

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

Present:

The Hon'ble Justice Lapita Banerji

WPO 177 of 2019

SMT. SUMANA BHOWMICK

-Vs-

THE UNION OF INDIA & ORS.

Alongwith

WPA 11842 of 2019

M/S. BALMER LAWRIE & CO. LTD

-versus-

THE DEPUTY CHIEF LABOUR COMMISSIONER (CENTRAL) & ORS.

For the Petitioner : Mr. Debashis Banerjee, Adv.
Mr. Shuvanil Chakraborty, Adv.
Mr. Supreem Naskar, Adv

For Union of India : Mr. Sunil Kr. Singhania, Adv.
Ms. Twinkle Kaur, Adv.

For the respondent no.8 : Mr. Pinak Kr. Mitra, Adv.

For Balmer Lawrie Co. Ltd : Ms. Sonal Shah, Adv.
Mr. Kushagra Shah, Adv.

Hearing concluded on : 16.12.2022.

Judgment on : 03.02.2023.

Lapita Banerji, J.:- Two writ petitions are taken up for consideration together. In **W.P. No.117 of 2019** the petitioner, who is an ex-employee of

Balmer Lawrie & Co. Ltd., has prayed for partial modification of the Impugned Order dated January 31, 2019, passed by the Deputy Chief Labour Commissioner (Central), Kolkata/Appellate Authority. In the second writ petition being **W.P.A. No.11842(W) of 2019**, the employer/Balmer Lawrie & Co. Ltd. has prayed for setting aside and/or quashing of the same Impugned Order dated January 31, 2019, passed by the Appellate Authority under The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

2. **W.P.O. 177 of 2019** is taken up for consideration first. On January 4, 2008, the petitioner joined the services of the respondent company/Balmer Lawrie. The petitioner worked as a Deputy Manager. The petitioner was designated to the post of Deputy Manager (Sales) from June 29, 2012. Thereafter, the petitioner worked in the post of Deputy Manager – Logistics Service Department and continued in service till her dismissal vide Order dated August 4, 2016. It is alleged that the Respondent No.8/one Manas Kumar Ganguly, the then Chief Operating Officer (COO) in the Logistics Department, misbehaved with the petitioner, sometimes in July 2015. The petitioner complained to the Prime Minister's Office (PMO) through Online Grievance Cell on November 2, 2015. Upon intervention by the PMO, the petitioner received a letter from the Internal Complaints Committee (ICC) of the respondent company, on December 23, 2015.

3. On January 5, 2016, the petitioner appeared before the **ICC** for agitating her grievance. The findings of the **ICC** were dated March 2, 2016. **ICC** found

that the allegations made by the petitioner against the respondent No.8 to be vague and ambiguous and held that the charges remained unproved. Based on the recommendations of the **ICC**, disciplinary proceeding was initiated against the petitioner and the petitioner was dismissed from service. The report of the Internal Complaints Committee was dated March 11, 2016, based on which the disciplinary proceeding was initiated. The said report and recommendation dated March 11, 2016 was challenged by the petitioner by filing a writ petition being W.P. No.1107 of 2016. An Order was passed on January 24, 2017, which was assailed in an intra-court appeal. The Hon'ble Division Bench by its Order dated October 30, 2017, granted liberty to the petitioner to prefer an appeal against the Impugned report/recommendations of the **ICC** before the Appellate Authority under Section 18 of the 2013 Act. By the Impugned Order dated January 31, 2019 the Appellate Authority set aside the Report of the **ICC** dated March 11, 2016. It directed a de-novo enquiry of the complaint made by the petitioner and remanded the proceedings before the **ICC**. The petitioner in **W.P.O. 177 of 2019** has challenged the decision to remand the petitioner's complaint for fresh consideration before the **ICC**. The petitioner claims that the only appropriate authority for enquiring into the complaint of the petitioner was the Local Complaints Committee (**LCC**) and not the **ICC**.

4. Mr. Banerjee, Learned Counsel appearing on behalf of the petitioner in **WPO 177 of 2019**, submits that under Section 6 of the 2013 Act, the **LCC** is the sole authority to receive complaints of sexual harassment and enquire into the same in the event the complaint is made by an aggrieved woman against

the employer. He submits that the private respondent No.8, who being the COO, headed the Department of Logistics at the time the petitioner was working as the Deputy Manager – Logistics Service Department, was covered under the definition of “Employer” as per Section 2(g) of the 2013 Act which reads as thus:-

- (a) *“Section 2(g)(i) of the 2013 Act defines an Employer inter alia to mean the Head of the department or organization, undertaking, establishment, enterprise, institution, office, branch or unit of the appropriate government.*
- (b) *Section 2(g)(ii) defines an Employer as any person responsible for the management, supervision and control of such workplace, which are not covered by under Section 2(g)(i) of the Act.”*

5. He contends that the respondent No.8 falls with the purview of the definition of an ‘Employer’, given the way ‘Employer’ is defined in 2(g)(i) and 2(g)(ii) read with 2(b) of the Act. He further submits that the Hon’ble Apex Court by its Judgment reported in 2013(8) SCC 345 (**Balmer Lawrie & Co. Ltd. & Ors. vs. Partha Sarathi Senroy**) has held Balmer Lawrie to be an instrumentality of the State being the Central Government. Therefore, the respondent company was held to be State within the meaning of Article 12 of the Constitution of India.

6. Since the act complained of happened in the office of the respondent No.8, Section 2(o)(i) of the 2013 Act squarely covers the place of occurrence under the definition of “workplace”.

7. On the factual aspects, he submits that since admittedly the respondent No.8 was of a much superior rank than the appointing authority of the petitioner and an integral part of the management of the Department of Logistics, he classified as an “Employer” of the Petitioner.

8. Even if the issue of the **LCC** being the appropriate authority/sole authority for considering the complaint of the petitioner, was not raised by way of pleadings or during arguments by the petitioner before the Appellate Authority, the same being a point of law can be raised by the petitioner before the Writ Court and/or before the Apex Court.

9. Miss Shah, Learned Counsel appearing on behalf of the respondent Nos.2, 3, 4, 5 and 6 in **WPO 177 of 2019** and for the Petitioner in **WPA 11842 of 2019** rebuts the arguments made by Mr. Banerjee. She assails the Order dated January 31, 2019 passed by the Appellate Authority on merits. She argues that the procedure adopted by the **ICC** and the manner in which the proceedings have been conducted, are fair and without any bias and the findings of the Appellate Authority are perverse. Therefore, the Impugned Order should be set aside. The main reason that prompted the petitioner to lodge a belated complaint of purported sexual harassment was not any act or conduct by the respondent No.8, but, an ulterior motive and malafide intention of stalling her transfer.

10. Furthermore, she relies on various documents since 2011 to show that the petitioner's job is a transferable one and despite the company seeking to transfer her since 2011, she was able to stall the transfer proceeding by adopting various ploys. By an Order dated September 29, 2015, passed by a Coordinate Bench in W.P. No.1147 (W) of 2015, the petitioner's plea for setting aside of the transfer order was rejected.

11. As a counter blast to the same, the petitioner/employee made a complaint to the PMO on November 2, 2015 and the PMO directed the **ICC** of the Employer company to look into the petitioner's complaint. The **ICC** after considering the entire conspectus of the case came to the finding that the charges against the respondent No.8 were vague and unproven. It also recommended institution of disciplinary action against the petitioner, given the fact that she has been resisting transfer for so long.

12. Since the petitioner in **W.P.O. 177 of 2019** did not raise the issue of reconsideration of her complaint by the **LCC** and not by the **ICC** before the Appellate authority, the same could not be agitated before the Writ Court. It is only while filing the Notes of Arguments, the petitioner became wiser and urged the issue of consideration of her complaint/grievance de-novo by the **LCC** and not the **ICC**.

13. The contention of Mr. Banerjee is also rebutted on the ground that since Section 2 of the 2013 Act opens with the words "*unless the context otherwise requires*", every context has to be analyzed before coming to the finding whether a person is an "Employer". The definition of "Employer" is restricted to

the **head** of the department or organization, undertaking, establishment, enterprise, institution, office, branch or unit of the **appropriate government or a local authority**. Such **appropriate government** is defined in Section 2(b) to mean a workplace established, controlled, owned or wholly or substantially financed by the funds directly or indirectly by the State Government or the Central Government. Since the company is neither owned by the Central Government nor is substantially financed by it, the question of redressal of the petitioner's grievance by LCC does not and cannot arise. The company is under the administrative control of the Ministry of Petroleum and Natural Gas, whose shares are held by the public. Therefore, the definition of "Employer" as any person responsible for the management, supervision and control of the workplace, being a department or organization etc. of the appropriate government or local authority does not include the accused/respondent No.8.

14. Factually, since the respondent No.8 did not perform any of the acts envisaged in Sections 4, 12, 13, 14 and 19 of the 2013 Act, the definition of the word "Employer" is inapplicable to him.

15. She relies on various Judgments in support of her contention that the requirement of consideration by **LCC** is not mandatory and **ICC** has the jurisdiction to consider such complaints even if the Respondent No.8 is found to be the Employer.

16. Furthermore, she submits that a practical problem has arisen due to the time lapse between the directions passed by the Appellate Authority to conduct

a de-novo hearing by the **ICC** and the hearing of the Writ Petitions as the accused/private respondent no.8 and many of the witnesses have left their employment with the Employer/Balmer Lawrie. Therefore, it would be impossible for the employer to conduct a fresh hearing of the complaint made by the petitioner or enforce any penalty if imposed on Respondent No.8.

17. She relies on the Judgment of the Division Bench of the High Court at Madras passed in W.P. Nos.10689, 24290 and 4339 of 2019 (**Union of India & Ors. vs. Rema Srinivasan Iyengar & Ors**). In the said case the complainant approached the **LCC** with her complaint of sexual harassment against the Deputy Registrar of Trade Mark. The complainant was an Assistant Registrar. The accused did not appear before the **LCC**. The **LCC** passed a cryptic order. Meanwhile, an **ICC** was also constituted. The complainant objected to the said constitution. The **LCC** recommended a detailed departmental enquiry against the accused by the employer. The accused complained that he ought to be heard before such recommendation was made. Furthermore, parallel proceedings before the **LCC** and **ICC** could not be continued. The complainant approached Central Administrative Tribunal (CAT) for declaration that the constitution of the new **ICC** was also invalid. CAT held that constitution of **ICC** was bad since the **LCC** was the only authority which could enquire into the complaints made by the complainant.

18. After analyzing the generic complaints made by the complainant, it was held by the Madras High Court that the conclusion of the **LCC** was not correct. The word “sexual harassment” was mentioned repeatedly without describing

the same. The findings of **LCC** were held to be invalid. Approaching the **LCC** by the complainant was in the nature of an afterthought. Since the accused was not involved in the formation of the **ICC**, he could not be deemed to be the Employer. In those circumstances, it was held that the provision of the 2013 Act should not be allowed to be misused by the complainant. The defiant attitude of the complainant in not attending the proceedings before the **ICC** and after formation of the **ICC** and the metamorphosis of the original complaint into the one of sexual harassment before the **LCC** was not appreciated by the Madras High Court.

19. She relies on the Judgment reported in **(DAVID G. SAMUEL V. COLLECTOR/DISTRICT & MAGISTRATE, PUNE AND OTHERS)**.

20. The complainants were the employees of Union Biblical Seminary which is a Public Charitable Trust. The accused was the President of the said Trust. The allegation of sexual harassment was made by the employees against the President. An **ICC** was formed. The accused challenged the constitution of the **ICC**. The accused challenged the formation of the ICC on the ground that since the accused was an Employer, **ICC** had no jurisdiction under the 2013 Act and an **LCC** must be set up by a District Magistrate, Additional District Magistrate, Collector or Deputy Collector for enquiring into the said complaint.

21. The enquiry was conducted by the **ICC** and in January, 2021 it was decided in favour of the complainants. In that case, the Court held that the attempts of the accused to curtail the powers of the **ICC** by seeking to shift the

proceedings to **LCC** cannot be accepted. The accused cannot skip the consequences of his actions by resorting to procedural formality.

22. She relies on a Judgment reported in 2020 SCC OnLine Delhi 1555 (**Rassi vs. Union of India & Anr.**) in which it was held that a victim/complainant can approach the **LCC** if the complaint was against the Employer himself. However, **ICC** should not be allowed to be easily replaced or done away with, as the basic scheme of the Act is for appointment of **ICC** and only if no alternative is available, should the victim be asked to approach the **LCC**. The said Judgment was mainly concerned with the question of reconstitution of **ICC** on the ground of bias. The Hon'ble Coordinate Bench was of the view that only when no alternative is available, the victim should be asked to approach the **LCC**. If an **ICC** can be constituted by senior members of the Department to which the complainant did not belong, then the purpose and spirit of the 2013 Act would be served. Persons, who have served under the accused or in the same position of the accused in the same department, may face difficulty in treating a complaint in an unbiased manner.

23. She also relies on a Judgment reported in 2014 SCC OnLineBom 814 (**Jaya Kodate vs. Rashtrasant Tukdoji Maharaj Nagpur University**). In that case it was held that **ICC** will have jurisdiction on every person, who can be placed as an Employer if he/she is a respondent and falls under otherwise a wider definition of the term "Employer". The jurisdiction of the **ICC** cannot be curtailed only because the respondent can be held to be an Employer of the victim/complainant. It was held that since the complaint was against the

President or Secretary or Principal, the argument that the **LCC** was alone competent to enquire into the matter, was uncalled for.

24. It is submitted by Mr. Mitra appearing on behalf of the private respondent No.8 that the scope of judicial review by the Constitutional Courts is very limited. Judicial review is not an appeal from the decision of the Appellate Authority but review of the decision making process. The Courts must bear in mind the inheritant restraints and should only interfere if the punishment is shockingly disproportionate and against the principles of Natural Justice. In the present case, the petitioner has not agitated that she did not receive a fair hearing and the principles of Natural Justice were not complied with. He refers to the decisions in (1995) 6 SCC 749 (**B.C. Chaturvedi vs. Union of India & Ors.**), (2003) 3 SCC 583 (**Lalit Popli vs. Canara Bank & Ors.**) and in (2020) 9 SCC 471 (**Pravin Kumar vs. Union of India & Ors.**), in support of his contention.

25. He further submitted that a party should not be allowed to agitate new points beyond his pleadings. The petitioner for the first time raised the issue of a de novo trial by the **LCC**. **ICC's** jurisdiction was questioned for the first time in the Written Notes of Arguments. The Appellate Authority did not get an opportunity to consider the same as it was not placed in the Memorandum of Appeal or during arguments. In support of his contention, he relies on the decision reported in (2003) 4 CompLJ 333 Cal (**Bharat Bhari Udyog Nigam Ltd. vs. Jessop & Co. Ltd Staff Association & Anr.**).

26. The Writ Court should not entertain a plea for the first time that was not canvassed before. The Writ Court should only examine procedural correctness and not go into the merits like allowing a plea to be raised for the very first time before the Appellate Authority. In the absence of procedural irregularity, the Writ Court should not interfere with the decision of the Appellate Authority. In support of his contention, he relies upon the decisions reported in (1996) 6 SCC 584 (**Haryana Urban Development Authority &Anr. vs. Ruchira Ceramics &Anr.**) and (2003) 7 SCC 350 (**Ramesh Chand Ardawatiya vs. Anil Panjwani**).

27. On facts, he submitted that **LCC** was not the appropriate authority to decide the complaint of the petitioner. The private respondent No.8 is not the Employer of the petitioner. **ICC** was not constituted by him as he was not an Employer. The respondent No.8 is just a salaried employee like that of the petitioner albeit in a higher rank. The respondent No.3 is a big organization with a proper **ICC**. Admittedly, the organization is so big that the petitioner herself was unaware of existence of the **ICC** within the company and lodged a complaint with the PMO. In support of his contention he refers to Writ Petition (C) No.705 of 2018 (**P.S. Malik vs. High Court of Delhi &Anr.**).

28. Having considered the rival submissions of the parties and the materials placed on record, This Court is of the view that:

- (i) The petitioner in **W.P. 177 of 2019**/employee approached the Appellate Authority pursuant to the Order passed by the Hon'ble Division Bench of this Court.

- (ii) The Appellate Authority remanded the matter to the Presiding Officer, Internal Complaints Committee (**ICC**) for re-hearing and submission of the report afresh.
- (iii) The Appellate Authority was of the view that no opportunity was given to the petitioner to cross-examine the witnesses and a complaint of sexual harassment is very complex and sensitive and, therefore, a confidentiality aspect should have been maintained.
- (iv) It also felt that there was not much substance in the recommendation that the petitioner should be dismissed as her complaint was malicious and frivolous. Such opinion was based on inadequate proof as required under Section 14 of the Act.
- (v) The Appellate Authority rejected the issue of maintainability raised by the respondent company/Employer.
- (vi) All the contentions of the petitioner/Employee have been considered in detail.
- (vii) The defence raised by the Employer was also examined in detail.
- (viii) Submissions/contentions of the private respondent/accused were also taken into consideration by the Appellate Authority.

- (ix) The Appellate Authority applied its mind before coming to the conclusion of setting aside the findings of the **ICC** dated March 2, 2016 along with the report/recommendations of the ICC dated March 11, 2016.
- (x) There is no allegation with regard to the fact that the Appellate Authority acted de hors the principles of Natural Justice and failed to give a fair hearing to either the Employee or the Employer or the accused.
- (xi) Admittedly, no pleading was made before the Appellate Authority regarding the adjudication of the complaint afresh by the **LCC**.
- (xii) Only at the time of filing of the Written Notes of Arguments, the issue regarding **LCC** being the sole authority having jurisdiction to investigate the complaint of the petitioner was raised.
- (xiii) It is urged by the Petitioner that since the accused/private respondent No.8 is the Employer, **LCC** has the sole jurisdiction to adjudicate the issue of sexual harassment under the Act.
- (xiv) Whether or not the respondent No.8 was an Employer within the meaning of the Act, would require a fact finding exercise in terms of the victim and the accused's nature of

duty, the accused's role in the management of the company and control over the members of the **ICC**.

- (xv) Such a fact finding exercise cannot be done by the Writ Court. Furthermore, in the event the Respondent no.8 has already left Balma Lawrie/Respondent No. 8 there is no possibility of control over the members of the **ICC**. Furthermore, this Court finds that the petitioner should not be allowed to travel beyond her pleadings.
- (xvi) The provisions of the 2013 Act have been enacted in order to protect the women.
- (xvii) The mischief that the enactment of Section 6 was trying to prevent, was unfair treatment or lack of a fair investigation and trial, in respect of a complaint in the nature of sexual harassment of a woman at the workplace, that the accused being in a position of influence and control of the **ICC** members may seek to exercise.
- (xviii) From the Judgments cited by Miss Shah, it appears that the jurisdiction of **ICC** has been preserved by the Courts. Usually it is the victim's choice whether or not to approach the **ICC**. The victim cannot be precluded from approaching the **ICC** just because an alternative forum is available. On the other hand the victim cannot be forced to agitate her

complaint before the **ICC** when the accused is an Employer within the meaning of the Act.

- (xix) Such protection given to the victim has to be weighed against the harassive and frivolous complaints made by the employees for an ulterior motive/gain.
- (xx) In the event the Petitioner/victim was of the opinion that no fair trial will be conducted by the **ICC**, the same should have been brought to the notice of the Appellate Authority.
- (xxi) The Appellate Authority should have been invited to apply its mind to the question whether the private respondent No.8 would qualify as an “Employer” of the petitioner/victim.
- (xxii) In the event it was found to be affirmative within the meaning of 2013 Act, then, the petitioner should have been given the choice to either approach the **LCC** or the **ICC** for fresh adjudication of her complaint. Without inviting the Appellate Authority to adjudicate upon the issue, it cannot be now alleged that the decision making process of the Appellate Authority with regard to remanding the matter before the **ICC** instead of **LCC** is bad, perverse and dehors the principles of Natural Justice.
- (xxiii) This Court agrees with the contentions of the private respondent No.8 on the issue that the Writ Court is not a

Court of Appeal and it is the decision making process that is to be examined in Judicial Review and not the decision, itself.

(xxiv) Therefore, the contentions made on behalf of the employer in **W.P. 11842(W) of 2019** cannot be accepted. In the said Writ Petition the petitioner/Employer invited the Writ Court to re-appreciate the evaluation of the evidence made by the Appellate Authority and set aside the Impugned Order passed by the Appellate Authority on January 31, 2019.

(xxv) This Court finds that since there is no allegation regarding the lack of a fair hearing given to the parties or the principles of Natural Justice not being complied with, there is no scope of interference with the Impugned Order passed by the Appellate Authority.

29. In the light of the discussions above, **WPO 177 of 2019** is **disposed of** with the direction that in the event the petitioner therein/employee makes an application for Review of the Impugned Order before the Appellate Authority within 2 weeks from date in the light of Section 6 of the 2013 Act, the same may be considered and disposed of by the Appellate Authority within 12 weeks of making of the representation.

30. This Court cannot sit in appeal over the Impugned Order passed by the Appellate Authority in Judicial Review and is of the view that there was no error of law on the face of the records/mala fide intent/bias/procedural impropriety/violation of principles of Natural Justice in passing of the Impugned Order. Accordingly, **WPA 11842 of 2018** is **dismissed** without any order as to costs.

31. All parties to act on the downloaded server copy of this order from the website.

32. Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon compliance of all the requisite formalities.

(Lapita Banerji, J.)