or the committee itself to have asked for Rupa to depose in

the proceedings. Rather than proceeding with such a course of action, the committee merely expressed its suspicion or skepticism by saying that it was “*weird*” that the petitioner would not have made the suggestions of the kind attributed to him in the presence of a third party. Both the complainant and the petitioner knew exactly what happened. If a third person i.e. Rupa was present, whether she was within hearing range of the two protagonists (i.e. the petitioner and the complainant) and given the short nature of the conversation whether the petitioner made the indecent suggestions in an undertone etc. would have been relevant. In these circumstances, the committee’s surmise that it would have been ‘weird’ for the petitioner to make the suggestion of the kind that he did was utterly uncalled for.

11. These facts were, naturally, considered by the appellate authority who felt that the facts proved and established by the enquiry committee warranted a graver punishment. This Court is conscious of the fact that proportionality is an important and at times crucial element, which is considered in the judicial review to prevent excessive punishment. However, at the same time, when the petitioner’s misconduct of the type alleged in this case is established, the application of proportionality requires also that the penalty not be rendered either a formality or a mockery. Negligible punishments will strike at the efficacy of the misconduct, which has been established after *Vishakha’s case (supra)*. Proportionality must also take in a ‘adequacy’ and public interest element. The penalty in a sense is not merely as one imposed by the employer on the employee because the former feels such behaviour strikes at discipline, but also one which assures generally the public and especially the female members of

the service of force in particular that such behaviour is outlawed and not tolerated in the work place. In that sense, this *species* of misconduct stands on a different footing. This aspect was recognized in *Samridhi Devi vs Union Of India* 125 (2005) DLT 284, by this Court, which held as follows:

“32. *Vishaka and its subsequent application, by the Supreme Court, in the Apparel Export Promotion case, were aimed at ensuring a workplace safe from sexual harassment, and protection of female employees from hostile circumstances in employment, on that account. The elaborate guidelines, evolved and put in place were a sequel to the court's declaration of law that such gender based unacceptable behavior had to be outlawed, and were contrary to Articles 15(1) and 21 of the Constitution of India. The declaration took note of provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the General Assembly of the United Nations, in 1979. The Committee on the Elimination of Discrimination against Women (CEDAW), set up under the Convention, adopted in January 1992 General Recommendation No. 19 on violence against women. Paras 17 and 18 recognized the ill effects of sexual harassment at the workplace, and subsequently provided for measures, to be taken by respective states for elimination of such practices. Such practices have to be outlawed not only because they result in gender discrimination, but also since they create a hostile work environment, which undermines the dignity, self-esteem and confidence of the female employees, and tends to alienate them. The aim of the Supreme Court, while evolving the guidelines in Vishaka was to ensure a fair, secure and comfortable work environment, and completely eliminate situations, or possibilities where the protector could abuse his trust, and turn predator.*

33. *In the United states of America, Congress had enacted [Section 703](#), Title VI of the Civil Rights Act, 1964, to address the issue of sexual harassment at the workplace; one of the first cases to be decided by the US Supreme Court, was in the year 1986, i.e Meritor v. Vinison 1986 (477) US 57. Australia has enacted the Sex Discrimination Act 1984; the United Kingdom enacted the Sex Discrimination Act, 1975, and also framed the Sexual Discrimination*

and Employment Protection (Remedies) Regulations, 1993. All these measures are functional, and there is considerable body of case-law on various nuances of the issues.

34. The courts, specially in the United States, have been willing to intervene on a range of issues and complaints, including inadequate response or action by the employer, resulting in liability. Thus, it has been ruled in some decisions (Ref *Ellison v. Brady* 924 F. 2d 872 [1991], *Fuller v. City of Oakland* 47 F.3d. 1522 [1995] and *Yamaguchi v. Widnall* 109 F.3d. 1475 [1997]) that appropriate remedial and corrective action includes measures reasonably calculated to end current harassment and to deter future harassment from the same, or other offenders. The 9th US Court of Appeals, in *Yamaguchi's* case (*supra*) summarised the position as follows :

"An employer is liable for a co-worker's sexual harassment only if, after the employer learns of the alleged conduct, he fails to take adequate remedial measures. These measures must include immediate and corrective action reasonably calculated 1) to end the current harassment, and 2) to deter future harassment from the same offender or others. *Fuller v. City of Oakland, Cal.*, 47 F. 3d 1522, 1528 (9th Cir. 1995) (citing *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991). In *Ellison*, this court held that to avoid liability an employer must take at least some form of disciplinary action against a harassing co-worker in order to prevent future workplace sexual harassment. *Intekofer v. Turage*, 973, F.2d 773, 777 (9th Cir, 1992); *Ellison*, 924 F.2d at 881-82 ("[employers send the wrong message to potential harassers when they do not discipline employees for sexual harassment" and "{e}mployers have a duty to `express{} strong disapproval' of sexual harassment, and to `develop {} appropriate sanction' . "(quoting 29 C.F.R. S 1604.11(f) ; see also *Fuller*, 47 F.3d at 1529. Failing to "take even the mildest form of disciplinary action" renders the remedy insufficient under Title VII. *Ellison*, 924 F.2d at 882. Page 1968 The adequacy of the employer' response depends on the seriousness of the sexual harassment. *Id.*"

35. The objective of putting in place guidelines in *Vishaka* was to ensure that the workplace was rendered safe, and assure other 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 sub-serve a wider societal purpose.”

This court thereafter concluded as follows:

“38. The debate or discourse on proportionality thus incorporates, as an essential element, the weight, undue or otherwise given to one or the other relevant factor. If the order gives excessive weight to one consideration, to the point of ignoring all other factors, the manifest imbalance results in a disproportionate order.

39. There is no gainsaying the importance of displaying sensitivity while considering appropriate penalty for a proved misconduct of sexual harassment. The measure adopted by the employer has to not merely be subjective, unlike other instances of misconduct; it services a wider purpose of assuring a safe workplace, and signals the willingness of the employer to address such issues with seriousness and promptitude. This consideration can never be overlooked in such cases. A reading of the appellate authority's order, however shows that it considered only the adverse impact of a dismissal order upon the fourth respondent. That is no doubt a consideration, but it cannot be the only factor. The impugned order is therefore, disproportionate.”

12. In the present case, in view of the above discussion, we are of the opinion that no interference is called for with the impugned order of reduction of pay by three stages from ₹ 8550+2400 to ₹ 7340+2000 in time scale of pay for a period of three years. The writ petition is consequently dismissed.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

DECEMBER 01, 2015/rb