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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Reserved on: 11th November, 2020
Date of decision: 4th December, 2020

+ **W.P. (C) 3396/2019**
RASHI Petitioner
Through: Mr. Tushar Ranjan Mohanty,
Advocate.

versus
UNION OF INDIA AND ANR. Respondents
Through: Mr. Chetan Sharma, ASG with Mr.
Abhay Prakash Sahay, CGSC, Ms.
Manu Singh, Ms. Indira Goswami &
Ms. Sejal Pawal, Advocates of UOI.

CORAM:
JUSTICE PRATHIBA M. SINGH
JUDGMENT

Prathiba M. Singh, J.

1. This judgment has been pronounced through video conferencing.

CM APPL. 15774/2020 (for early hearing) in W.P. (C) 3396/2019

2. This application has been filed by Respondent No.1, praying for the petition to be heard on the scheduled date i.e., 21st July, 2020. Since the matter was taken up on 21st July, 2020, this application is disposed of as infructuous.

REVIEW PET.46/2020 & CM APPL. 4190/2020 (for stay) in W.P. (C) 3396/2019

3. The present review petition has been filed seeking review of the order/judgment dated 6th December, 2019 passed by this Court by which the writ was disposed of with the following directions:

“9. ... Accordingly, the following directions are issued:

i. The ICC shall now be constituted strictly in accordance with the office memorandum dated 2nd February, 2009 issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions since the complaint is against a Secretary level officer. The earlier constituted committee shall stand terminated and a new committee shall be appointed within four weeks.

ii. Insofar as the provision of a defence assistant is concerned, the Petitioner is permitted to avail the services of a defence assistant to assist her in the proceedings. If the Petitioner makes a request for the defence assistant to be a legal practitioner i.e., an Advocate or a lawyer, a view on the same shall be taken by the ICC in accordance with law.

iii. The inquiry, in terms of the judgement of the Division Bench shall be an inquiry under Rule 14 of the CSS (CAA) Rules, 1964 read with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.”

Brief Facts

4. The brief background to this petition is that allegations were made by the Petitioner – a contractual employee against Mr. Kamlesh Kumar Pandey, a Secretary level officer who was appointed as the Chairman, Rehabilitation Council of India (*hereinafter*, “RCI”) and whose substantive post was that of Chief Commissioner for Persons with Disabilities (*hereinafter*, “Ex-Chairman”). The case of the Petitioner was that her complaint of sexual

harassment against the Ex-Chairman was not being considered in accordance with law. Her services were terminated with effect from 3rd October, 2018. Since no action was taken on her complaint, W.P (C) No. 11734/2018 was filed which was disposed of vide order dated 30th October, 2018 with a direction to the Respondents to look into the Petitioner's complaint and take action in accordance with law.

5. Thereafter, the complaint was referred to the Internal Complaints Committee (*hereinafter*, "ICC") constituted vide office order dated 21st April, 2017. However, due to the inability of one of the members to participate in the proceedings, as well as the fact that the Chairperson of the ICC was junior in rank to the Ex-Chairman against whom the complaint was made, the ICC was reconstituted by the Competent Authority vide order dated 18th February, 2019. The Petitioner had a grievance about the constitution of the ICC itself. It was her submission that the constitution of the ICC ought to be in terms of the office memorandum dated 26th September, 2008 issued by the Cabinet Secretariat, which has continuously been extended till 17th September, 2014. It was submitted that since the complaint was filed against a Secretary level officer, the office memorandum ought to be followed and the ICC ought to be constituted by the Cabinet Secretariat. Accordingly, the present writ petition was filed.

6. On 6th December, 2019, the Id. ASG who was appearing for the Union of India submitted that the Ministry of Social Justice had sent a request to the Cabinet Secretariat for appointment of a Committee, however, the Cabinet Secretariat had advised the Department to refer the matter to the Department's ICC itself. However, on a query by the Court, it was submitted that this letter of the Cabinet Secretariat was not available on record. Since

the only issue that was surviving was in respect of the constitution of the ICC, on the said date, on behalf of the UOI, and no objection was expressed by the Government to the reconstitution of the ICC in terms of the Office Memorandum dated 26th September, 2008 and the extensions thereof, the directions above were issued.

7. The Union of India has, however, now filed a review petition seeking review of the order dated 6th December, 2019 on the ground that the constitution of the ICC for a Secretary level officer in terms of office memorandum dated 26th September, 2008 was prior to the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (*hereinafter*, “POSH Act”). After the POSH Act has come into operation, the ICC would only be constituted in terms of Section 4 of the POSH Act and there is no requirement that the same should be constituted by the Cabinet Secretariat. While the review was being heard and objections were directed to be filed by the Petitioner, the Central Government was asked to reconsider the constitution of the ICC. An affidavit dated 16th September, 2020 was placed on record reconstituting the ICC as under:

Sr. No.	Name & Designation	Position in the ICC
1.	Ms. Upma Shrivastava. Additional Secretary, D/o SJ&E (holding additional charge of Commissioner in the office of CCPD)	Presiding Officer
2.	Sh. Mrityunjay Jha, Deputy Secretary, DEPwD	Member
3.	Ms. Meena Kumari Sharma, Under Secretary, DEPwD	Member

4.	Dr. Sangita Dhal, Assistant Professor, Department of Political Science, Kalindi College, Delhi University	Member (Non Official)
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Submissions

8. The question that has now arisen is whether the above reconstituted ICC is in accordance with law or not. On behalf of the Government, supporting the prayer for review, the Id. ASG, duly assisted by the CGSC, has submitted that as per Section 4(1) of the POSH Act, the ICC is to be constituted in the respective Ministry itself. The newly constituted Committee consists of a woman Chairperson who is an IAS officer. There are totally three women in the Committee and thus, all the requirements of Section 4 have been met. Reliance is also placed on the judgment of the Allahabad High Court in ***Shobha Goswami v. State of U.P. and Ors. [Writ A. No.31659/2015, Order dated 27th May, 2015]*** to argue that the Chairperson of the ICC need not be a person senior to the person against whom the complaint has been brought. It is sufficient if the Chairperson is a lady member of a senior rank. The judgment is thus pressed into service to argue that the present ICC is in accordance with law. It is also submitted that the Ex-Chairman was a doctor who was serving as a Commissioner and none of the Members of the ICC have worked under him. Thus, the ICC is an independently constituted ICC.

9. On behalf of the Petitioner, Mr. Mohanty, Id. counsel submits that the impugned order was passed with the consent of the parties on 6th December, 2019. Thus, consent cannot be withdrawn in this manner. Moreover, there is no error of law in the direction of this Court, which simply asked for re-

constitution of the ICC in terms of office memorandum dated 2nd February, 2009. Id. counsel further submits that a perusal of the various office memoranda would show that the appointing authority for any officer of the level of Joint Secretary and above is the Appointments Committee of the Cabinet (*hereinafter*, “ACC”) and thus, under Section 4, the employer would be the ACC. The respective Ministry or Department cannot be considered the ACC for officers serving at the level of Joint Secretary and above. It is thus submitted that since the ACC is the employer, the Committee also ought to be constituted by the ACC. It is further argued that office memorandum dated 26th September, 2008 and subsequent office memoranda extending the same ought to be followed even in the present case.

10. Mr. Sahay, Id. CGSC, however, points out that insofar as the final extension dated 17th September, 2014 is concerned, the same was only in respect of pending inquiries. After the POSH Act came into place there has been no extension of the earlier office memorandum and as per the extant policy of the Government, the ICC is to be constituted in accordance with the POSH Act. Reliance is placed on the office memorandum dated 26th November, 2018, which was specifically in respect of this case, where the Cabinet Secretariat in consultation with the PMO had directed that the Department of Empowerment of Persons with Disabilities (*hereinafter*, *DEPwD*”), being the employer, could constitute the ICC. It is further submitted that the Ex-Chairman against whom the complaint was made is no longer working in the said Department and is now working as an independent private doctor with an NGO.

11. Mr. Mohanty, Id. counsel however, refutes this and submits that the

Ex-Chairman has applied for re-appointment, however, the ACC refused to appoint him in view of the pending sexual harassment complaint. He relies upon Rule 14 (22) of the CCS (CCA) Rules, 1965 to argue that the extension given in 2014 is also not required inasmuch as a new committee has taken over from where the old Committee left. Thus, the extension of the old Committee in 2014 shows the intention of the Government to have a fair and impartial ICC.

12. Mr. Sahay, Id. counsel submits that the Id. ASG who had submitted that the Government has no objection to the reconstitution of the ICC on 6th December, 2019 had not been given consent, though at that stage the instructions were that the office memorandum could be followed and even if a concession is given, the same would not bind the Government.

Analysis and Findings

13. The main question in this review petition is in respect of the constitution of the ICC. This was the very same question which had arisen when this Court had passed judgment dated 6th December, 2019. The present review has been filed by the government primarily placing on record the letter of the Cabinet Secretariat dated 26th November 2018, to the effect that the Office memorandum relied upon is no longer in operation and the ICC ought to be, therefore, directed to be constituted in accordance with Section 4 of the POSH Act.

14. The directions given by this Court in the judgment under review are as under:

“9. The Ld. ASG submits that the Government has no objection to reconstitute the ICC and there has been no departure from the above two memoranda,

as per her instructions. In view of the above two memoranda, it is clear that the ICC in the present case has to be reconstituted - which has in fact been agreed to by the UOI. Once the committee is re-constituted, the committee shall take a decision as to whether upon a request by the Petitioner for a counsel i.e., a legal practitioner ought to be permitted or not. Needless to clarify that a defence assistant will in any case be permissible to the Petitioner during the inquiry proceedings. Accordingly, the following directions are issued:

i. The ICC shall now be constituted strictly in accordance with the office memorandum dated 2nd February, 2009 - issued by the Government of India Ministry of Personnel, Public Grievances and Pensions since the complaint is against a Secretary level officer. The earlier constituted committee shall stand terminated and a new committee shall be appointed within four weeks.

ii. Insofar as the provision of a defence assistant is concerned, the Petitioner is permitted to avail the services of a defence assistant to assist her in the proceedings. If the Petitioner makes a request for the defence assistant to be a legal practitioner i.e., an Advocate or a lawyer, a view on the same shall be taken by the ICC in accordance with law.

iii. The inquiry, in terms of the judgement of the Division Bench shall be an inquiry under Rule 14 of the CCS (CAA) Rules, 1964 read with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.”

15. Insofar as directions (ii) and (iii) are concerned, the government does not seek review of these directions. It is only in respect of direction (i) that

the present review is sought. Firstly, it appears that the statement recorded in paragraph 9 on behalf of the Id. ASG was made on the basis of instructions given to her on that date. In any event, since the Court was examining the memorandum and was not informed of any memorandum to the contrary, direction (i) was issued. The submission now is that the appointing authority i.e., the Cabinet Secretariat has now taken the position that the ICC ought to be constituted by the Department itself.

16. Before considering whether the order is liable to be reviewed or not, it is necessary to record the details of the various office memoranda. The first relevant document is the Cabinet Secretariat's order dated 26th September, 2008. The same reads as under:

"ORDER NO.1

Subject: Constitution of a Complaints Committee to enquire into complaints of sexual harassment made against officers of the level of Secretary and Additional Secretary to the Government of India.

With the approval of the Prime Minister, it has been decided to constitute a Complaints Committee to enquire into complaints of sexual harassment made against officers of the level of Secretary and Additional Secretary and equivalent level in Ministries, Department and organizations directly under the control of the Central Government other than Central PSUs.

2. The Committee will proceed in accordance with the guidelines laid down by the Supreme Court in the case of Vishakha and Others vs. State of Rajasthan. The composition of the Committee will be as follows:

i. Ms. Rathí Vinay Jha (IAS retired) - Chairperson
Secretary-General,

*World Travel and Tourism Council,
New Delhi*

ii. *Ms. Indu Agnihotri, - Member
Senior Fellow,
Centre for Women's Development Studies,
New Delhi*

iii. *A senior officer with experience of the sector
or department to which the complaint relates
(to be nominated for each case separately
depending upon the Department/Ministry to
which the complaint relates) - Member*

3. *The Committee will have a tenure of three
years from the date of issue of this order and will
be serviced by the Cabinet Secretariat."*

17. This Order was extended vide office memorandum dated 2nd February, 2009 by the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) under the CCS (Conduct) Rules, 1964. The office memorandum dated 2nd February, 2009 reads as under:

"OFFICE MEMORANDUM

Subject: Central Civil Services (Conduct) Rules, 1964 - constitution of a Complaints Committee to enquire into complaints of sexual harassment made against officers of the level of Secretary and Additional Secretary to the Government of India.

The undersigned is directed to refer to the Department of Personnel and Training's O.M. No. 11013/10/97-Estt.(A) dated 13.02.1998 on the guidelines and norms to be observed to prevent sexual harassment of women issued under rule 3 of the Central Civil Services (Conduct) Rules, 1964 in pursuance of the judgment of the Hon'ble Supreme Court in Vishakha & Others vs. State of Rajasthan & Others (JT 1997 (7) SC 384) and to

say that para 6 of the Supreme Court's guidelines provides for creation of an appropriate complaint mechanism so as to ensure time-bound treatment of complaints of sexual harassment. Para 7 thereof stipulates that the Complaints Committee should be headed by a woman and not less than half of its members should be women and that further to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either an NGO or other body who is familiar with the issue of sexual harassment. The various Ministries/Departments were also advised vide DOPT's O.M. No. 11013/10/97- Estt. (A) dated 13.07.1999 to ensure that the Committee constituted for redressal of the complaints by the victims of sexual harassment should be headed by an officer sufficiently higher in rank so as to lend credibility to the investigations. Subsequently, in 2004 a proviso was added to rule 14(2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 to the effect that the Complaints Committee established in each Ministry or Department or Office for inquiring into complaints of sexual harassment shall be deemed to be the Inquiring Authority appointed by the Disciplinary Authority and that the Complaints Committee shall hold, if separate procedure has not been prescribed for the Complaints Committee for holding the inquiry into such complaints, the inquiry, as far as practicable in accordance with the procedure laid down in the said rules.

2. For inquiring into complaints made against officers of the level of Secretary and Additional Secretary and equivalent level in the Government of India in the Ministries/Departments and Organisations directly under the control of the Central Government (other than the Central

PSUs), it has been decided with the approval of the Prime Minister to constitute a Complaints Committee in terms of Cabinet Secretariat's Order No.1 dated 26.09.2008 (copy enclosed). Existing Complaints Committee established in each Ministry or Department or Office will, therefore, inquire into fresh complaints of sexual harassment against only those Government servants who are not covered by the Cabinet Secretariat's Order No. 1 dated 26.09.2008.

3. All Ministries/Departments are requested to bring the foregoing to the notice of all concerned for information and necessary action.”

18. The above Order and Memorandum were stated to have been issued pursuant to the judgment of the Supreme Court in ***Vishaka and Others vs. State of Rajasthan and Others, 1997 (6) SCC 241***. The procedure prescribed was meant to provide a proper complaint mechanism to ensure the time-bound treatment of complaints of sexual harassment against officers of the level of Secretary and Additional Secretary to the Government of India. As per this memorandum, the following was to be the constitution of the complaints committee:

- a) More than half the members were to be women.
- b) To avoid any pressure or influence from senior levels, the committee was to involve a third party, either an NGO or other body familiar with the issue of sexual harassment.
- c) The Committee was to be headed by an officer sufficiently higher in rank so as to lend credibility to the investigations.
- d) Insofar as complaints made against officers of the level of Secretary and Additional Secretary and equivalent level in the

Ministries/Departments/Government Organization were concerned, the complaints committee was to be constituted in terms of the Cabinet Secretariat's order dated 26th September, 2008. Order dated 26th September, 2008 had constituted a committee of three persons, two of whom were named. The Chairperson was an ex-IAS officer, one member was an external lady member and the third member was to be a senior officer with experience of the sector or department to which the complaint related.

19. Thus, a conjoint reading of the Order dated 26th September, 2008 and office memorandum dated 2nd February, 2009 shows that in complaints involving officers of the level of Secretary and Additional Secretary, the Committee was to be constituted by the Cabinet Secretariat, with the approval of the Prime Minister's Office. The tenure of this Committee was extended from time to time vide orders dated 9th November, 2011, 17th September, 2012 and finally, vide order dated 17th September, 2014. In the extension orders, further members were added to the committee, however, the Cabinet Secretariat was still the authority responsible for constituting the committee for senior officers. Finally, vide order dated 17th September, 2014, an extension was given to the Committee appointed by the Cabinet Secretariat till 31st December, 2014 or the completion of the report under consideration of the Committee.

20. On 27th November, 2014, an office memorandum was issued in respect of the constitution of the ICC and in effect, the constitution of a separate Committee for senior officers by the Cabinet Secretariat was done away with. On 16th July, 2015, a guide called '*Steps for conducting inquiry*

in case of allegation of Sexual Harassment' was published. However, the guide did not mention any specific Committee to deal with complaints against senior officers.

21. The attention of the Court has been drawn to the office memorandum dated 26th November, 2018 in which the Cabinet Secretariat has stated that as per the POSH Act, the Department concerned is competent to constitute the ICC. Thus, the Cabinet Secretariat did not constitute a separate ICC in the present case.

22. The complaint in this case has admittedly been made against a Secretary level officer. The complaint against him was made at the time when he was Chairman of the RCI, which comes under the DEPwD. The question is whether the Committee now constituted by the DEPwD itself would be fair and unbiased. The Committee, which is newly constituted, consists of three officers from the same Department where the Ex-Chairman was working and one academician from the University of Delhi. Out of the four members, three are women. The Committee has been constituted by the Director of DEPwD. It is stated that the Ex-Chairman is no longer working in the said Department, however, three members of the committee are from the same Department where he was working.

23. It is the settled position in law that the ICC should be a body which is objective and neutral. The ICC ought not to be biased in any manner. This is clear from a reading of the judgments of the Supreme Court in ***Vishaka (supra)*** and ***Punjab and Sind Bank and Others v. Durgesh Kuwar, 2020 SCC OnLine SC 774*** as also the judgments of the Delhi High Court in ***U.S. Verma, Principal, DPS & Anr. v. National Commission for Women & Ors, (2009) 163 DLT 557, Linda Eastwood v. Union of India & Anr., 2015 SCC OnLine Del 14396, Ruchika Singh Chhabra v. Air France India and Ors., 2018 (170)***

DRJ 609 and Somaya Gupta v. Jawaharlal Nehru University and Anr., (2018) 159 FLR 390. The relevant extracts of these judgments are as follows:

Vishakha & Ors. v. State of Rajasthan & Ors., (1997) 6 SCC 241

“17. ...

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

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. ...”

Punjab and Sind Bank and Others v. Durgesh Kuwar, 2020 SCC OnLine SC 774

“22. Clause (c) of Section 4(2) indicates that one member of the ICC has to be drawn from amongst a non-governmental organization or association committed to the cause of women or a person familiar with issues relating to sexual harassment. The purpose of having such a member is to ensure the presence of an independent person who can aid, advise and assist the

Committee. It obviates an institutional bias. During the course of hearing, we have received a confirmation from the learned senior counsel appearing on behalf of the bank that Ms. Seema Gupta was, in fact, a panel lawyer of the bank at the material time. This being the position, we see no reason or justification on the part of the bank not to accede to the request of the respondent for replacing Ms. Seema Gupta with a truly independent third party having regard to the provisions of Section 4(2)(c) of the Act. This is a significant facet which goes to the root of the constitution of the ICC which was set up to enquire into the allegations which were levelled by the respondent.”

U.S. Verma, Principal, DPS & Anr. v. National Commission for Women & Ors, (2009) 163 DLT 557

“77. It was noticed previously that Mr. Narender Kumar and Dr. Nanda recused themselves, when the complainants objected to their presence, as they were known to be associated with Verma. This substantiated the allegation of a possible bias. Yet, the report nowhere shows that the said individuals stayed away entirely. On the contrary, it records their participation, and their having signed the report. In the body of the report, Mr. Narender Kumar's version, about what transpired when one of the complainants approached him, is recorded. This, in the opinion of the Court, can hardly inspire confidence in the objectivity or impartiality of the committee.

78. One of the cardinal rules of natural justice is that a person hearing a case or cause should not only be impartial but should have no personal knowledge or interest. The recusal of two members including Mr. Narendra Kumar when the complainants were present and their subsequent participation and even signature upon the report completely erodes the objectivity of the Visakha Committee in dealing with issues before it. To

compound this further; the committee takes into account the version of Mr. Narendra Kumar, in the capacity as a Member. This Court recollects the decision in (1993) 4 SCC 10 : AIR 1993 SC 2155 titled Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School, where, in a domestic inquiry, concerning the conduct of an employee in a school, the deposition of the member of the committee was also considered. The Supreme Court commented that such a conduct vitiated the entire proceedings stating as follows: ...

...

79. For the above, this Court is of the opinion that the report of the Visakha Committee headed by Dr. Sharda Nayak cannot be sustained.

80. Apart from the issue of conflict and bias discussed above, this Court also views with concern, the procedure adopted by the Sharda Nayak Committee. In all the Committee appears to have held four hearings. Some of the complainants presented themselves on 17.5.1999 and 17.6.1999 but refused to participate due to lack of clarity of the committee's constitution and its competence. During the intervening stages the committee had strangely enough proceeded to record the statements of Verma and all those staff members as well as others who supported him. The DPS Society and the Committee set up by it, in following this procedure appears to have completely lost sight of the objectives of the Visakha guidelines. The need to frame the guidelines and emphasis on their binding nature, was lack of legal structure whereby complaints of sexual harassment could be looked into. The entire thrust of the complaints committee procedure and its underlying

premise is that the complainant employees are assured objectivity and neutrality in the inquiry. The Court went to great lengths in this regard, even mandating that not less than half of the membership of the committee were to be drawn from amongst women employees and at least one of its members were to be drawn from amongst an NGO with suitable experience. The task of the committee therefore was to enquire into the allegations leveled by the complainants/female staff or employees. This in turn pre-supposed that complainant's version was first considered either by recording it suitably and if needed, by preparing charges. The gist or summary of such allegations were to be thereafter put to the accused employee. In essence the procedure was to broadly mirror that of inquiry committee's or domestic Tribunal, who takes upon itself the task of framing the charges and putting it to the accused/employee, in the case of a departmental inquiry, such a procedure was not followed in this case at all. The Sharda Nayak Committee proceeded to record the statements of all others who wished to clear Verma's name."

Linda Eastwood v. Union of India & Anr., 2015 SCC OnLine Del 14396

"12. The findings recorded by the second Reconstituted Committee, in my considered view, cannot be given effect to as the very foundation/constitution of the committee was flawed. The second committee came into existence on 13.09.2013 when the first committee had purportedly submitted its final report to the concerned Ministry on 31.08.2013 and it was pending consideration before it. It is pertinent to note that Mr. M.K. Singh became CMD on

02.09.2013. By his orders on 13.09.2013, the Internal Complaint Committee was reconstituted with the above named Presiding Officer/members. The draft was approved by Mr. M.K. Singh. It is relevant to note that both Mrs. Namrata Mehta and Mrs. Sabita Mitra had appeared as witnesses on behalf of the complainant in the proceedings recorded by the previous committee. Apparently, they had conflict of interest and could not have been included in the Internal Complaint Committee as Presiding Officer/Member. Mrs. Roma Sengupta taken as 'external member' in the second committee was earlier a member in the first committee and had opted to remain absent on 29.08.2013. She did not sign the final proceedings recorded on 29/31.08.2013. Similarly, Mrs. Pranati Mondal had abstained herself from the proceedings recorded by the previous committee. Apparently, their inclusion in the second committee was motivated as they had declined to remain members in the first committee chaired by Mrs. Linda Alen. The Reconstituted committee in its proceedings conducted on 23.11.2013 took no time to exonerate Mr. M.K. Singh of all serious charges. He was also very prompt to participate in the said proceedings and the committee lost no time to express thanks for his participation in the said proceedings. The Reconstituted committee reviewed the findings recorded by the previous committee. Considering the peculiar facts and circumstances of the case, the findings of the Reconstituted committee are unsustainable as there was element of bias and conflict of interest. The employer is expected to develop clear and precise procedures to deal with the complaints of sexual harassment in an effective manner. The procedure should be fair and unbiased. It has to be ensured that there is no undue pressure or influence from senior level. Credentials of the Presiding Officer/members should be absolutely without blemish. The entire investigation should be impartial, independent and without any bias for or against any party. Members of the committee are

expected to ensure that no injustice is done.

13. In the instant case, Mr. M.K. Singh against whom there were serious charges of sexual harassment came at the helm of the affairs of the company at the relevant time and was instrumental in selecting the members of the committee of his choice to get a favourable report. Composition of the second committee was, thus, vitiated and flawed. Principles of natural justice were flagrantly violated. Mr. M.K. Singh being a party ought not to have taken active part in the decision of formation/constitution of the Committee. No sanctity can be attached to the proceedings conducted by the Second committee to give a clean chit to Mr. M.K. Singh.”

**Ruchika Singh Chhabra v. Air France India and Ors.,
2018 (170) DRJ 609**

“29. This court in U.S. Verma, Principal and Delhi Public School Society v. National Commission for Women, 163 (2009) DLT 557 (delivered by the author of this judgment), held that the entire thrust of the complaints committee procedure and its underlying premise is that the complainant employees are assured objectivity and neutrality in the inquiry, insulated from the employers' possible intrusions. To achieve that end, the requirement under law with respect to the qualification of the independent member on the ICC is an indispensable necessity for meting out justice under the Workplace Harassment Prohibition Act.

30. Having regard to the conspectus of circumstances in the present case, apart from the issues discussed hereinabove, this Court also views with concern, the procedure adopted by the ICC in the present case. In all, the Committee appears to have not conducted the proceedings according to principles of natural justice. It is contended by the appellant that no charges were framed by the ICC, that independent witnesses admitted to having read the evidence of the accused and yet, they

were not disqualified, the Appellant was forced to cross examine and be cross examined by the accused and there was apparent unresponsiveness on the part of Respondent no. 1 in dealing with the complaint of the Appellant. The no-cause sudden termination of employment of the Appellant also raises concerns regarding there being bias in the proceedings of the ICC. Apart from non-compliance with employers in the composition, and the alleged bias by members of the ICC, that body did not take steps to lend confidence or assurance to the Appellant as she repeatedly raised concerns of not feeling comfortable in the manner in which the proceedings were being conducted and also expressed her discomfort in being around the accused, which was so vital for the fairness in the enquiry, and mandated by Vishaka (supra). This court is of the opinion, that although allegations about the conduct of inquiry are serious and can have the effect of invalidating the process altogether, it would not be appropriate to return them as findings, given that what was addressed during the hearings, were the question of jurisdiction and the validity of appointment of Mr. Dias.

31. This court wishes to emphasize here that the Vishaka Guidelines are to be taken seriously, and not followed in a ritualistic manner. The march of our society to an awareness and sensitivity to the issue of sexual harassment and its baneful effects, flagged in Vishaka (supra), culminated in the path breaking Workplace Harassment Prohibition Act over 17 years later. Even today, the world over is rocked by horrific tales of all forms of sexual harassment of female co-workers at varied workplaces. Decision makers, Parliament, courts and employers are to be ever vigilant in ensuring that effective policies are swiftly and impartially enforced to ensure justice and see that no one is subjected to unwelcome - and unacceptable behavior. Unlike stray cases of individual indiscipline, which are dealt with routinely, upon employers lie the

primary obligation to ensure the effectuation of these laws and rules, aimed at securing a safe workplace to their women employees. A permissiveness or infraction in implementation in one case, implies the employer's lack of will, or inability to assure such safety and equality at its workplace. A complainant who takes courage to speak out against unwelcome behavior regardless of the perpetrator is not merely an object of pity or sympathy, but as Alex Elle said:

“You are not a victim for sharing your story.

You are a survivor setting the world on fire with your truth. And you never know who needs your light, your warmth, and raging courage...”

Somaya Gupta v. Jawaharlal Nehru University and Anr., (2018) 159 FLR 390

“8. The petitioner seeks reconstitution of the entire ICC on the ground of bias. In order to succeed, the petitioner would require to establish that there is real likelihood of bias. Mere apprehension in the petitioner's mind would be insufficient for securing such relief.

9. In S. Parthasarathi v. State of Andhra Pradesh, (1974) 3 SCC 459, the Supreme Court had explained the test of bias in the following words:

“The tests of “real likelihood” and “reasonable suspicion” are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The Court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the enquiry.”

24. A perusal of the decisions extracted above shows that the following

broad principles have been laid down by the Supreme Court and the High Courts regarding the constitution/conduct of the proceedings in the ICC:

- i) Members of the ICC must be impartial i.e. they should not have any personal knowledge or interest in the case or be connected to the case in any manner;
- ii) Members of the ICC should not have conflict with any of the parties involved;
- iii) Complete neutrality has to be observed in the proceedings;
- iv) Objectivity needs to be maintained in the conduct of the proceedings;
- v) There should be no cause for bias for or against any of the parties;
- vi) Members of the ICC ought to possess blemish-less credentials;
- vii) Independent members are needed on the ICC to aid, advise and assist the ICC in a fair and impartial manner;
- viii) An independent person should actually be someone external and cannot, for example, be the panel lawyer of a bank in a situation where the Complainant and the Respondent are employees of the bank;
- ix) There should be no undue pressure and influence on the ICC from senior levels;
- x) In cases where persons who have been at the helm of affairs are themselves the Respondents in a complaint, the ICC cannot be one of their choice or of persons who have worked under them;
- xi) The ICC should follow a clear and precise procedure to deal with sexual harassment complaints;

- xii) The principles of natural justice should be followed scrupulously;
- xiii) The proceedings should lend confidence and assurance to the Complainant and make her comfortable;
- xiv) The principles and guidelines laid down by the Supreme Court in *Vishakha (supra)* continue to guide the constitution of these Committees, even after the enactment of the statute. The said principles ought to be followed rigorously and not in a ritualistic manner;
- xv) Women should not be the object of sympathy or pity but a Complainant who takes courage to speak out against unwelcome behavior regardless of the perpetrator is a survivor.
- xvi) The inquiry proceedings should inspire the confidence of the Court.

25. The underlying object of constituting the ICC, as laid down by the Supreme Court in *Vishaka (supra)*, and the various decisions set out above is that the inquiry ought to be impartial and fair. For the said purpose to be achieved, the ICC ought to be an independent and unbiased body. External members are appointed on the ICC to ensure neutrality of the ICC. In case complaints are made against senior level officers working in ministries/departments, who have enormous influence over their subordinates, it is to be ensured that the complaints are inquired into in a completely unbiased manner. The age old aphorism that '*Justice must not only be done but also be seen to be done*' is apt in this context.

26. The various office memoranda referred to above show that in respect of officers of the level of Secretary and Additional Secretary, the Cabinet

Secretariat had constituted a committee to conduct the inquiry. However, the stand of the Government now is that since the POSH Act has been enacted, the Committee can now be constituted in terms of Section 4.

27. In case of Ministries/Departments, usually the head of the Department or the Ministry would be the '*employer*'. The question that arises is that if the allegations are against the person heading the Department or the Ministry itself or a person of the same/equivalent Rank, should the Committee still be constituted by an official of the same Department or Ministry where the person was working. In the opinion of this Court, that would be completely contrary to the basic tenets of fairness and impartiality as a Secretary level officer is the head of the Department/Ministry and he would be superior to almost all the personnel working therein. If the ICC consists of members who are from the same Department/Ministry, there is every possibility of them being required to entertain and decide allegations against their own superior officer who may be able to exercise influence on them. Therefore, such a possibility ought to be avoided in order to ensure that there is no institutional bias in the conduct of the inquiry.

28. The office memorandum of 2008, which was prevalent till 2014, ensured that even within the government, if a complaint was made against a high ranking officer, an independent body such as the Cabinet Secretariat would constitute the ICC. The judgment dated 6th December, 2019 was passed keeping in mind that the Cabinet Secretariat would be able to constitute an independent, high level and impartial committee, which would be fair to both the Petitioner and the Ex-Chairman.

29. However, in the review petition, the stand of the government has changed. The submission of the Id. ASG is that the office memoranda were

in operation prior to the enactment of the POSH Act and after the enactment of the said Act, the ICC ought to be constituted as per Section 4 of the Act. Section 4 of the POSH Act reads as under:

“4. Constitution of Internal Complaints Committee.

— (1) Every employer of a workplace shall, by an order in writing, constitute a Committee to be known as the “Internal Complaints Committee”:

Provided that where the offices or administrative units of the workplace are located at different places or divisional or sub-divisional level, the Internal Committee shall be constituted at all administrative units or offices.

(2) The Internal Committee shall consist of the following members to be nominated by the employer, namely: —

(a) a Presiding Officer who shall be a woman employed at a senior level at workplace from amongst the employees:

Provided that in case a senior level woman employee is not available, the Presiding Officer shall be nominated from other offices or administrative units of the workplace referred to in sub-section (1):

Provided further that in case the other offices or administrative units of the workplace do not have a senior level woman employee, the Presiding Officer shall be nominated from any other workplace of the same employer or other department or organisation;

(b) not less than two Members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge;

(c) one member from amongst non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to

sexual harassment:

Provided that at least one-half of the total Members so nominated shall be women.

(3) The Presiding Officer and every Member of the Internal Committee shall hold office for such period, not exceeding three years, from the date of their nomination as may be specified by the employer.

(4) The Member appointed from amongst the non-governmental organisations or associations shall be paid such fees or allowances for holding the proceedings of the Internal Committee, by the employer, as may be prescribed.

(5) Where the Presiding Officer or any Member of the Internal Committee, —

(a) contravenes the provisions of section 16; or

(b) has been convicted for an offence or an inquiry into an offence under any law for the time being in force is pending against him; or

(c) he has been found guilty in any disciplinary proceedings or a disciplinary proceeding is pending against him; or

(d) has so abused his position as to render his continuance in office prejudicial to the public interest, such Presiding Officer or Member, as the case may be, shall be removed from the Committee and the vacancy so created or any casual vacancy shall be filled by fresh nomination in accordance with the provisions of this section.”

30. The term ‘employer’ is defined in Section 2(g)(i) as under:

“2. In this Act, unless the context otherwise requires,

...

(g) “employer” means—

(i) in relation to any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit of the appropriate Government or a local

authority, the head of that department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit or such other officer as the appropriate Government or the local authority, as the case may be, may by an order specify in this behalf;”

31. As per the above provisions, the ‘employer’ is the person with whom the power of appointing the ICC is vested. Though usually, the employer would be the head of the Department or Ministry, the question is, who would be the employer in the present case where a Secretary level officer is involved. The Act, under Section 6, provides that if the complaint is against the employer himself, the victim can approach the Local Complaints Committee (*hereinafter, “LCC”*). However, in the opinion of this Court, the ICC ought not to be so easily replaced or done away with as the basic scheme of the Act is for appointment of an ICC and only if no alternative is available, should the victim be asked to approach the LCC.

32. Such a predicament was also discussed in the Department-Related Parliamentary Standing Committee on Human Resource Development’s ‘239th Report on the Protection of Women against Sexual Harassment at Workplace Bill, 2010’, which observes as follows:

“9.5 Committee takes note of a very pertinent issue highlighted by NCW that where the perpetrator might be the concerned Head of the establishment or Head of a large private company/Government establishment. Block, taluka or tehsil level Local Committee or even district level Local Committee would not be in a position to provide adequate redressal in such cases. It was suggested that a provision for a High Power Committee constituted under the Ministry may be considered to address

such situations and the punishment in case of employers may be made more stringent. On this matter being taken up with the Ministry, it was pointed out that setting up of a high-power Committee may not be feasible.

9.6 The Committee understands the predicament of local level Committee in providing redressal to victims against highly placed officials of a Government or private company. The Committee would like to point out that categorical non-acceptance by the Ministry would not solve the problem. An alternate mechanism has to be identified. The Committee is of the view that State Commissions for Women need to be involved in handling of cases against employers. A workable mechanism which can be the district level LCC with representative from the State Commission for Women can be the best option.”

The above apprehension, though expressed in the Report, did not however result in a separate mechanism being provided in the Act to deal with allegations against senior level officials in Government or private establishments.

33. As per the Government of India (Transaction of Business) Rules, high ranking officers i.e. Joint Secretary and above, are appointed by the ACC. In order to obviate any allegations of unfairness and bias, in case of complaints against high ranking officers, majority of the Committee members preferably ought not to be from the same Ministry/Department. This would be in accordance with the purpose and spirit of the POSH Act. Persons who have served under high ranking officers or in the same department may face difficulty in treating the complaint in an unbiased manner.

34. In the present case, a perusal of the complaint shows that the allegations are not merely against the Ex-Chairman but also against other

staff members who are alleged to have been complicit with the main person against whom the allegations are raised. Moreover, the Chairperson of the ICC now appointed appears to be the successor in the very same post which the Ex-Chairman was holding. Two other members are from the Department where the Ex-Chairman had been a Secretary level officer. Under such circumstances, it would only be fair if the ICC is constituted with members who do not belong to the same Department to look into the allegations.

35. A similar situation had arisen in the case of ***M. Rajendran v. M. Daisyrani & Ors., (2018) 3 MLJ 84*** wherein the Madras High Court was dealing with a case where allegations were made against the Dean of a college. The Committee had been constituted by the Dean himself and all members of the Committee, except one external member, were subordinate to the Dean. Under these circumstances, the High Court had constituted an independent Committee to ensure that the Committee is impartial and fair. The accused sought review of the said judgment, which was dismissed.

36. The complaint in the present case is against the then Chairman of the RCI. This is a body that comes directly under the DEPwD. The facts of this case show that the Respondent in the complaint i.e., the Ex-Chairman is closely connected with the DEPwD and the Rehabilitation Council of India. Even the possibility that members of the Committee may have worked under the Ex-Chairman and may have been his colleagues would be sufficient to require the constitution of an independent Committee. A perusal of the complaint in fact shows that some of the employees working in the said Department were also alleged to be in collusion with the Ex-Chairman. The Ex-Chairman also appears to have continued association with the Rehabilitation Council of India and the Department concerned. He is also

currently stated to be under consideration for appointment on senior level positions. Hence, there is a greater need to ensure that the ICC is independently constituted and the Inquiry is conducted fairly to both parties. Thus, when allegations are made against senior level officers, this Court is of the opinion, that the same should be inquired into by a Committee appointed not at the level of the Department but someone external and independent. This is more so in the case of a Government establishment where an alternative mechanism can be easily evolved for constitution of the ICC.

37. Under the above facts and circumstances, it is directed that a Committee be constituted by the Cabinet Secretariat, consisting of such persons who are independent and unbiased, to enquire into the allegations made by the Petitioner/Complainant. The Committee shall be constituted within four weeks.

38. The present judgment be also placed before the appropriate authorities for considering the constitution of an independent ICC to deal with sexual harassment complaints against high ranking officers of the level of Joint Secretary and above working in various Government departments and Ministries.

39. The review petition is disposed off with these directions. All pending applications are also disposed of. The standing counsel for the Union of India to communicate this order to the Cabinet Secretariat of the Government of India. Registry to also communicate this order to the Cabinet Secretary, Government of India, Rashtrapati Bhawan, New Delhi.

PRATHIBA M. SINGH, J.

DECEMBER 4, 2020/dk/T