THE HIGH COURT OF SIKKIM : GANGTOK

(CIVIL EXTRA ORDINARY JURISDICTION)

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

WP(C) No. 30 of 2019

Silajit Guha,
Son of late N.C. Guha,
Professor,
Department of xxx (name withheld),
Sikkim University.

..... **Petitioner**

Versus

1. Sikkim University,
Represented by and through the Registrar,
6th Mile Tadong,
Gangtok,
East Sikkim.

2. The Vice Chancellor,
Sikkim University,
6th Mile Tadong,
Gangtok,
East Sikkim.

3. The Executive Council,
Represented by and through the Vice Chancellor,
Sikkim University,
6th Mile Tadong,
Gangtok,
East Sikkim.

4. The Internal Complaints Committee,
Sikkim University,
Represented by and through the Chairperson,
6th Mile Tadong,
Gangtok,
East Sikkim.

5. Ms Rxxx (name withheld),
A student of xxx (name withheld)
in xxx (name withheld),
Sikkim University Department,
6th Mile Tadong,
Gangtok,
East Sikkim.

..... **Respondents**

Appearance:

Mr. Kalol Basu, Advocate with Mr. Suman Banerjee and Mr. Ranjit Prasad, Advocate for the Applicant.

Mr. Karma Thinlay Namgyal, Senior Advocate with Mr. K.T. Gyatso, Advocate, for the Respondents No. 1 to 4.

Mr. Karma Thinlay Namgyal, Senior Advocate with Mr. K.T. Gyatso, Advocate, for the Respondent No. 5.

Application under Article 226 of the Constitution of India.

Date of hearing : 16.10.2020, 17.10.2020, 12.11.2020 & 13.11.2020

Date of judgment: 08.12.2020

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The present writ petition has been filed by the petitioner, who was a Professor in a Department of the respondent no.1 [Sikkim University (University)]. Pursuant to a complaint of sexual harassment filed by respondent no.5 (a student of that Department), the respondent no.4 [the Internal Complaints Committee (ICC)], conducted an inquiry and forwarded the inquiry report dated 08.06.2019 to the Executive Council of the University, i.e., respondent no.3 (Executive Council). The petitioner was issued a show cause notice dated 10.06.2019, in which the inquiry report was also enclosed. On 21.06.2019, the petitioner replied to the show cause notice. On 28.06.2019, the Registrar of the University issued office order bearing no. 201/2019 dated 28.06.2019, in which the petitioner

was informed that the Executive Council in its 33rd Meeting held on 28.06.2019 considered the inquiry report of the ICC and the representation made by the petitioner under clause 8(6) of the University Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015 (UGC Regulations) and that the Executive Council had come to the conclusion that the petitioner was not fit to be retained in the service of the University and had imposed the major penalty of termination of service with immediate effect. Thereafter, on 01.07.2019, the petitioner preferred a statutory appeal. It is the petitioner's case that the impugned office order was received by him only on 03.07.2019. The writ petition seeks the quashing of the show cause notice dated 10.06.2019, the inquiry report dated 08.06.2019 and the order of termination dated 28.06.2019 and for various other consequential reliefs.

2. Heard Mr. Kalol Basu, learned Advocate for the petitioner and Mr. Karma Thinlay Namgyal, learned Senior Advocate for the Respondents.

3. Mr. Kalol Basu submitted that the facts would reveal that the alleged act complained of by the respondent no.5 was an act purportedly committed at a wedding reception in a hotel beyond the definition of "workplace" under section 2(o) of the

Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Act of 2013). Consequently, he submitted that the ICC did not have the jurisdiction to examine the complaint and give the impugned inquiry report. He relied upon the judgments of the Supreme Court in ***Regional Director, E.S.I Corporation and Another vs. Francis De Costa and Another***[1], ***Shakuntala Chandrakant Shreshti vs. Prabhakar Maruti Garvali and Another***[2] and ***Daya Kishan Joshi and Another vs. Dynemech Systems Private Limited***[3]**.** It was his contention that sweeping definition cannot be given to the term "workplace" relying upon the judgment of Delhi High Court in ***Saurabh Kumar Mallick vs. Comptroller & Auditor General of India & Anr***[4]. He further submitted that Regulation 8(4) of the UGC Regulations provided that the Executive Authority of Higher Educational Institution (HEI) shall act on the recommendations of the committee within a period of thirty days from the receipt of the inquiry report unless an appeal against the findings is filed within that time by either party. As admittedly, the petitioner had preferred an appeal on 01.07.2019, before the expiry of the thirty days as provided in Regulation 8(4) of the UGC Regulations, the termination order dated 28.06.2019 was illegal. Mr. Kalol Basu also submitted that since the Act of 2013 has penal consequences, it must be strictly construed and for construction

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[1] (1996) 6 SCC 1
[2] (2007) 11 SCC 668
[3] (2018) 11 SCC 642
[4] 2008 SCC Online Del 563

of a penal statute, if two views are possible, then the one which supports the accused is to be adopted. For the said propositions, he relied upon ***Tolaram Relumal and Another vs. State of Bombay***[5]. Mr. Kalol Basu further submitted that the proceeding before the ICC was not conducted in the manner prescribed. To support his contention, he relied upon ***Zuari Cement Limited vs. Regional Director, Employees' State Insurance Corporation, Hyderabad and Others***[6]**.** He relied upon ***Khem Chand vs. Union of India and Others***[7] to argue that in the inquiry before the ICC, his right to cross-examination had been denied and the principles of natural justice violated. He also referred to ***Dr. Vijayakumaran C.P.V. vs. Central University of Kerala and Others***[8] and ***Medha Kotwal Lele and Others vs. Union of India and Others***[9]**,** to impress upon this court that in the present proceeding, the UGC Regulations and CCS/CCA Rules, were applicable.

4. Mr. Karma Thinlay Namgyal on the other hand submitted that since the Act of 2013 is a social and a beneficial legislation, the definition of workplace must receive a wider interpretation and if it was so done then the act complained of by the respondent no.5 would fall within the definition of workplace and more specifically under section 2(o)(v), i.e, "*any place visited by the employee arising out of or during the course of employment*

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[5] (1955) 1 SCR 158/AIR 1954 SC 496
[6] (2015) 7 SCC 690
[7] AIR 1958 SC 300
[8] 2020 SCC Online SC 91
[9] (2013) 1 SCC 311

including transportation provided by the employer for undertaking such journey". It was his submission that the legislature has purposely used the disjunctive word "or" between the two set of words, i.e., "arising out of" and "during the course of". Therefore, while the meaning ascribed by the Supreme Court in ***Shakuntala Chandrakant Shresthi*** (supra) and ***Daya Kishan Joshi*** (supra) would be applicable to interpret the two sets of words as used in section 2(o), the use of the word "or" in between them would bring any place visited by the employee either "arising out of" employment or "during the course of" employment within the mischief of the provision. He further submitted that the complaint by the respondent no.5 was not only restricted to the incident of 05.05.2019 at the wedding reception, but also for other similar instance where the petitioner had allegedly touched the respondent no.5 inappropriately. He, therefore, submitted that it would not be correct to nonsuit the complaint of the respondent no.5 on examining only the incident of 05.05.2019 at the wedding reception. He relied upon the judgment of the Supreme Court in ***Fakir Mohd. (dead) by LRS vs. Sita Ram***[10] and ***State of Uttar Pradesh vs. C. Tobit And Others***[11]. Relying upon ***Gaurav Aseem Avtej vs. Uttar Pradesh State Sugar Corporation Limited and Others***[12]**,** it was submitted that a statute is best interpreted when we know why it was enacted and therefore, the definition of "workplace" in

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[10] (2002) 1 SCC 741
[11] AIR 1958 SC 414
[12] (2018) 6 SCC 518

the Act of 2013 ought to be interpreted not to defeat the very purpose of its enactment. Mr. Karma Thinlay Namgyal also drew the attention of this court to Regulation 8(6) of the UGC Regulations to submit that Regulation 8(4) must be read along with Regulation 8(6) of the UGC Regulations and if so done, the termination would be legally justified. He further submitted, relying upon ***State of U.P. vs. Harendra Arora and Another***[13]**,** that Regulation 8(4) of the UGC Regulations was a procedural law and every infraction of statutory provisions would not make the consequent action void. He also relied on the judgments of the Supreme Court in ***General Manager, B.E.S.T. Undertaking, Bombay vs. Mrs. Agnes***[14] and ***M.V. Bijlani vs. Union of India and Others***[15].

5. At the very outset, it is pertinent to keep in mind that admittedly, a statutory appeal is pending before the Executive Authority. Most of the issues, which have been raised in the writ petition can very well be canvassed and pressed before the Appellate Authority. Therefore, although the issues raised by the learned counsel for the parties were tempting, this court is of the opinion that at this stage it would be better to exercise restraint. Any expression of opinion by this court on issues which have been or may be canvassed before the Executive Authority may prejudice the parties. Having said that, Mr. Kalol Basu has also

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[13] (2001) 6 SCC 392
[14] (1964) 3 SCR 930
[15] (2006) 5SCC 88

pressed a jurisdictional issue before this court. In Zuari Cement Ltd. (supra), the Supreme Court held that want of jurisdiction renders orders passed by court/tribunal a nullity. Mr. Kalol Basu submits that the ICC did not have the jurisdiction to take cognizance of the complaint as the alleged incident purportedly took place in a private hotel at the wedding reception beyond the definition of "workplace". This point may have to be resolved in this writ petition since an appeal being an extension of the original proceeding, the appellate authority may not also then have jurisdiction to decide the pending appeal, if it were to be held that the ICC did not have the jurisdiction to hold the inquiry. Section 2(o) of the Act of 2013 reads as:

> ""**2. Definitions**.— In this Act, unless the context otherwise requires, —
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> .....
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> (o) "workplace" includes—
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> (i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;
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> (ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainmental, industrial, health services or financial activities

including production, supply, sale, distribution or service;

(iii) hospitals or nursing homes;

(iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;

(v) any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey;

(vi) a dwelling place or a house;"

6. The definition of "workplace" is an inclusive one and not an exhaustive one. The complaint dated 12.05.2019 alleged that the petitioner misbehaved with the respondent no.5 by touching her inappropriately and without her consent at a wedding reception of one of the faculty member's family on 05.05.2019. She further alleged that it was not the first time that the petitioner had tried to touch her inappropriately. The respondent no. 5 was examined on 15.05.2019 by the ICC in her statement. The respondent no. 5 gave a detailed account of what transpired on 05.05.2019 at the wedding reception. She along with the entire department had been invited by the Assistant Professor of the department for the wedding. She stated that the petitioner had put his hand on her back and stroked her bra strap and kept his hand there. According to her, she was wearing a kurta, slightly exposed at the back. The petitioner put his hand on the exposed part of her dress. She felt uneasy and tried to

move his hand but he grabbed her hand and said - don't you want a job .... I know you want a job. The petitioner then asked the respondent no.5 to sit down. She told him that she wanted to go to the bathroom, but the petitioner insisted her to sit down. Then the respondent no.5 pushed away forcefully and walked off. She, thereafter, narrated the story to a friend 'Nxxx' (name withheld). The respondent no. 5 also asserted that everybody in the Department knew that the petitioner targeted girl students and tried to get close to them. She asserted that one day he called her separately to his office and told her to come to the class as she was a good student and needed to excel in studies. According to the respondent no.5, she could make out what kind of intention he had when he said that. The respondent no.5 further complained that there were other girls facing the same issue but they did not want to come out and speak. According to the respondent no.5, all the girls had accepted that he had touched them inappropriately. Ms 'Nxxx' was also examined by the ICC who corroborated the statement of the respondent no.5 regarding the incident at the wedding reception. According to Ms 'Nxxx', the petitioner made them feel uncomfortable by the way he looked at them. As rightly pointed out by Mr. Karma Thinlay Namgyal, the complaint was not with regard to an isolated incident at the wedding reception but was also with regard to other incidents, one of which transpired in the office of the petitioner. It cannot be argued that the petitioner's office is not a

"workplace" as defined in section 2(o) of the Act of 2013. Section 9 of the Act of 2013 provides that a complaint of sexual harassment at workplace can be made within a period of three months from the date of incident or in case of a series of incidents, within a period of three months from the date of last incident. The last incident in the present case transpired on 05.05.2019 and the complaint was filed on 12.05.2019, within seven days after the date of the last incident. In such circumstances, prima facie, it cannot be said that the ICC did not have the jurisdiction to examine the complaint filed by the petitioner. It is noticed that the petitioner has taken the ground, *inter alia*, that the alleged incident of 05.05.2019 at the wedding reception would not come within the jurisdiction of ICC as it would not fall within the definition of "workplace". Therefore, it is felt necessary to leave the question as to whether the incident at the wedding reception would come within the meaning of "sexual harassment at workplace", as provided in section 9 of the Act of 2013, to be decided by the Executive Authority in the pending appeal as well.

7. The petitioner next contends that the respondents no.1 to 4, ought to have allowed the period of thirty days as provided in Regulation 8(4) of the UGC Regulations before acting on the recommendation of the ICC. It is contended that the Executive Council having issued the impugned termination order

dated 28.06.2019 even before the expiry of the thirty days period, has made its mala fide intention manifestly clear.

8. In ***Harendra Arora*** (supra), the Supreme Court held while referring to its earlier judgment in ***Managing Director, ECIL Hydrabad and Others vs B. Karunakar and Others***[16] that it is plain that in cases covered by the constitutional mandate, i.e., Article 311(2), non-furnishing of inquiry report would not be fatal to the order of punishment unless prejudice is shown. Therefore, requirement in the statutory rules of furnishing copy of the inquiry report cannot be made to stand on a higher footing by laying down that questions of prejudice is not material therein. It was also held:

> **"13.** The matter may be examined from another viewpoint. There may be cases where there are infractions of statutory provisions, rules and regulations. Can it be said that every such infraction would make the consequent action void and/or invalid? The statute may contain certain substantive provisions, e.g., who is the competent authority to impose a particular punishment on a particular employee. Such provision must be strictly complied with as in these cases the theory of substantial compliance may not be available. For example, where a rule specifically provides that the delinquent officer shall be given an opportunity to produce evidence in support of his case after the close of the evidence of the other side and if no such opportunity is given, it would not be possible to say that the enquiry was not vitiated. But in respect of many procedural provisions, it would be possible to apply the theory of substantial compliance or the test of prejudice, as the case may be. Even amongst procedural provisions, there may be some provisions of a fundamental nature which have to be complied with and in whose case the theory of substantial

[16] (1993) 4 SCC 727

compliance may not be available, but the question of prejudice may be material. In respect of procedural provisions other than of a fundamental nature, the theory of substantial compliance would be available and in such cases objections on this score have to be judged on the touchstone of prejudice. The test would be, whether the delinquent officer had or did not have a fair hearing. In the case of *Russell* v. *Duke of Norfolk* [(1949) 1 All ER 109 (CA)] it was laid down by the Court of Appeal that the principle of natural justice cannot be reduced to any hard-and-fast formulae and the same cannot be put in a straitjacket as its applicability depends upon the context and the facts and circumstances of each case."

9. Regulation 8 of the UGC Regulations deals with the process of conducting inquiry and is quoted below:

"**8. Process of conducting Inquiry** – (1) The ICC shall, upon receipt of the complaint, send one copy of the complaint to the respondent within a period of seven days of such receipt.

(2) Upon receipt of the copy of the complaint, the respondent shall file his or her reply to the complaint along with the list of documents, and names and addresses of witnesses within a period of ten days.

(3) The inquiry has to be completed within a period of ninety days from the receipt of the complaint. The inquiry report, with recommendations, if any, has to be submitted within ten days from the completion of the inquiry to the Executive Authority of the HEI. Copy of the findings or recommendations shall also be served on both parties to the complaint.

(4) The Executive Authority of the HEI shall act on the recommendations of the committee within a period of thirty days from the receipt of the inquiry report, unless an appeal against the findings is filed within that time by either party.

(5) An appeal against the findings or/recommendations of the ICC may be filed by either party before the Executive Authority of the HEI within a period of thirty days from the date of the recommendations.

(6) If the Executive Authority of the HEI decides not to act as per the recommendations of the ICC, then it shall record written reasons for the same to be conveyed to ICC and both the parties to the proceedings. If on the other hand

it is decided to act as per the recommendations of the ICC, then a show cause notice, answerable within ten days, shall be served on the party against whom action is decided to be taken. The Executive Authority of the HEI shall proceed only after considering the reply or hearing the aggrieved person.

(7) The aggrieved party may seek conciliation in order to settle the matter. No monetary settlement should be made as a basis of conciliation. The HEI shall facilitate a conciliation process through ICC, as the case may be, once it is sought. The resolution of the conflict to the full satisfaction of the aggrieved party wherever possible, is preferred to purely punitive intervention.

(8) The identities of the aggrieved party or victim or the witness or the offender shall not be made public or kept in the public domain especially during the process of the inquiry."

10. Upon the receipt of the complaint by the ICC, Regulation 8 contemplates an inquiry within a period of ninety days from the date of the complaint and thereafter, the submission of the inquiry report within ten days from the completion of the inquiry to the Executive Authority. Regulation 8(4) provides that the Executive Authority shall act on the recommendation of the ICC within a period of thirty days from the receipt of inquiry report, unless an appeal against the findings is filed within that time by either party. Time, thus begins to run for the Executive Authority from the day it receives the inquiry report and stops only if an appeal is filed within the thirty days period. During the thirty days period as envisaged in Regulation 8(4), Regulation 8(6) provides for certain processes to be completed before acting on the recommendation of the ICC. A show cause notice answerable within ten days is mandated and

the Executive Authority is required to proceed only after considering the reply or hearing the aggrieved person. Regulation 8(5), however, provides that an appeal against the recommendation of the ICC may be filed by either party before the Executive Authority within a period of thirty days from the recommendation of the ICC. Time for the aggrieved parties begins to run from the date of the recommendation of the ICC. Thus, an aggrieved party has a statutory right to prefer an appeal within thirty days from the date of recommendation. A perusal of Regulation 8 makes it clear that the legislative intent was to ensure that the process of inquiry is not only done fairly but also, speedily. The word "act" used in Regulation 8(4) would mean to take all such steps to give effect to the recommendations including following the steps envisaged in Regulation 8(6). However, a composite reading of all the sub-clauses of Regulation 8, makes it evident that the Executive Authority could not have taken the final step of terminating the petitioner on the recommendation of the ICC before the thirty days period provided to him under Regulation 8(5) to prefer an appeal. It is noticed that an appeal is provided against the findings or/recommendations of the ICC. If during the period of thirty days as provided in Regulation 8(4), the aggrieved person preferred an appeal, then the Executive Authority must await the final outcome of the appeal before taking the final step, as in the present case, issuing the termination order dated 28.06.2019. An

aggrieved person should also be given the opportunity to prefer an appeal within the time frame as contemplated in Regulation 8(5). If the Executive Authority took the final step, as was done in the present case, before the expiry of the thirty days period, then prejudice would be writ large. Admittedly, the petitioner had preferred an appeal on 01.07.2019 and the facts disclose that he could have done so on or before 08.07.2019. Thus, the impugned order of termination dated 28.06.2019 could not have been issued. This court is, therefore, of the view that during the pendency of the appeal before the Executive Council, his termination order, bearing no. 201/2019 dated 28.06.2019, shall be kept in abeyance until the final decision in the pending appeal. The appeal before the Executive Council must be decided expeditiously after giving an opportunity of hearing to both the parties.

11. The observations made on the facts of the case is only for the purpose of addressing the arguments made by the parties and it shall not influence the Executive Council before whom the appeal is pending. All issues and questions which are open to challenge under the law and taken in the appeal shall be decided by the Executive Council in its jurisdiction as the Appellate Authority.

12. Considering the fact that the petitioner has preferred an appeal which is pending, no further orders may be required to be passed in the present writ petition.

13. The writ petition is disposed accordingly.

14. No order as to costs.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting : **Yes/~~No~~**
Internet : **Yes/~~No~~**

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