

30-11-2023
ct no. 13
Sl. 10
sp

WPA 3049 of 2023

Atul Agarwal

-Versus-

Bandhan Bank Limited & Ors.

Mr. Kaushik Dey,
Mr. Rajnish Kr. Kalawatia,
Mr. Sunny Nandy,
Mr. Subho Pathak,
Mr. Abdullah Bin Masi

...for the petitioner

Mr. Lakshmi Kumar Gupta,
Mr. Siddhartha Banerjee,
Ms. Soni Ojha,
Ms. Sonia Nandy

..for the respondent Bandhan Bank

1. The subject matter of the instant writ petition is the punishment order dated November 10, 2022 discharging him from service, passed by the Bandhan Bank Limited against the petitioner who was the branch head of the said bank of the Howrah Maidan Branch.

Facts of the Case

2. The proceedings leading to the punishment order was a complaint of sexual harassment lodged by co-worker of an associate (Insurance partner) of the bank in the same branch.
3. The complainant was posted in the same branch to function in tandem with the

officials of the bank. The complaint is dated July 6, 2022.

4. The substance of the complaint is that on July 5, 2022, the complainant had reported to the branch. On the next day, the complainant was asked to sit by the petitioner in his cabinet in front of him for a substantial part of the day. He thereafter asked the complainant and two other personnel in the branch to accompany him to a local fair on the occasion of Ratha Yatra.
5. In the fair, the complainant alleged that she was put in a position to sit next to the petitioner on a ferris wheel. While the wheel was in motion, the petitioner was alleged to have inappropriately touched the complainant. The complainant accused the petitioner of sexual harassment.
6. The complaint was referred to the Internal Complaints Committee (ICC) of the bank. The petitioner responded in writing to the complaint denying all charges. Evidence of 7 witnesses was recorded. The ICC found the petitioner guilty of the allegation in the complaint.
7. The petitioner was furnished with all the evidence that came on record and he represented against the same in writing.

Both the complainant and the petitioner were personally heard by the ICC. On the basis of the findings of the ICC and its recommendation, the impugned order of punishment dated November 10, 2022 was passed whereby the petitioner was discharged from his service.

Arguments on behalf of the Petitioner

8. The learned counsel Mr. Kaushik Dey, appearing for the petitioner would argue that the procedure adopted by the bank is in violation of the provisions of the Rules for sexual harassment in the bank as also the Protection of Women against Sexual Harassment Act of 2013 (POSH Act, 2013). Procedural impropriety is also alleged. Perversity of the findings of the ICC is argued in the following manner,

(a) The complainant who admittedly took a second ride on the Ferris along with the petitioner after the alleged inappropriate behaviour of the petitioner in course of the first ride. The allegation of inappropriate behaviour is, therefore, ex facie incorrect. The finding of the ICC is, therefore, perverse.

- (b) There is no finding of actual sexual harassment by the ICC. The question of any penalty or punishment on the petitioner on that score, therefore, does not and cannot arise.
- (c) The petitioner did not get a chance to cross-examine any of the 7 witnesses examined before the ICC. There was, therefore, violation of principles of natural justice. The proceedings are, therefore, vitiated and liable to be quashed.
- (d) The ICC in terms of Sections 13 and 14 of the said Act did not recommend any penalty to the bank. The copy of the recommendation annexed to the petition does not contain any recommendation. The impugned order of punishment is, therefore, illegal.
- (e) The petitioner had submitted a detailed representation against the findings of the ICC. There was no second show cause notice issued to the petitioner before the order of punishment was made. The final order of punishment, therefore, is vitiated.
- (f) The order of punishment of discharge includes within it other considerations

apart from the subject matter of the complaint and the proceedings before the ICC. An appropriate independent departmental enquiry within the rules of the bank to impose a punishment of discharge was warranted. It is, therefore, argued that the penalty imposed on the petitioner has been without any enquiry and hence calls for interference by this Court.

9. The order of punishment, even assuming for the sake of argument that the proceedings are in accordance with law, is excessive and disproportionate to the charges and the findings of the ICC.

Court's Findings and Analysis

10. When this Court took up the matter after receiving the affidavits, it found that a Co-ordinate bench had in essence upheld the maintainability of the writ petition against the employer who was a private bank limited by shares. The interim finding was arrived at on the ground that the subject matter of sexual harassment at work place and the proceedings against the petitioner are statutory in nature since they flow out of the POSH Act, 2013.

11. But for the subject matter of proceedings against the petitioner arising out of a statute (POSH Act 2013), the employment of the petitioner with the Bandhan Bank Limited, would not have attracted any public law element, to maintain a writ petition under Article 226 of the Constitution of India.
12. On the argument of the learned counsel for the petitioner, that the order of punishment in the instant case, travels beyond the scope of the statutory provisions, this Court is of the clear view that it had no jurisdiction to enter into same. As already stated above the same would have to be the subject matter of any independent civil or other proceedings.
13. Let us now examine the arguments advanced by the learned counsel for the petitioner as regards the legality and propriety of the ICC proceedings, based on the POSH Act, 2013.
14. It appears to this Court that since the petitioner was furnished with a copy of the complaint and was allowed to make a written representation; and that he was allowed copies of the deposition of all 7 witnesses, and was thereafter heard in person after receiving a written representation there against, there is substantial compliance of the principles of natural justice.

15. What, however, remains to be examined is as to whether the petitioner had any right of cross-examination of any of the witnesses who deposed before the ICC.
16. A plain reading of the procedure prescribed under Sections 11, 12 and 13 of the POSH Act, 2013 and the rules framed thereunder, namely, the POSH Rules of 2013 clearly indicate that the right of cross-examination is not specifically provided thereunder.
17. An enquiry under the ICC constituted under the POSH Act, 2013 is a quasi judicial proceeding. It need not follow the strict principles of evidence or the procedure of a regular trial civil or criminal. Mere denial of cross-examination by itself would not vitiate a process of enquiry of this nature. The petitioner even otherwise did not formally pray for a right to cross-examine any of the witnesses or even the complainant in course of enquiry. In the above circumstances, any further discussion on the subject would be academic if not an idle formality.
18. On this issue it would, however, be useful to refer to paragraph 17 of the judgment of the Kerala High Court in **L.S. Sibbu Vs. Air India & Ors.** reported in **(2016) SCC OnLine Ker**

511. The said decision has been upheld by a Division Bench of this Court.

“17. The fundamental principles relating to the principles of natural justice is that when a prejudicial statements are made, the same shall not be used against any person without giving him an opportunity to correct and contradict. In sexual harassment complaint, sometimes the complainant may not have courage to depose all that has happened to her at the work place. There may be an atmosphere restraining free expression of victim's grievance before the Committee. The privacy and secrecy of such victims' also required to be protected. It is to be noted that verbal cross examination is not the sole criteria to controvert or contradict any statement given by the aggrieved before any authority. Primarily, in a sexual harassment complaint, the committee has to verify and analyse the capability of the aggrieved to depose before them fearlessly without any intimidation. If the Committee is of the view that the aggrieved is a feeble and cannot withstand any cross examination, the Committee can adopt such other measures to ensure that the witnesses statement is contradicted or corrected by the delinquent in other manner. The fair opportunity, therefore, has to be understood in the context of atmosphere of free expression of grievance. If the Committee is of the view that the witness or complainant can freely depose without any fear, certainly, the delinquent can be permitted to have verbal cross examination of such witnesses. In cases, where the Committee is of the view that the complainant is not in a position to express freely, the Committee can adopt such other method permitting the delinquent to contradict and correct either by providing statement to the delinquent and soliciting his objections to such statement.”

19. In **Aureliano Fernandes Vs. State of Goa** reported in **2023 SCC OnLine SC 621** at Para 64, it was held as follows:-

“64. Rule 14 prescribes the procedure required to be followed for conducting an inquiry by a Public Authority which entails issuance of a charge sheet, furnishing

details of the Articles of Charge, enclosing statements of imputations in respect of each article of charge, forwarding of a list of witnesses and the documents sought to be relied upon by the Management/employer. The said procedure may not have been strictly followed by the Committee in the present case, but it is not in dispute that all the complaints received from time to time and the depositions of the complainants were disclosed to the appellant. He was, therefore, well aware of the nature of allegations levelled against him. Not only was the material proposed to be used against him during the inquiry furnished to him, he was also called upon to explain the said material by submitting his reply and furnishing a list of witnesses, which he did. Furthermore, on perusing the Report submitted by the Committee, it transpires that depositions of some of the complainants were recorded audio-visually by the Committee, wherever consent was given and the appellant was duly afforded an opportunity to cross-examine the said witnesses including the complainants. The charges levelled by all the complainants were of sexual harassment by the appellant with a narration of specific instances. Therefore, in the given facts and circumstances, non-framing of the Articles of Charge by the Committee cannot be treated as fatal. Nor can the appellant be heard to state that he was completely in the dark as to the nature of the allegations levelled against him and was not in a position to respond appropriately. So far, so good.”

20. It is, therefore, held that the enquiry would not be vitiated merely based on the fact that the petitioner could not cross-examine the complainant or any of the witnesses in the facts and circumstances of the case. In fact cross-examination of witnesses or the complainant could be replaced with other methods of testing the veracity of the

evidence of a witness in an enquiry under the POSH Act, 2013.

21. It would not be out of place to mention here that a large number of other enquiries of this nature and sensitivity under various other statutes do not provide for any cross-examination of witnesses. One clear case that comes to the mind of this case are proceedings before the Banking Ombudsman.
22. In respect of argument that the ICC had not recommended any penalty or punishment to the petitioner in its findings, this Court is of the view that it is for the bank to take an appropriate decision on the basis of its own rules as to what penalty would be imposed on the findings of the ICC. Any omission by the ICC in this regard would not be fatal to the proceedings.
23. Across the bar today, in course of hearing, a document has been handed over which is the actual report of the ICC which has, in fact, recommended that the petitioner should be discharged from his service of the bank. There is no evidence that the petitioner did not have the last page of the recommendation of the ICC.

24. Even assuming that the petitioner did not know of the recommendation of the ICC on the punishment, applying the prejudice theory, as expounded in the decision of the ***State Bank of Patiala Vs. S.K. Sharma*** reported in ***(1996) 3 SCC 364***, this Court finds no serious prejudice having been caused to the petitioner without the last page recommendation of the ICC being made available to him. He had, in fact, made a detailed representation against the main findings.
25. The principles of a mandatory issue of a second show cause notice in respect of departmental proceedings as laid down by the Hon'ble Supreme Court in the case of ***Managing Director, ECIL, Hyderabad and others Vs. B. Karunakar and others*** reported in ***(1993) 4 SCC 727***, cannot be imported and applied to proceedings under the POSH Act, 2013. They are applied to General Discipline and Appeal Rules of bodies. Proceedings in respect of sexual harassment of women at workplace stand on a slightly different footing. There is a lesser degree of leverage conferred on an employer after conclusive finding, and recommendation of the ICC.

26. Coming to the main argument of perversity in the findings of the ICC, the argument of Mr. Dey that the complainant would not have gone in for a second ride on the ferris wheel with the petitioner had she been, in fact, inappropriately touched, is a matter that cannot entered into by a writ Court.
27. The findings of the ICC must be held as conclusive and sustained in the facts of the case. There is clear evidence of inappropriate behaviour of the petitioner on record. The findings are based on the evidence on record and not on extraneous materials. Even if another plausible view is possible in the facts of the case, a writ Court under Article 226 of the Constitution of India cannot substitute the other view on the employer. A writ court while reviewing administrative action applies the Wednesbury test and the settled principles of judicial review followed consistently in this country. The impugned order therefore cannot be deemed perverse at all.
28. On the question of proportionality of punishment this Court finds a much more limited scope of interference in cases of Sexual Harassment. Even applying the test of proportionality expounded in the cases of

Ranjit Thakur Vs. UOI reported in **(1987) 4 SCC 611** and **UOI Vs. G. Ganayutham** reported in **(1997) 7 SCC 463**, this Court does not find that the punishment imposed on the petitioner is shocking or disproportionate to the charged proved against the petitioner.

Conclusion

29. For the reasons stated hereinabove, this Court is of the view that the impugned decision discharging the petitioner from service based on the findings of the ICC do not call for any interference. The writ petition shall stand dismissed.
30. There shall be no order as to costs.
31. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)