

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.03.2019

DELIVERED ON : 15.03.2019

CORAM

THE HONOURABLE Mr.JUSTICE V.PARTHIBAN

W.P.No.29012 of 2018

and

W.M.P.No.33917 of 2018

The Management of Christian
Medical College and Hospital,
Post Box No.3,
Ida Scudder Road,
Vellore 632 004.
Rep by its General Superintendent

... Petitioner

Vs

Mr.S.G.Dhamodharan,
Emp No.02932,
Sr.Clerk Gr II,
RUSHA Department.

.... Respondent

PRAYER : Petition filed under Article 226 of the Constitution of India, praying to issue a writ of Certiorari, to call for the records connected with A.P.No.49 of 2013 in I.D.No.23 of 2010 on the file of the Presiding Officer, Industrial Tribunal, Tamil Nadu, Chennai and to quash the order dated 25.09.2018.

For Petitioner : Mr.Sanjay Mohan for
M/s.S.Ramasubramaniam & Associates

For Respondent: Mr.S.T.Varadarajulu

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O R D E R

Heard Mr.Sanjay Mohan, learned counsel for the petitioner and Mr.S.T.Varadarajulu, learned counsel appearing for the respondent.

2. The petitioner has approached this Court, seeking the following relief:-

"To issue a Writ of Certiorari, to call for the records connected with A.P.No.49 of 2013 in I.D.No.23

of 2010 on the file of the Presiding Officer, Industrial Tribunal, Tamil Nadu, Chennai and to quash the order dated 25.09.2018."

3. The case of the petitioner is as follows:-

(i) The petitioner Management is a Minority Educational Institution. It received a complaint from one Mrs.B.Samathannamma, Hospital House Keeping Attendant, RUHSA Department, on 20.03.2013, against the respondent employee, regarding sexual harassment. The complaint given by the said person was forwarded to the committee specially constituted as per the judgment of the Hon'ble Supreme Court of India in Vishaka case reported in 1998 (2) LLN 965. The petitioner Management has constituted a committee in accordance with the above judgment of the Hon'ble Supreme Court, with the following members:-

- (i) Dr. Anna Tharyan (Chairman)
- (ii) Mr. Samuel Abraham (Legal Officer)
- (iii) Mr. Durai Jasper (Member)
- (iv) Dr. Elizabeth Tharion (Member)
- (v) Mrs. Emma Koshi (External Member)
- (vi) Mrs. Selva Titus Chacko (Secretary)

(ii) In pursuance of the complaint, an incamera proceedings had been conducted by the Committee and the statements were taken from the relevant staff including the complainant herself and the respondent workman. On consideration of the relevant materials and evidence, the committee gave a finding, holding the respondent employee guilty of the charges framed against him, by its report dated 06.06.2013. The committee has also recommended to initiate action against the respondent employee and pursuant to the recommendation, a show cause notice was issued on 20.06.2013 to the employee. The respondent employee submitted his explanation on 22.06.2013.

(iii) Thereafter, the petitioner Management issued a memo dated 28.06.2013, along with the copy of the complaint dated 20.03.2013 and also the report of the committee along with the letter dated 17.06.2013. Subsequently, the respondent submitted his explanation dated 30.06.2013, having not stated any new grounds to disprove the charges, the explanation was hardly convincing, the petitioner Management was constrained to dismiss the respondent on 24.07.2013. In view of the pendency of dispute before the Industrial Tribunal, an approval petition was filed in A.P.No.49 of 2013, seeking approval of the dismissal of the respondent with effect from 24.07.2013.

(iv) The learned Industrial Tribunal, Chennai, has passed an order finally on 25.09.2018, holding that there was no sufficient documentary evidence to establish that the enquiry

was conducted in a fair and proper manner and proceeded to post the approval petition for enquiry by adjourning the matter to future date. According to the Industrial Tribunal, the charge was not proved against the respondent employee. Therefore, it required that the charges to be proved before it once again. The said order passed by the Industrial Tribunal is put to challenge in the present writ petition.

4. The learned counsel for the petitioner Management would submit that the Industrial Tribunal has completely misdirected itself by holding the enquiry conducted against the respondent, was not fair and proper by treating the case on hand as an yet another normal case by the Management in dismissing the employee without properly conducting the enquiry, without appreciating that in a case like this, the Management has little and no choice at all except to follow the guidelines issued by the Hon'ble Supreme Court of India in Vishaka case. According to the learned counsel, the Hon'ble Supreme Court of India issued a detailed guidelines which were required to be followed before any formal enactment is made on the subject matter and the petitioner Management had followed the guidelines strictly by constituting a special committee for the said purpose.

5. According to the learned counsel for the petitioner Management, the committee as comprised, had gone into the complaint and received statement and evidence and ultimately concluded against the respondent employee and when such committee comes to a conclusion on the basis of the materials gathered, it is not open to the Industrial Tribunal to hold such enquiry was not fair and proper and call for enquiry once again. Such procedure cannot be adopted by the Industrial Tribunal in sexual harassment cases where the enquiry is conducted by the special committee which was put in place on the basis of the Hon'ble Supreme Court directions. Once a committee gives a report and recommends action, the Management had no choice at all except to proceed against the employee concerned and the only discretion to the Management in this regard is the imposition of type of penalty on the erring employee. In this case, the Management found that the employee was charged with the serious offence of sexual harassment, which was a subversive to discipline and therefore, decided to impose the penalty of dismissal from service, since any such retention of character like the respondent, would be against the public interest.

6. The learned counsel for the petitioner would draw the attention of this Court to the subsequent decision of the Hon'ble Supreme Court of India, in the case of Medha Kotwal Lele and Ors Vs. Union of India (UOI) and Ors, where he would draw the attention to paragraph No.17 which is extracted hereunder:-

"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."

He would therefore submit that the Management is bound by the Vishaka guidelines and in case any parties aggrieved, it is open to the party to approach the respective High Courts and in such circumstances, it is definitely not open to the Industrial Tribunal to question the committee's wisdom in arriving at the conclusion. According to him, the cases of sexual harassment stand on different footing and therefore, the Industrial Tribunal cannot sit in appeal against the conclusion reached by the special committee.

7. The learned counsel would also draw the attention of this Court to the observation made by this Court following the Vishaka directive in W.P.No.38815 of 2006, dated 13.06.2008, wherein, the Division Bench of this Court held that the employees can have only one stage action. He would particularly draw the attention to the observation of the Division Bench in paragraph No.29, which is extracted hereunder:-

"29. Therefore, now the employers can have only one stage action. After the sexual harassment committee's report, they must proceed to impose punishment on an employee found guilty of sexual harassment. This order came to be passed by the Supreme Court, as the Court had received complaints that the earlier procedure led the woman being further harassed by attending before two separate enquiries one by the Special Committee and the other before the Enquiry Officer appointed in terms of Service Rules. In the light of the above, the question of examining the victim girl in the presence of the first respondent does not arise."

8. The learned counsel for the petitioner Management would therefore submit that the nature of enquiry in such type of cases, cannot be held in open, treating the case as a normal one before the Industrial Tribunal and it requires a sensitive approach and that is why a special committee was put in place to conduct the enquiry. In such matters, once such enquiry has been conducted and the respondent employee was found guilty of the charges, that was end of it and the Management had no choice except to take action against the employee concerned.

9. The learned counsel would therefore submit that it is not that the petitioner is remedy less. It is always open to him to

workout his remedy in the manner known to law, on the basis of the observations of the Hon'ble Supreme Court of India, as extracted supra. However, it is certainly not open to the Industrial Tribunal to compel the parties to lead evidence as that would defeat the very scheme of guidelines framed by the Hon'ble Supreme Court in Vishaka case. Even otherwise, in such matters, the evidence of the complainant is very important which complainant cannot be summoned to give evidence once again by the Industrial Tribunal.

10. The learned counsel would submit that the conclusion by the Industrial Tribunal suffers from misapplication and non-application of mind by treating the case of sexual harassment on par with the normal cases of dispute, wherein, the approval has been sought. The learned counsel reiterated that once the committee makes a recommendation, the Management had no choice at all except to take action and in which event, the Industrial Tribunal cannot apply the normal rule in consideration of approval petition and hold it against the Management.

11. Per contra, the learned counsel for the respondent employee would submit that once an approval petition is filed by the Management, it has subjected itself to the jurisdiction of the Tribunal. Therefore, the Tribunal has to follow the procedure as contemplated in the scheme of Industrial Disputes Act. Therefore, the Tribunal has followed the procedure and held that the respondent employee was not given an adequate opportunity and the charge was not established at all. After holding so, the only course open to the Tribunal was to direct the parties to prove the case under the scheme of Industrial Disputes Act, which does not make any distinction between the sexual harassment or other cases. Ultimately, the right of the workman was affected, since he was dismissed from service. Such dismissal from service can only be on the basis of properly conducted enquiry and finding and in the absence of the same, the learned Tribunal has rightly interfered with the action of the Management. Therefore, there is nothing wrong in the order passed by the Tribunal, calling for the intervention of this Court.

12. The learned counsel for the respondent employee, in support of his contention, would also rely on the decision of this Court rendered by the Single Judge, which is reported in 1995 1 LLN 1022. He would draw the attention of this Court to paragraph No.8 of the order, which is extracted hereunder:-

"8. Taking into consideration all these aspects, we are of the view that the findings recorded by the Labour Court on preliminary issues such as whether the domestic inquiry has been fair or proper or the Labour Court has jurisdiction to entertain the dispute or

whether the person claiming the status as a workman is a workman or not, should not be interfered with, unless such findings are recorded without notice to any one of the parties or recorded without any reason. The point raised for determination is answered accordingly. The preliminary order challenged in the writ petition does not fall in any one of the aforesaid exceptions. Therefore, we see no ground to interfere with the order passed by the learned Single Judge. Accordingly, the writ appeal is rejected. The parties are directed to appear before the Labour Court on 3rd January 1995 and from that date, within three months, the Labour Court shall decide the case. The civil miscellaneous petition is rejected. However, there will be no order as to costs."

Therefore, the learned counsel would submit that the procedure adopted by the Industrial Tribunal cannot be faulted with and it is always open to the Management to adduce evidence before the Industrial Tribunal, in order to establish the charge against the workman. Therefore, he would request this Court to dismiss the writ petition as being devoid of merits.

13. Heard the learned counsels appearing for the parties and perused the materials, pleadings and the relevant decisions rendered on the subject matter by the Hon'ble Supreme Court of India as well as this Court. Before enactment of Sexual Harassment of Women at Working Place (Prevention, Prohibition and Redressal) Act, 2013, the Hon'ble Supreme Court of India has evolved a detailed guidelines to be followed by Managements in respect of sexual harassment cases. The guidelines as framed by the Hon'ble Supreme Court of India, are extracted hereunder:-

"The GUIDELINES and NORMS prescribed herein are as under:-

Having regard to the definition of 'human rights' in Section 2(d) of the Protection of Human Rights Act, 1993.

Taking note of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time.

It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

1. Duty of the Employer or other responsible persons in work places and other institutions:

It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. Definition:

For this purpose, sexual harassment includes such unwelcome sexually determined behavior (whether directly or by implication) as:

- a) physical contact and advances;
- b) a demand or request for sexual favours;
- c) sexually coloured remarks;
- d) showing pornography;
- e) any other unwelcome physical verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive Steps:

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

- (a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.
- (b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/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 woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings:

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary Action:

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

6. Complaint Mechanism:

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee:

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women.

Further, to prevent the possibility of any under pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them. The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. Workers' Initiative:

Employees should be allowed to raise issues of sexual harassment at workers meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. Awareness:

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in suitable manner.

10. Third Party Harassment :

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993."

14. All the Managements were directed to follow the guidelines and the Governments were also directed to ensure the guidelines laid down by the Hon'ble Supreme Court, are observed by the employers in private sector. The Hon'ble Supreme Court has held that the guidelines and norms would be strictly followed in all work places, in order to enforce the right of the gender equality of the working women. As per guideline 7,

the Hon'ble Supreme Court has also observed that the committee be formed viz., compliance committee and also rendered a detailed procedure to be followed. Taking clue from the order, the latest decision of the Hon'ble Supreme Court, has held that any violation of the vishaka guidelines, the respective High Courts can be approached by the aggrieved parties, as per paragraph No.17 of the Hon'ble Supreme Court's order which is extracted supra.

15. In the case on hand, the sexual harassment case was complained by the woman employed by the petitioner Management and on the basis of which, an enquiry was conducted by the special committee constituted for the purpose. In terms of the Vishaka guidelines, the committee has rendered its findings against the respondent employee and on the basis of which, an action was taken by the Management in dismissing the employee from service. Once the committee makes a recommendation by giving a report against the employee concerned, as rightly contented by the learned counsel for the petitioner that the Management had no choice except to take action and in this case, the Management had taken a call to terminate the service of the employee by considering the circumstances of the case. When the Management had no choice except to take action against the employee concerned, how could the Industrial Tribunal compel the parties to adduce a fresh evidence to prove the charge against the employee by sitting in appeal over the conclusion reached by the special committee.

16. The conclusion reached by the Industrial Tribunal that the enquiry was not fair and proper, cannot be countenanced both in law and on facts, since the committee's finding cannot be trifled with by the Industrial Tribunal or the Labour Court as an appellate authority. Unfortunately, the Industrial Tribunal by non-application of mind, has treated the case of sexual harassment on par with normal case where an employee suffers adverse action by the Management.

17. The procedure as adopted by the Industrial Tribunal is against the very directive issued by the Hon'ble Supreme Court of India and also the observations made by the Hon'ble Division Bench of this Court which is extracted above, wherein, the Division Bench has held that the employees can have only one stage action. When the Management was left with no choice at all in these type of cases, it does not fall within the domain of Industrial Tribunal to compel the parties to lead any further evidence in order to satisfy itself about the correctness of the charge or the proof of it. Such procedure adopted by the Industrial Tribunal would amount to usurping the powers of special committee and would also be against the conclusion reached by the special committee.

18. The arguments advanced on behalf of the respondent employee would be correct in normal cases where the Industrial Tribunal or the Labour Court can go into the question of correctness of the enquiry conducted against the employee concerned. But, such procedure cannot be applied to the sexual harassment case, since the sexual harassment cases are completely dealt with by the special mechanism as evolved by the Hon'ble Supreme Court of India before the enactment of the Act, 2013. After the act, such cases can be dealt with by the mechanism created under the Act. Therefore, when the special arrangement has made and the Management has followed the special arrangement as directed by the Hon'ble Supreme Court of India, that will prevail over the general powers vested in the Industrial Tribunal under the provisions of the Industrial Disputes Act.

19. The case law as relied on by the learned counsel for the respondent, has application only in other cases and not in the sexual harassment case of this nature and in any case observation of the learned single judge of this Court can have no application on the factual matrix of the present case. Further, in cases of this nature, the complainant cannot be summoned to appear and give evidence as that itself would be a harassment to the complainant, which is not what was envisaged when the legal principles were laid down by the Hon'ble Supreme Court of India or the subsequent enactment in the year 2013.

20. As rightly contended by the learned counsel for the petitioner Management that it would not be in the interest of the complainant to be summoned by the Industrial Tribunal and to compel her to give evidence once again against the perpetrator of harassment. Such scenario is not conducive for dealing with the cases of sexual harassment and would also result in negation of sensitivity to be shown in such matters by the Institution. In any event, as rightly contended by the learned counsel for the petitioner that in case of any non-adherence to the Vishaka guidelines, it is always open to the aggrieved party to workout their remedies in the manner known to law.

21. Ultimately, this Court finds that the approach of the Industrial Tribunal appears to be invalid in not making a distinction between sexual harassment cases and other normal cases and such cliched and stereotype approach of the Industrial Tribunal per se discloses non-application of mind and therefore, it calls for interference of this Court. At the risk of repetition, it is to be reiterated that once the Management had no choice except taking action against the employee concerned on the basis of the report of the special committee, such action cannot be at the risk of interference by the Industrial Tribunal

and the consequences of such interference by the Industrial Tribunal would only result in finding fault with the action of the Management when such fault cannot be attributable to the Management at all in terms of the scheme of Vishaka guidelines and the recommendations of the special committee in such matters.

22. For the above said reasons, this Court finds that the order passed A.P.No.49 of 2013 in I.D.No.23 of 2010 on the file of the Presiding Officer, Industrial Tribunal, Tamil Nadu, Chennai, dated 25.09.2018, is unsustainable in law and therefore, the same is set aside and the writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

gsk

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To
The Presiding Officer,
Industrial Tribunal,
Chennai.

+1cc to M/s.S.Ramasubramaniam & Associates,
Advocate, SR.No.24423

W.P.No.29012 of 2018

Kak(30/05/2019)

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