Samridhi Devi Vs Union of India (UOI) and Others

Court: Delhi High Court

Date of Decision: Nov. 7, 2005

Acts Referred: Administrative Tribunals Act, 1985 â€" Section 14, 14(1), 19, 19(1), 3
Central Civil Services (Classification, Control and Appeal) Rules, 1965 â€" Rule 11, 27
Civil Rights Act, 1964 â€" Section 703
Constitution of India, 1950 â€" Article 15(1), 21, 226, 227, 32

Citation: (2005) 125 DLT 284 : (2006) 3 SLJ 225

Hon'ble Judges: S. Ravindra Bhat, J

Bench: Single Bench

Advocate: S.C. Luthra, for the Appellant; Jayant Sud, for Respondent Nos. 1-3 and Satya M a Garg, for the Respondent

Judgement

S. Ravindra Bhat, J.
The petitioner, in these proceedings under Article 226 of the Constitution, calls into question the order dated 28-2-

2001 passed by the third respondent as not proportionate to the gravity of the established misconduct of the fourth respondent. The fourth

respondent had been charged with sexual harassment of the petitioner, and found guilty. The penalty of dismissal imposed on him was modified by

the impugned order into compulsory retirement. Pleadings of parties

2. The respondent No.4, while working as Dairy Supervisor in Delhi Milk Scheme, was issued a charge sheet on 20.01.2000 alleging attempted

sexual assault and outraging the modesty of the petitioner, who was working as Diary Mate on 31.12.1999 when she was alone in the Office of

Central Dairy. The petitioner had been recently widowed, and had been appointed to work as a ""mate"" by the Delhi Milk Scheme. The charges

were denied, by way of a letter dated 31.01.2000 stating that allegations were completely biased and fabricated, in order to take revenge with

vested interests on the part of witnesses. In this letter the said respondent also stated that the truth could be unveiled only in an enquiry under the

rules.

3. A departmental enquiry was conducted; the fourth respondent participated in the proceedings. The enquiry officer in his report, based on the

deposition of the witnesses and other circumstantial evidence, concluded that the possibility of the charge could not be ruled out. It was held that in

such cases, there was seldom any direct evidence, and circumstantial evidence had to be usually assessed, and evaluated. The fourth respondent

was held guilty of the charges. He was furnished the copy of the enquiry report and was given an opportunity to make a representation, which he

did.

4. The disciplinary authority, after considering his representation and taking into consideration the findings of the Enquiry Officer, imposed a penalty

of dismissal from service on the fourth respondent by order dated 24.07.2000. That order, inter alia, reads as follows:

The Enquiry Officer has given reasons in his report before coming to the conclusion that the standard of proof required in a disciplinary case is that

of preponderance of probability and not proof beyond reasonable doubt and proved the charge against the official. After considering all the facts

and documents on record as well as the submission dated 06.07.2000 made by the charged official, the undersigned has to come to the conclusion

that the charged official has himself admitted in his defense brie submitted before enquiry officer after closing the enquiry proceeding that by

touching the breast of the women does not prove the sexual assault. This clearly establish that he has tried to assault and to outrage the modesty of

Smt. Samridhi Devi, Dairy Mate when she was alone in the office of Central Dairy. Thus the charge against the official with sexual assault and

attempted to outrage the modesty of his subordinate female co-employee when she was on duty and alone has been fully proved. The statement of

Smt. Samridhi Devi before Enquiry Officer as well as in her complaint unambiguously conveyed in no uncertain terms as to what her complaint

was. The entire episode reveals that the charged official had harassed, pestered her by a conduct which is against the moral sanctions and which

did not withstand the test of decency and modesty as well as projected unwelcome sexual advances. Such an action on the part of the charged

official would be squarely covered by the terms sexual assault and such an act is unbecoming of good behavior expected from a Superior officer

where there is a number of female employees and undoubtedly amounted to sexual harassment. Keeping in view the aforesaid facts, the

undersigned in inclined to accept Enquiry Officer"s report and found Shri L.R. Saxena Dairy Supervisor guilty of the charge. Therefore, no lenient

view would be justified in a case of molestation of a woman employee when the charge has been proved by the Enquiry Officer after following due

procedure as provided under CCS (CCA) Rules, 1965. Any lenient action in such cases would have a demoralizing effect on the working of

women in the organization. He is, Therefore, not a fit person to be retained in Government Service.

Now, Therefore, the undersigned in exercise of the powers conferred under Rule 11 of the CCA (CCA) Rules, 1965 for good and sufficient

reasons hereby imposes a penalty of dismissal from service on Shri L.R. Saxena, Diary Supervisor with immediate effect.

5. The fourth respondent appealed against the penalty, which was considered by the Appellate Authority. As he had rendered more than three

decades of service and had an unmarried daughter of marriageable age and had a family to support, the penalty was considered to be harsh. The

Appellate Authority converted the penalty of dismissal to compulsory retirement vide order dated 28.02.2001. The relevant part of the order of

the Appellate authority reads as follows:

Based on the above mentioned charge, an enquiry was conducted and the enquiry report was submitted by the Enquiry Officer to the General

Manager and the General Manager after considering the representation of Sh. Saxena came to the conclusion that the charges have been proved

and the major penalty of dismissal from service was imposed vide the impugned order against which Sh. Saxena has now made the appeal.

I have perused the record and find that imposition of penalty of dismissal from service, is a bit harsh one for an official who has rendered more than

three decade of service in DMS. The extenuating factor is the family i.e. wife and the unmarried daughter of marriageable age. The punishment will

adversely effect the dependent family.

Therefore, in exercise of power conferred under rule 27 of CCS (CCA) Rules, 1965, I hereby convert the penalty of dismissal to compulsory

retirement from service as provided under rule 11 of a CCS (CCA) Rules 1965 with effect from the date of his dismissal.

6. The petitioner calls into question the order dated 28-2-2001 as not proportionate to the gravity of the misconduct proved. It is claimed that

having regard to the nature of the charge, the penalty that had been originally imposed was the most appropriate, but the impugned order reduced

it, making a mockery of the proved misbehavior. In such cases, it is claimed that the penalty should be of the severest variety, more so since the

protector, a superior official, abused his position, and indulged in sexual assault. The petitioner has relied heavily on the judgments of the Supreme

Court in Vishaka and others Vs. State of Rajasthan and Others, and Apparel Export Promotion Council Vs. A.K. Chopra,

7. The fourth respondent has denied the petitioner''s claims. He alleges to be the victim of a conspiracy, and claims to be innocent of the charges. It

is also averred by him that the proceedings are motivated. The fourth respondent alleged that the petitioner did not file the petition. He has also

objected to the maintainability of the proceedings on the ground that the petitioner has no locus standi to challenge the impugned order, which was

passed by the appellate authority, after taking into consideration all relevant factors. He also alleges that Shri Ashok Bansal, and Shri G.P Sharma

were involved in the conspiracy to level false charges, and ruin the fourth respondent''s career. It is alleged that the petitioner did not immediately

complain, contemporaneous to the alleged misconduct; the police authorities too were not notified about the incident. It is further alleged that the

petitioner had herself withdrawn the complaint. Later, she alleged that the letter so withdrawing the complaint had been written under duress. An

inquiry was held against the official said to have practiced the coercion; however that officer, Shri Mishra, was exonerated. In view of these, the

impugned order is neither arbitrary nor illegal.

8. The court, on the basis of allegations leveled against the petitioner, had required her to execute specimen signatures, which are on record. On

23-7-2003, the court recorded the petitioner''s statement. She had deposed that the proceedings were indeed initiated by her. Later, by the order

dated 4-5-2005, the court reiterated its prima facie view that the petitioner had initiated the writ proceedings.

9. The first three respondents have also raised objections as to maintainability of the petition, and further stated that the impugned order was

neither arbitrary, nor disproportionate, but passed after taking into consideration all relevant factors.

Contentions urged in the proceedings

10. Mr. S.C. Luthra, learned counsel for the petitioner, submitted that during the pendancy of these proceedings, the fourth respondent had

approached the Central Administrative Tribunal, by filing an original application. The petitioner sought leave to implead herself in those

proceedings, which was declined. Later, by its order dated 14th July, 2005, the tribunal declined to interfere with the findings in the disciplinary

proceedings.

11. Learned counsel submitted that with the advent of the judgments in Vishaka''s case and the Apparel Export Promotion Council case (supra)

there has been a substantial change in the law. Every employer is under an obligation to ensure safety of women employees, and provide

mechanisms to deal with complaints of sexual harassment at the workplace. These requirements are not formal; the underlying purpose is to outlaw

behavior that is unwanted or unacceptable. The employer Therefore is under a corresponding obligation to impose a penalty, which is sufficiently

severe as to deter repetition of such misconduct, in proven cases, and also assure female employees that their concerns are addressed.

12. Learned counsel refutes the allegations of the fourth respondent about the petitioner''s lack of standing. He submits that in such cases, the

petitioner has a vital interest in the proceeding; if the penalty in a given case is neither adequate nor sufficient, it does not fulfill the purpose. Wrong

doers, and potential wrong doers would be emboldened by a lenient approach. The grievance would not be of the employee charged with the

misconduct; it would not be by the authority, which imposes an inappropriate (read not proportionate) penalty. The only person with a grievance in

such cases would be the complainant employee, instrumental in the initiation of disciplinary proceeding. To deny forum to such a class of persons

would be a travesty of law, and result in miscarriage of justice. Besides, it is submitted that the jurisdiction under Article 226 is sufficiently wide to

entertain and adjudicate upon such disputes; indeed it is the only appropriate remedy, since there are inherent limitations under provisions of the

Administrative Tribunals Act, 1985 that restrict action on behalf of persons who are not aggrieved. He submitted that the definition of ""service

matter"" u/s 3(q) and the nature of jurisdiction, defined u/s 14 does not admit applications by third parties like the petitioner.

13. Mr. Satya Mitra Garg, on behalf of the fourth respondent urged that the entire proceedings are motivated. He dwelt at length with the

allegation that the petitioner had withdrawn the charges, but later complained that the withdrawal was under compulsion. These allegations were

gone into in a separate departmental enquiry, which exonerated one Mr. Mishra, who is alleged to have coerced the petitioner. It was submitted

that this automatically resulted in an inference that the withdrawal was genuine. The petitioner could not, Therefore, maintain these proceedings.

14. Learned counsel also submitted that the writ proceedings are an abuse of the judicial process. He submitted that the petitioner had not signed

in the affidavit in support of the petition. He invited reference to the specimen signatures, given to court, in these proceedings, and sought to

compare them with those in the affidavit. He also submitted that the petitioner has no right to question the nature or reasonableness of the penalty

imposed on the fourth respondent. The latter, being higher in hierarchy, considered all the materials and decided to impose the penalty of

compulsory retirement.

15. It was submitted that the order passed by the Appellate Authority was well -reasoned justified passed in accordance with law and in exercise

of the powers vested in it under Rule 27 of the CCS (CCA) Rules, 1965. The fourth respondent had put in a meritorious service of more than

three decades and at the relevant time was senior in rank to the petitioner. The punishment and imposition of a sentence is a matter between the

disciplinary authority and the concerned officer, the complainant, i.e., the petitioner has no locus to either ask for enhancement of punishment or

reduction thereof.

16. It was submitted that while imposing a penalty, various mitigating factors have to be considered in as much as which are relevant for the present

case being no FIR was lodged with the Police, the petitioner herself not being medically examined. The conduct of the petitioner herself in first

lodging the complaint, then retracting from it on 05.01.2000 and then again subsequently retracting the withdrawal of the complaint speaks volumes

about her conduct. It was also submitted that the petitioner did not reveal the incident to any other colleagues except Shri G.P. Sharma. Counsel

submitted that even compulsory retirement, i.e., the punishment awarded to the respondent No.4 is neither in appreciation nor a condensation by

any means of his act. Compulsory retirement also carries with it a stigma pointing towards the fact that the delinquent officer has been found guilty

of having violated the service rules.

17. Learned counsel relied upon the judgment of U.P. State Road Transport Corpn. and Others Vs. A.K. Parul, wherein it has been held by the

Supreme Court as follows:-

that while exercising judicial review, the courts shall not normally interfere with the punishment imposed by the authorities and this will be more so

when the court find the charges were proved.

He also relied on the decision of the Supreme Court in the case of State of Punjab and others Vs. Bakhshish Singh,

18. The learned counsel lastly urged that the petitioner has no locus standi to prefer the present writ petition asking for enhancement of the

sentence, especially in view of the matter that the Central Administrative Tribunal has categorically by order dated 14.07.2005 upheld the orders

passed by the Appellate Authority, which have thus attained finality. The Petitioner could have approached the Tribunal if she was aggrieved. The

provisions of the Administrative Tribunals Act bar exercise of jurisdiction under Article 226. It contended that the present petition even otherwise

is pre-mature and should not be acted upon by this Court.

Jurisdiction and locus standi

19. The fourth respondent''s submission was that in view of provisions of the Administrative Tribunals Act, 1985 (hereafter ""the Act"") the petitioner

could not maintain these writ proceedings. This was in view of Sections 3(q), 14(1) and 19 of the Act. Section 3(q) of the Administrative Tribunals

Act defines ""service matters"" as follows:

3. (q) service matters , in relation to a person, means all matters relating, to the conditions of his service in connection with the affairs of the Union

or of any State or of any local or other authority within the territory of India or under the control of the Government of India, or, as the case may

be, of any corporation or society owned or controlled by the Government, as respects

(i) remuneration (including allowances), pension and other retirement benefits;

(ii) tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation;

(iii) leave of any kind;

(iv) disciplinary matters; or

(v) any other matter whatsoever;

Section 14 vests in the Tribunal the jurisdiction, power and authority earlier exercised by courts, amongst others, in respect of service matters.

Section 19(1) enacts that subject to the other provisions of the Act, a person aggrieved by any order pertaining to any matter within the jurisdiction

of a Tribunal can apply to the Tribunal for redressal of his grievances.

20. In Dr. Duryodhan Sahu and Others Etc. Etc. Vs. Jitendra Kumar Mishra and Others Etc. Etc., the Supreme Court, after construing Section

3(q) and Section 19 of the Act, held that:

16. In Thammanna Vs. K. Veera Reddy and Others, t was held that although the meaning of the expression ""person aggrieved"" may vary

according to the context of the statute and the facts of the case, nevertheless normally, a person aggrieved must be a man who has suffered a legal

grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him

something or wrongfully affected his title to something.

The court also held that tribunals under the Act do not possess plenary powers, and derived jurisdiction in the context of specific provisions of

Sections 14, and 19, which narrowly defined ""person aggrieved"" and ""order"". It was held that:

The constitution of Administrative Tribunals was necessitated because of the large pendency of cases relating to service matters in various courts

in the country. It was expected that the setting up of Administrative Tribunals to deal exclusively in service matters would go a long way in not only

reducing the burden of the courts but also provide to the persons covered by the Tribunals speedy relief in respect of their grievances. The basic

idea as evident from the various provisions of the Act is that the Tribunal should quickly redress the grievances in relation to service matters. The

definition of ""service matters"" found in Section 3(q) shows that in relation to a person, the expression means all service matters relating to the

conditions of has service. The significance of the word ""his"" cannot be ignored. Section 3(b) defines the word ""application"" as an application made

u/s 19. The latter section refers to ""person aggrieved"". In order to bring a matter before the Tribunal, an application has to be made and the same

can be made only by a person aggrieved by any order pertaining to any matter within the jurisdiction of the Tribunal.

21. In view of the above declaration of law, the petitioner cannot question the impugned order before the Administrative Tribunal. As noticed in the

judgment, the tribunal was designed to adjudicate disputes between persons aggrieved by orders passed against them, or action taken against

them, by designated employers, covered by the Act. The legislature did not visualize a situation where third parties could legitimately raise

grievances against orders passed in disciplinary proceedings, against others.

The judgment, and declaration of law, in Vishaka, to that extent, adds a new dimension, which was never in the contemplation of Parliament, when

it defined ""service matters"" and conferred specified jurisdiction, upon tribunals under the Act. Hence, the appropriate forum for determining

disputes and controversies, of the kind raised in these proceedings, is the writ jurisdiction of the High Court, under Article 226 of the Constitution

of India.

22. The next question is whether the petitioner can properly maintain the present proceedings; whether she has locus standi to move the court

under Article 226 complaining that the penalty order passed against some one else, viz the fourth respondent is illegal and arbitrary.

23. The normal rule in civil action is that the person directly aggrieved by the action complained against has the right to move the court. This rule

has undergone a substantial change, particularly in the field of public law, and public interest litigation. In this context, without entering into a wider

debate, the observations of the Supreme Court, while holding that a petition under Article 32 of the Constitution of India was maintainable, at the

behest of a practicing advocate, on behalf of a woman who had been raped while traveling in a railway train (The Chairman, Railway Board and

Others Vs. Mrs. Chandrima Das and Others,) are appropriate:

In Bangalore Medical Trust v. B.S. Muddappa 27 the Court held that the restricted meaning of aggrieved person and the narrow outlook of a

specific injury has yielded in favor of a broad and wide construction in the wake of public interest litigation.

The Court further observed that public-spirited citizens having faith in the rule of law are rendering great social and legal service by espousing

causes of public nature. They cannot be ignored or overlooked on a technical or conservative yardstick of the rule of locus standi or the absence of

personal loss or injury. There has, thus, been a spectacular expansion of the concept of locus standi. The concept is much wider and it takes in its

stride anyone who is not a mere ""busybody"".

24. In the present case, the petitioner cannot be termed as a ""busybody"". Although in all other circumstances, a co-employee, at whose instance

disciplinary action might be initiated, would not have locus standi to question the employer''s decision, action or inaction, nevertheless, in the case

of sexual harassment complaints, by their very nature, and the public interest element involved, the employer is under a duty to ensure that the

workplace is kept safe, and free from sexual harassment. If action is not taken, or taken belatedly, or taken in a casual or inappropriate manner,

the confidence and morale of female employees, as a class would be undermined. The sufficiency, promptitude and appropriateness of the

employer''s response would be a matter of concern not only to the complainant/ victim, but also to the whole class of female employees. The

Vishaka mandated edifice was meant to address these issues.

25. In the United States of America, courts, in certain states (notably California) have ruled that even if a claimant/plaintiff has not herself been

subjected to sexual harassment at the workplace, yet, action can be maintained by her to enjoin the employer, to create a workplace free from

hostility, and ensure protection from sexual harassment or abuse (Fisher v. San Pedro Peninsula Hospital 1989 [214] CA 590; Mogilefsly v.

Superior Court 1993 [20] CA 1409. Such proceedings are termed ""bystander"" actions.

26. In the light of the above reasoning, I am of the opinion that the petitioner has locus standi to file, and prosecute the present writ petition. I am

also satisfied, on an examination of the records, and after considering the statement of the petitioner, recorded by the court, that these proceedings

have been initiated and continued by the petitioner herself. The exoneration of another employee, relied upon by the fourth respondent of certain

charges, cannot be a determinative factor to decline examination of the issues and grievances raised by the Petitioner.

Proportionality

27. The petitioner''s claim is mainly premised on the argument that the impugned order is arbitrary, as it is not proportionate to the misconduct of

the fourth respondent. The doctrine of ""Proportionality"" as understood in public law parlance, in the context of the order of a disciplinary authority,

(while imposing penalty, after appreciating findings of a domestic enquiry) is the choice of penalty or sanction, which is not commensurate with, and

is excessive to, the proved misconduct. As applied by the Supreme Court, and the High Courts, it is a component of judicial review to ensure that

the penalty or sanction is not grossly disproportionate (Bhagat Ram Vs. State of Himachal Pradesh and Others, ; Ranjit Thakur v. Union of India

AIR 1997 SC 2386). In B.C. Chaturvedi Vs. Union of India and others, the Court limited judicial intervention, under Article 226 to cases where

the penalty is so excessive or exaggerated, as to ""shock the conscience"" of the Court. In such eventuality, the court has to remit the issue for re-

consideration by the decision maker; in exceptional cases, the court assumes the role of the ""primary decision maker"" (a phrase used in Union of

India and another Vs. G. Ganayutham (Dead) by LRs., subsequently followed in Om Kumar and Others Vs. Union of India, and substitutes the

penalty in a relief-moulding exercise.

28. English law has assimilated, albeit circumspectly, the ""proportionality"" doctrine while adjudging the correctness of an administrative order, or

determination, in judicial review (Ref : R v. Secretary of the State for Home, ex-parte Brind 1991 (1) All ER 720; R v. Westminster City Council,

ex parte Monition 1990 (1) QB 187; R. v. Ministry of defense, ex p Smith 1995 (4) All ER 427 In a recent decision, reported as A v. Secretary

of State 2005 (3) All ER, the House of Lords, by a majority of 8-1, on an application of, inter alia, the proportionality doctrine held that a statutory

order, and the Anti-terrorism, Crime and Security Act, 2001 were incompatible with the provisions of the European Convention for the Protection

of Human Rights and fundamental Freedoms.

29. The decided case and authorities point to the use of the proportionality test as an element enabling judicial review, of an administrative measure

or order, as being excessive, hence ""disproportionate"" and arbitrary. The issue here is, however converse; the petitioner says that the penalty is not

proportionate (i.e. in the sense that it is inadequate) having regard to the gravity of the misconduct. The question is whether such an argument is

permissible while dealing with a ""proportionality"" issue.

30. Law, and legal principles, are seldom, if ever immobile. Except in certain permanent elements, which are universal, law reflects changing

patterns, follows developments in, and challenges posed by, society. Legal principles are relative in their points of contract, with society. As stated

by Rashbehary Ghosh in the Tagore Law Lectures:

In history, law does not repeat itself, except for its permanent elements, which are abstract or universal. The various stages, former changing, rest

on one great immovable base. Law changes according to the new interests and necessities of life. The rural elements keep rising one out of the

other.

Therefore, proportionality, an element or principle though conceived as a tool in the judicial review armory, in the context of certain assumptions,

its use, unless shown to be inappropriate or irrelevant, cannot be wished away in other circumstances, seemingly disparate.

31. The discourse of rights and obligations of employers and co-workers, sans Vishaka, and Apparel Export Promotion case could conceivably

have confined the proportionality doctrine in its application to excessive penalties. Those two decisions, and the ensuing legal obligations, have

injected a radical shift or change in law. Just as a complainant employee might claim no response to her representations, allege illegality in not

initiating action as per the decisions, and approach the Court for appropriate directions, there could possibly be situations where the course of

proceedings, or the propriety of orders passed in such proceedings, can be subject matter of judicial review. If in such cases, proceedings under

Article 226 would be an appropriate remedy, the changed circumstances warranting a fresh interpretation, nay, application of the proportionality

doctrine, cannot be ruled out.

32. Vishaka and its subsequent application, by the Supreme Court, in the Apparel Export Promotion case, were aimed at ensuring a workplace

safe from sexual harassment, and protection of female employees from hostile circumstances in employment, on that account. The elaborate

guidelines, evolved and put in place were a sequel to the court''s declaration of law that such gender based unacceptable behavior had to be

outlawed, and were contrary to Articles 15(1) and 21 of the Constitution of India. The declaration took note of provisions of the Convention on

the Elimination of All Forms of Discrimination Against Women, adopted by the General Assembly of the United Nations, in 1979. The Committee

on the Elimination of Discrimination against Women (CEDAW), set up under the Convention, adopted in January 1992 General Recommendation

No. 19 on violence against women. Paras 17 and 18 recognized the ill effects of sexual harassment at the workplace, and subsequently provided

for measures, to be taken by respective states for elimination of such practices. Such practices have to be outlawed not only because they result in

gender discrimination, but also since they create a hostile work environment, which undermines the dignity, self-esteem and confidence of the

female employees, and tends to alienate them. The aim of the Supreme Court, while evolving the guidelines in Vishaka was to ensure a fair, secure

and comfortable work environment, and completely eliminate situations, or possibilities where the protector could abuse his trust, and turn

predator.

33. In the United states of America, Congress had enacted Section 703, Title VI of the Civil Rights Act, 1964, to address the issue of sexual

harassment at the workplace; one of the first cases to be decided by the US Supreme Court, was in the year 1986, i.e Meritor v. Vinison 1986

(477) US 57. Australia has enacted the Sex Discrimination Act 1984; the United Kingdom enacted the Sex Discrimination Act, 1975, and also

framed the Sexual Discrimination and Employment Protection (Remedies) Regulations, 1993. All these measures are functional, and there is

considerable body of case-law on various nuances of the issues.

34. The courts, specially in the United States, have been willing to intervene on a range of issues and complaints, including inadequate response or

action by the employer, resulting in liability. Thus, it has been ruled in some decisions (Ref Ellison v. Brady [1991] 924 F. 872, Fuller v. City of

Oakland [1995] 47 F. 1522 and Yamaguchi v. Widnall [1997] 109 F. 1475 that appropriate remedial and corrective action includes measures

reasonably calculated to end current harassment and to deter future harassment from the same, or other offenders. The 9th US Court of Appeals,

in Yamaguchi''s case (supra) summarised the position as follows :

An employer is liable for a co-worker''s sexual harassment only if, after the employer learns of the alleged conduct, he fails to take adequate

remedial measures. These measures must include immediate and corrective action reasonably calculated 1) to end the current harassment, and 2)

to deter future harassment from the same offender or others. Fuller v. City of Oakland, Cal., 47 F. 1522, 1528 (9th Cir. 1995) (citing Ellison v.

Bardy, 924 F. 872. In Ellison, this court held that to avoid liability an employer must take at least some fort of disciplinary action against a

harassing co-worker in order to prevent future workplace sexual harassment. Intekofer v. Turage, 973, F. 773; Ellison, 924 F. 881 (""[employers

send the wrong message to potential harassers when they do not discipline employees for sexual harassment"" and ""{e}mployers have a duty to

`express{} strong disapproval'' of sexual harassment, and to `develop {} appropriate sanction'' . ""(quoting 29 C.F.R. S 1604.11(f) ; see also

Fuller, 47 F. 1529. Failing to ""take even the mildest form of disciplinary action"" renders the remedy insufficient under Title VII. Ellison, 924 F.2d at

882. The adequacy of the employer'' response depends on the seriousness of the sexual harassment. Id.

35. The objective of putting in place guidelines in Vishaka was to ensure that the workplace was rendered safe, and assure other female employees

that in the event of similar future behavior, the employer would take prompt and serious action. In that sense, the requirement of taking action is not

merely subjective to the incident, or facts of a case, it is to comply with, and sub-serve a wider societal purpose.

36. The disciplinary authority, in its order had discussed all aspects, including the nature of the charge and the evidence, and concurred with the

Enquiry Officer. In the light of totality of the circumstances, it imposed the penalty of dismissal. The fourth respondent in exercise of his right to

appeal, questioned that order. The appellate authority maintained the findings of guilt. However, it deemed appropriate to reduce the penalty to

compulsory retirement, in the light of the delinquent officials long service, the adverse impact upon him and his family, consisting of an unmarried

daughter, if the order of dismissal were maintained. The appellate authority, in exercise of his undoubted jurisdiction, has power to reduce or alter

the penalty. While doing so, it is expected to take into consideration all material circumstances. These would indisputably include the adverse

impact of the order upon the employee. However, in the facts of the case, such circumstance cannot be the sole determining factor to conclude

whether or not to impose the penalty of dismissal, or a lesser penalty. Proved sexual harassment is an altogether different species of misconduct;

the authorities under each employer be they disciplinary or appellate authority have to look at all circumstances, and keep in mind the sensitivities

expected of the employer in such cases, while weighing, and balancing each factor and making a choice for the appropriate penalty. I am Therefore

of the opinion that these facts distinguish the approach to be adopted by the court, from the general rule of non-interference with orders of penalty;

the case law relied on behalf of the fourth respondent (A.K. Parul"s case and Bakhshish Singh"s case supra) are Therefore not apt, they do not

deal with a similar situation. They were instances where the courts were invited to interfere with orders of penalty, at the behest of delinquent

officers.

37. Interestingly, the erudite and scholarly treatise Judicial Review and Administrative Action (De Smith, Woolf and Jowell, 8th Edition, page 557)

speaks about situations where administrative actions are held to be ""disproportionate"" where the decision maker gives undue weight to a single

factor, or set of factors, while balancing considerations. Para 13-015 is as follows:

When the courts review a decision they are careful not readily to interfere with the balancing of considerations which are relevant to the power

that is exercised by the authority. The balancing and weighing of relevant considerations is primarily a matter for the public authority and not for the

courts. Courts have, however, been willing to strike down as unreasonable decisions where manifestly excessive or manifestly inadequate weight

has been accorded to a relevant consideration.

Certain decisions, including the judgments reported as Westminster City Council v. British Waterways Board 1985 AC 676 and London

Residuary Body v. Lambeth LBC 1990 (1) WLR 744 have been cited in support of the proposition.

38. The debate or discourse on proportionality thus incorporates, as an essential element, the weight, undue or otherwise given to one or the other

relevant factor. If the order gives excessive weight to one consideration, to the point of ignoring all other factors, the manifest imbalance results in a

disproportionate order.

39. There is no gainsaying the importance of displaying sensitivity while considering appropriate penalty for a proved misconduct of sexual

harassment. The measure adopted by the employer has to not merely be subjective, unlike other instances of misconduct; it services a wider

purpose of assuring a safe workplace, and signals the willingness of the employer to address such issues with seriousness and promptitude. This

consideration can never be overlooked in such cases. A reading of the appellate authority''s order, however shows that it considered only the

adverse impact of a dismissal order upon the fourth respondent. That is no doubt a consideration, but it cannot be the only factor. The impugned

order is Therefore, disproportionate.

40. In view of the above conclusion, ordinarily, the petition would have been allowed. However, such a course of action would not be appropriate,

having regard to the law laid down by the Supreme Court, in B.C. Chaturvedi''s case that the court should refrain from modifying the penalty.

Besides, in view of the peculiar nature of the facts of this case, where the finding is that the appellate authority has not taken into consideration and

given due weight to all factors, it would be singularly inappropriate for the court to don the mantle of a ""primary decision-maker"". One more,

important consideration is that the order of the Tribunal, dismissing the fourth respondent''s application has not been challenged by him; his

remedies are as yet available under Articles 226 and 227 of the Constitution of India.

41. In the light of the foregoing discussion, a direction is issued, setting aside the impugned order, dated 28th February, 2002, issued by the

appellate authority. The matter shall be re-examined by the appellate authority. The appellate authority shall consider and pass a fresh, speaking

order on the appeal of the fourth respondent in the light of the findings in this judgment, after taking into consideration, all relevant materials and

factors, within four weeks from today.

42. All pending applications are disposed off in the light of the above judgment. No costs.