

IN THE HIGH COURT AT CALCUTTA

CIRCUIT BENCH AT JALPAIGURI

Constitutional Writ Jurisdiction

Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya.

W.P.A 1935 of 2022

Anjali Kumari

Vs.

Union of India and others.

For the petitioner : Mr. Nikunj Berlia, Adv.
Mr. Rachit Lakhmani, Adv.

For the respondent nos. 2 to 5 : Mr. Dhiraj Trivedi, Adv.
Ms. Amrita Pandey, Adv.
Ms. Anamika Pandey, Adv.
Mr. Ghanshyam Pandey, Adv.
Ms. Sneha Singh, Adv.
Ms. Shikha Kumari Kashyap, Adv.
Ms. Shabnam Farooqui, Adv.

Mr. Kamal Singh, Adv.

Last Heard on : 02.08.2022.

Delivered on : 11.08.2022.

Moushumi Bhattacharya, J.

1. The petitioner is an employee of NHPC Limited, a Government of India undertaking, having its office at Kalijhora Bazar, Darjeeling. NHPC Limited is the respondent no. 2 before the Court. The petitioner prays for a mandamus commanding NHPC and its managers and officers to cancel and withdraw an impugned Report dated 30.05.2022 and a show cause notice dated 20.06.2022. The petitioner's ground of challenge to the impugned notices is that the said notices were issued for extraneous considerations and as a reaction to a complaint made by the petitioner against the respondent no. 6 for sexual harassment. The respondent no. 6 is the General Manager, Finance of NHPC.

2. Learned counsel appearing for the petitioner submits that the impugned show cause notice has been issued in violation of the Conduct Discipline and Appeal Rules (CDA Rules) which came to force with effect from 14.05.1979 and

applies to all employees of NHPC except those stated in Rule 2 of the said Rules. Counsel submits that the show cause notice alleging misconduct against the petitioner was the result of a complaint which the petitioner filed against the respondent no. 6 for sexual harassment. Counsel submits that an inquiry was initiated against the petitioner without giving the petitioner due notice of the same. Counsel further submits that the Committee constituted for inquiring into the sexual harassment complaint filed by the petitioner was contrary to the provisions of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (the 2013 Act).

3. Learned counsel appearing for the respondents defends the legality of the show cause notice on the ground that the petitioner has not challenged the jurisdiction of the authority to issue the said notice. Counsel places a Memorandum issued to the petitioner on 18.04.2022 and submits that the petitioner instituted the complaint of sexual harassment against the respondent no. 6 only after the Memorandum. Counsel submits that the petitioner has failed to make out any case against the respondent no. 6 with regard to the alleged sexual harassment. Counsel submits that the complaint of sexual harassment was a mere reaction to the show cause notice dated 18.04.2022 and further that the writ petition is premature since the respondent authorities have not passed any order against the petitioner. Counsel assures the Court that any action taken pursuant to the impugned show cause notice would strictly be in accordance with the CDA Rules.

4. From the submissions made on behalf of the parties, it appears that the controversy in the present writ petition may be demarcated into two separate and independent causes of action. The first is the complaint of sexual harassment made by the petitioner against the respondent no. 6; the second is the impugned Report dated 30.05.2022 and the show cause notice dated 20.06.2022 which allege misconduct of the petitioner with regard to the performance of her duties as the Manager (Finance) of NHPC.

5. With regard to the issue of sexual harassment, the material before the Court clearly show that the respondent no. 2 NHPC failed to constitute an Internal Complaints Committee (ICC) in accordance with section 4 of the 2013 Act. Section 4 carries a mandate on every employer of a work place to constitute by an order in writing, an Internal Complaints Committee. Section 4(2) (a)-(c) stipulates the composition of the ICC including that the ICC shall consist of a woman Presiding Officer and that one-half of the total members nominated should also be women. Section 4(2) also makes it clear that the total number of members of the ICC shall not be less than four.

6. In the present case, there is no evidence on record that NHPC (the employer) constituted an ICC in terms of section 4 of the 2013 Act to inquire into the complaint made by the petitioner against the respondent no. 6. The show cause notice simply states that an inquiry has been conducted on the petitioner's complaint and no more. A letter of an Investigating Officer dated 17.05.2022 proves that a sole gentleman was appointed as the Investigating

Officer to inquire into the complaint which is patently contrary to the requirements of the 2013 Act. The petitioner was not given any communication to show that the ICC, if at all constituted, came to any finding on the complaint or took any steps in that regard. The defence of NHPC that the petitioner failed to take requisite steps under the 2013 Act is a classic case of shifting the onus on the complainant when the employer has no defence to the clear non-compliance of the provisions of the 2013 Act. The case of sexual harassment filed by the petitioner therefore remained in limbo without any proper inquiry being undertaken by NHPC under the provisions of the 2013 Act.

7. The sequence of events is of some importance with regard to the second part of the controversy, that is, the charge of alleged misconduct on the part of the petitioner. A Memorandum dated 18.04.2022 was issued to the petitioner alleging incomplete audit work and other duties assigned to the petitioner. The petitioner was called upon to show cause within 5 days from the receipt of the letter as to why appropriate disciplinary action should not be taken against the petitioner for the alleged misconduct. The petitioner replied to the Memorandum by a letter dated 23.04.2022. Besides defending herself against the charge of misconduct the petitioner also raised certain allegations of inappropriate conduct against the respondent no. 6. A further advisory was issued against the petitioner with reference to discharge of assigned duties on 26.04.2022 to which the petitioner replied on 2.05.2022. The petitioner again made allegations of sexual harassment against the respondent no. 6 in the said reply.

8. The impugned document dated 30.05.2022 was issued to the petitioner with a warning not to repeat the acts of non-adherence to the instructions of her superior in the future. The petitioner wrote to the Executive Director on 3.06.2022 asking for the inquiry report, copies of statements of individuals and data of the evidence produced during the preliminary inquiry together with findings arrived at in respect of the complaint against the respondent no. 6. The petitioner also lodged an FIR against the respondent no. 6 on 16.06.2022. The impugned show cause notice dated 20.06.2022 was thereafter issued upon the petitioner requiring the petitioner to explain the reasons for certain allegations of misconduct detailed in the said show cause notice.

9. The above sequence of letters exchanged between the petitioner and NHPC shows two striking features. First, the warning and show cause were issued after the petitioner leveled charges of sexual impropriety against the respondent no. 6. Second, the impugned show cause notice dated 20.06.2022 appears to be a consequence of the inquiry conducted on the petitioner's complaint of sexual harassment against the respondent no. 6. The contents of the show cause notice make it evident that the inquiry against the respondent no. 6 resulted in the findings of the misconduct against the petitioner which have been stated in the show cause notice. The specific allegations of misconduct came up for the first time in the show cause notice and did not find place either in the Memorandum dated 18.04.2022 or in the warning dated 30.05.2022.

10. There is hence every reason to presume that the show cause notice was retaliatory in nature and was in consequence of the allegations of sexual harassment made by the petitioner against the respondent no. 6. This view is strengthened by the fact that the petitioner also lodged an FIR against the respondent no. 6 on 16.06.2022, four days before the show cause notice. The correctness of the allegations of misconduct made in the impugned notice dated 20.06.2022 would have assumed some importance had the said notice been issued under the Rules framed by NHPC for dealing with complaints of this nature. The basis of this view follows in the next paragraph.

11. The NHPC Conduct Discipline and Appeal Rules provides for a comprehensive set of rules in cases of misconduct and punishments for certain offences committed by employees of NHPC. The Rules were amended in 2022 pursuant to an Office Order published on 08.04.2022. Rule 29 – “Procedure for imposing Major Penalties”– provides for cases where the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehavior against any employee. The disciplinary authority may either look into the matter itself or appoint any inquiry authority to do the needful (Rule 29.2). Rule 29.3 underlines the procedure to be adopted where an inquiry is proposed. In that case, the disciplinary authority shall deliver to the employee a copy of the articles of charge, the statement of the imputations of misconduct / misbehaviour and a list of documents and witnesses by which each article of charge is proposed to be sustained. On receipt of the articles of charge the employee shall be required

to submit his / her written statement of defence and also state whether the employee desires to be heard in person within a period of 15 days which may also be extended for 15 days at a time for reasons to be recorded in writing by the Disciplinary Authority. Rule 29.4 provides for the next stage that is, after receipt of the written statement of defence from the person against who allegations of misconduct have been made, the disciplinary authority may itself inquire into such of the articles of charge as are not admitted by the person or appoint under Rule 29.2, an inquiring authority to take further steps in that regard.

12. None of the above Rules, namely, Rule 29.2, 29.3 and 29.4, were followed in the present case. The Memorandum issued to the petitioner dated 18.04.2022 asked the petitioner to show cause in writing within 5 days as to why appropriate disciplinary action should not be taken against the petitioner. The said Memorandum did not contain the imputations of misconduct or a list of documents or witnesses by which each articles of charge was proposed to be sustained. This was against Rule 29.3. The petitioner was also given 5 days' time to show cause whereas Rule 29.3 clearly mentions a period of 15 days which may also be extended further. The non-compliance continued to Rule 29.4 under which the Disciplinary Authority was required to take certain further steps upon receiving the written statement of defence from the petitioner.

13. The non-compliance becomes even more pronounced by the letter of the petitioner dated 3.06.2022 whereby the petitioner requested NHPC to provide the Inquiry Report, a copy of statements of all the individuals, data of the evidence produced during preliminary inquiry and the findings of the preliminary inquiry. Admittedly, none of the aforesaid documents were provided to the petitioner.

14. This Court is therefore of the view that the proceedings initiated against the petitioner were (i) in retaliation of the sexual harassment complaint made by the petitioner against the respondent no. 6 and (ii) contrary to the Conduct Discipline and Appeal Rules of NHPC which NHPC was bound to follow before initiating any disciplinary action against the petitioner. The contention that the petitioner has not suffered any prejudice from the impugned show cause notice is without basis since the impugned show cause notice was issued without complying with the Rules. NHPC also failed to discharge its duty as an employer to follow up with the sexual harassment complaint made by the petitioner as required under the 2013 Act.

15. *Special Director vs. Mohd. Gulam Ghouse; (2004) 3 SCC 440, Executive Engineer Bihar State Housing Board vs. Ramesh Kumar Singh; (1996) 1 SCC 327 and Chanan Singh vs. Registrar Co-op Societies. Punjab; (1976) 3 SCC 361* have been cited as instances where the writ petitions were considered to be premature since the petitioners therein did not suffer any prejudice by the show cause notices. The Supreme Court however made it clear that a Court

can invoke powers under Article 226 of the Constitution where it is shown that the show cause notice was issued without any authority or jurisdiction. The present case fits into the aforesaid exception as it has been found that the respondents did not follow the procedure framed by the respondent no. 1 for issuing a notice in relation to the allegations of misconduct or misbehavior.

16. A common issue with regard to cases of this nature is that the person proceeded against resorts to allegations of sexual harassment as a shield against charges of misconduct. The present case is the opposite. The employer has mixed up the boundaries of sexual harassment and professional misconduct. The demarcation between the two is required to be kept intact for effective implementation of the 2013 Act. Allegations of sexual impropriety or harassment can neither be used as a shield nor as a sword. The dissipation of boundaries at the behest of the employer will only result in misuse of the Act which is for protection of the fundamental rights of a woman including the right to equal treatment under Articles 14 and 15 of the Constitution coupled with the right to live with dignity under Article 21 of the Constitution. The 2013 Act further safeguards the right to practice any profession or carry on any occupation which includes a right to a safe environment free from sexual harassment.

17. Being of the considered view that the impugned Report and the show cause notice dated 30.05.2022 and 20.06.2022 respectively cannot be sustained either in fact or under the Rules framed by the respondent no. 1,

WPA 1935 of 2022 is allowed by quashing both the impugned notices. The respondents are accordingly directed not to give further effect to the impugned notices.

18. The writ petition is disposed of accordingly.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)