157 **09.6.2016**

2016

W.P. 2991 (W) of
with **gd**
C.A.N. 4169 of 2016
Pradip Mandal
Vs.
Union of India & Ors.

Mr. Soumya Mazumdar
Mr. Amritam Mandal
..for the Petitioner

Mr. P. S. Sengupta
Ms. Noelle Banerjee
Mr. Dipak Dey
..for the Respondent No.2.

Ms. Manali Ali
Mr. Zulfiqar Ali
..for the Respondent No.4.

The prayers in the petition under Article 226 of the Constitution are directed against an appellate order of December 3, 2015 as it upheld an order of punishment of March 3, 2015. A writ of mandamus is sought to rescind the order of punishment as affirmed in appeal and a writ of certiorari is sought to quash the order of punishment.

C.A.N. 4169 of 2016 is an application for amending the petition and incorporating additional grounds. The proposed additional grounds appended to the amendment application pertain to the report of an Internal Complaints Committee under the Sexual

Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The additional prayer sought to be incorporated in the petition is for the issuance of a writ of mandamus to rescind the report of the ICC of February 4, 2015.

A complaint of sexual harassment was lodged by a colleague at MSTC Ltd against the petitioner who was the Manager (Law) at the head office. The ICC furnished its report under Section 13 of the said Act of 2013 on February 4, 2015 but it is the undisputed position that no copy of such report was made available to the petitioner prior to March 11, 2015. Following the report of the ICC and the recommendation therein, the disciplinary authority under the service rules governing the petitioner imposed a punishment of lowering the petitioner's grade of pay by an order of March 3, 2015. The petitioner was forwarded a copy of the order of punishment of March 3, 2015 prior to the petitioner being furnished the report of the ICC. The petitioner preferred an appeal against the order of punishment on March 20, 2015, without the petitioner assailing the report of the ICC rendered under Section 13 of the said Act.

During the pendency of the appeal, it may have dawned on the petitioner that the scope of the appeal from the order of punishment was extremely limited in the absence of an appeal against the findings or recommendation made by the ICC and WP 15850 (W) of 2015 was carried to this court in July, 2015 to challenge the ICC report.

During the pendency of such previous petition, the appellate order against the punishment was passed on December 3, 2015. The punishment was upheld. The previous petition in this court was not prosecuted by the petitioner as would be evident from an order of February 10, 2016 by which such petition was dismissed for non-prosecution:

> "It is submitted by Mr. Lahiri, learned advocate for the petitioner that the petitioner is not willing to proceed with this writ petition any further.
> "In view thereof, the writ petition stands dismissed for non-prosecution.
> "Written instruction filed in Court today shall be retained with the records."

At the outset, the present hearing is sought to be scuttled on behalf of the petitioner on the ground that the petitioner has applied, by way of CAN 3167 of 2016, for recalling the order dated February 10, 2016 and for leave to pursue the petitioner's remedies against the findings

and recommendation of the ICC in accordance with law. The petitioner says that in the light of such application appearing elsewhere in this court, the present petition should not be finally heard. According to the petitioner, if the application on the previous petition succeeds, the scope of the present petition would be substantially enlarged from its present

restricted ambit.

Ordinarily, in keeping with the principle of comity, a Bench would yield to such a prayer and defer to another Bench ruling on the appropriate application. However, such course of action need not be adopted in this case since the fate of the petitioner is already sealed, irrespective of the outcome of the application pertaining to the previous petition appearing before another Bench.

Section 13(4) of the said Act of 2013 makes the recommendation of an internal committee or local committee under Section 13 thereof binding on the employer as the employer is mandated to act thereupon within 60 days of the receipt thereof. However, such mandate is subject to the right of appeal, recognised by Section 18 of the Act, of any person aggrieved by any recommendation made under Section 13 of the said Act.

Section 18 of the said Act, particularly in its choice of the expression "court or tribunal" makes the appellate provision somewhat confusing, but that is a matter that calls for attention later in the present discussion; for the moment it must be recognised that unless the recommendation made under Section 13 of the Act is interfered with in appeal, it is binding on the employer.

What is evident is that upon the petitioner being in receipt of both the report of the ICC and the order of punishment by or about the second week of March, 2015, it was open to the petitioner to prefer an appeal against either or both; and, by March 20, 2015, the petitioner opted to prefer an appeal against the order of punishment without preferring any appeal against the report or recommendation of the ICC.

Though the appeal papers appended to the petition reveal that the petitioner questioned the propriety of the findings rendered by the ICC in the body thereof, neither the head – the caption describing the appeal – nor the tail – the prayers in the final paragraph thereof – sought to assail the findings or recommendation of the ICC or present any form of challenge thereto. The appeal was squarely directed against the order of

punishment and such order alone, though in the narrative in the body of the appeal the findings of the ICC were referred to and criticised. In any event, it was not the petitioner's contemporaneous understanding that the petitioner had combined the two appeals into one and preferred it before the appellate forum under the service rules applicable to the petitioner. If such were to be the petitioner's understanding, there would be no occasion to carry the previous petition to this court to specifically challenge the report of the ICC.

Now to the order dated February 10, 2016 and the effect thereof. It must be said that the previous petition of the petitioner was stillborn to start with since the petitioner had not availed of the remedy of appeal but had sought to challenge the order of punishment, notwithstanding the order of punishment being entirely founded on the report of the ICC. Once the petitioner challenged the consequence and not the root, it was no longer permissible for the petitioner to change tack and attack the root upon his belated realisation that without a challenge to the basis for the order of punishment, the extent of interference with the order of punishment would be rather restricted. Thus, whether or not the previous

petition was mistakenly withdrawn – though it does not appear to be so on the basis of the written instructions issued by the petitioner – it makes little difference. Even if the previous petition were to be resurrected or the petitioner were to be given leave to pursue any other remedy that may have been available to the petitioner at the time of the withdrawal of the earlier petition, the petitioner cannot today assail the report or the recommendation of the ICC upon the petitioner having consciously abandoned such course of action on or about March 20, 2015 by opting to prefer an appeal against the order of punishment without

questioning the report of the ICC.

As to the merits of the present petition, it has to be limited to the perceived arbitrariness in the appellate order not interfering with the order of punishment and, possibly, to the grounds urged in the appeal before the domestic forum that may not have been expressly discussed in the terse appellate order of December 3, 2015.

In this limited challenge, the petitioner appears to clutch at straws. The petitioner attempts to peck at a few words used in the order of punishment and a few others

in the appellate order to suggest how horrendously wrong the approaches of the two authorities were. The petitioner emphasises on the requirement in Section 13(1) of the said Act of 2013 of furnishing a copy of the report to the concerned parties and the failure in this case of such report being furnished to the petitioner prior to the order of punishment being served on the petitioner. The petitioner places several portions from the order of punishment and the appellate order that refer to the findings of the ICC and record concurrence therewith. The petitioner complains that all this was done without reference to the petitioner and without the disciplinary authority issuing a show-cause notice to the petitioner before considering the quantum of punishment that the petitioner deserved.

The scheme of the said Act of 2013, though it is telescoped into the disciplinary proceedings available against employees, gives a somewhat exalted status to an inquiry report under Section 13 thereof than an ordinary inquiry report would command before a disciplinary authority in a departmental action. In Section 13(4) of the said Act making the recommendation of the committee binding on the employer and in Section 18 thereof

providing an appellate remedy against the findings or recommendation of a committee under Section 13 of the said Act, the final recommendation cannot be tinkered with by the employer or its disciplinary authority or regular appellate authority. The findings become binding and the only exercise that is to be undertaken by a disciplinary authority is to consider the quantum of punishment that is warranted in a given set of circumstances.

It is true that the report of the ICC should have been made available to the petitioner within reasonable time of the same being prepared or simultaneously with the same being forwarded to the employer. At any rate, such report should have been made available to the petitioner prior to the order of punishment being passed, if only to afford the petitioner an opportunity to prefer an appeal before an order of punishment was passed; though a subsequent appeal, if successful, would still render the order of punishment nugatory.

The scheme of the said Act of 2013 read with the usual service regulations or the manner of conduct of disciplinary proceedings would not warrant a showcause notice to be issued by the disciplinary authority prior to

an order of punishment being made. In a regular departmental action, the show-cause notice issued by the disciplinary authority is to afford the delinquent a chance to question the findings in the inquiry report to the extent the disciplinary authority may rely thereon. By virtue of Section 13(4) of the Act of 2013, the findings and recommendation of a committee are binding on the employer and, consequently, on its disciplinary authority and any representation made against such findings before the disciplinary authority by the delinquent would of no consequence. Thus, it does not appear that any prejudice was occasioned to the petitioner upon the disciplinary authority proceeding to pass an order of punishment without reference to the petitioner and on the basis of the recommendation of the ICC.

The petitioner could have undone the order of punishment if the petitioner had preferred an appeal in accordance with law against the report or recommendation of the ICC and succeeded therein. In the petitioner consciously choosing not to prefer an appeal against the recommendation of the ICC, but being satisfied with only filing an appeal against the order of punishment, the petitioner could only question the

quantum of punishment in the backdrop of the recommendation; but the petitioner could no longer challenge the findings of fact on the basis of which the recommendation had been made by the ICC.

One of the seemingly substantial straws that the petitioner seeks to clutch at is a reference in the order of punishment to the previous misconduct of the petitioner. The petitioner asserts that if such matter was to be taken into consideration for assessing the punishment in the sexual harassment case, a prior notice was called for.

The matter may have been of some relevance if the petitioner had not suffered any previous punishment for misconduct and the disciplinary authority had erroneously referred to any punishment. As it transpires, the petitioner accepts that the petitioner had earned a minor punishment earlier. Merely because such previous misconduct of the petitioner is referred to in the order of punishment, does not vitiate such order, particularly in the light of the punishment suffered by the petitioner thereunder.

The petitioner has been awarded a rather lenient punishment which has been upheld in appeal. The

reduction of the petitioner's pay scale or grade, in the light of the recommendation of the ICC that can no longer be questioned, does not shock the conscience of the court nor does it appear to be disproportionate to the conduct attributed to the petitioner in the report on the tests of proportionality.

The petitioner says that since it was unclear as to the forum that could receive an appeal under Section 18 of the said Act, the petitioner made a comprehensive pitch, both against the order of punishment and the acceptance of the findings and recommendation of ICC therein, in the appeal preferred before the regular domestic appellate forum. The petitioner claims that the petitioner approached this court with the previous petition within reasonable time of the petitioner being furnished the report of the ICC, upon the petitioner failing to identify or ascertain the appropriate forum before which the appeal against the recommendation of

ICC could be carried.

It is here that Section 18 of the said Act falls for interpretation, though neither view possible thereunder may help the petitioner out at this stage. Section 18 of the said Act identifies the appellate forum as "the court or

tribunal in accordance with the provisions of the service rules applicable to the said person or where no service rules exist then, without prejudice to provisions contained in any other law for the time being in force, the person aggrieved may prefer an appeal in such manner as may be prescribed." The phrase "the said person" used in the quoted extract covers "Any person aggrieved" referred to at the beginning of the provision. It is strange that the provision refers to "the court or tribunal", since service rules prepared even by governments or public sector undertakings or public companies controlled by the State can scarcely dictate a court or tribunal, as ordinarily understood, to take up appeals. The word "tribunal", in such context, has to be seen in its larger sense as being any body which

exercises quasi-judicial or adjudicating authority, even if such body is not primarily constituted for such purpose. It may be possible, thus, for any service rules governing the employees of any department or organisation or undertaking or establishment or the like (as would be covered by the definition of "workplace" in Section 2(o) of the Act) to identify an appellate authority specifically for the purpose of Section 18 of the said Act and even a

complainant would be subject to the authority of such appellate forum. It is only in the absence of an appellate forum under Section 18 of the said Act being identified in any service rules that the authority prescribed under Rule 11 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 would be attracted. But no conclusive opinion on such aspect need be rendered herein since the petitioner could not have preferred an appeal under Section 18 of the said Act before the regular domestic appellate authority under the service rules and the petitioner did not attempt to prefer any appeal before the authority prescribed under Rule 11 of the said Rules. The appeal of March 20, 2015 carried by the petitioner to the domestic appellate forum identified in the service rules applicable to the petitioner had, per force, to be regarded as not being an appeal under Section 18 of the Act. This has to be so since the complainant could not have approached such appellate authority in the absence of such appellate authority being expressly specified as the appellate authority for the purpose of Section 18 of the said Act; and, it is elementary that an appellate authority has to have jurisdiction to receive all appeals under an appellate

provision and not appeals from only one class of persons entitled to prefer an appeal.

Even if the petitioner's application in the previous petition were to be allowed – which is highly unlikely – such order cannot undo the fact that the petitioner chose, on March 20, 2015, to prefer an appeal against the consequence of the recommendation and not against the parent recommendation or the basis thereof. It may also be remembered that the petitioner held the post of Manager (Law) at the head office of MSTC Ltd.

Since the limited aspect of this petition is the quantum of the punishment as upheld in the appeal, the scope thereof cannot be enlarged by allowing the amendment application or by looking beyond the order of punishment or the appellate order to the findings of the ICC or any discussion on such findings in either the order of punishment or the appellate order. The petitioner cooked his own broth by making the conscious choice on March 20, 2015 and the petitioner has to be live with it. There is no merit in W.P. 2991 (W) of 2016 and C.A.N. 4169 of 2016, which are dismissed. In keeping with the lenient view taken against the petitioner in the order of punishment, no costs are awarded.

Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance of the requisite formalities.

(Sanjib Banerjee, J.