

CENTRAL ADMINISTRATIVE TRIBUNAL
BANGALORE BENCH

ORIGINAL APPLICATION NO.170/00734/2017

DATED THIS THE 9th DAY OF JANUARY, 2019

HON'BLE SHRI DR. K.B. SURESH, MEMBER (J)

HON'BLE SHRI CV.SANKAR MEMBER (A)

S.Palani Swamy
S/o Subramani
Aged 47 years
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Tarikere SO-577 228
Residing at School Colony
Jakkanki Village, Bannur Post
Balehonnur-577 112
Chikmagalur District.Applicant

(By Shri AR.Holla..... Advocate)

vs.

1.Union of India,
By Secretary,
Department of Posts,
Dak Bhavan,
New Delhi – 110 001.

2.The Chief Post Master General,
Karnataka Circle,
Bengaluru 560 001

3.The Director of Postal Services,
Office of the Postmaster General,
S K Region,
Bengaluru 560 001

4.The Superintendent of Post Offices,
Chikmagaluru Division,
Chikmagaluru – 577101.

RESPONDENTS

(By Shri Rajakumar ... Counsel)

ORDER (ORAL)DR. K.B. SURESH, MEMBER (J):

1. Heard. This matter is in very small compass. We had passed an order in OA.No.1524/2013 dated 1/7/2014 which we quote:-

“You
Are the wind.
A strong
A terrible wind
That blows
Out of the darkness
And I
I
Am the greyness
Of your shadow
In the short night.

Two gods, two gods,
And each his solemn hall.
And each his ponderous throne,
And each his lamps, his gifts.
And one may worship one, -
The other not at all.
Or hate the one
And love the other much.
Or fear the one too much,
The other not enough.
But to fear both,
Or to love both,
Or not to love or hate, -
That may not be.
For so 'tis willed by both.

Two gods upon their ponderous thrones,
Each silent in his giant hall.

Theodore Dreiser

1. These lines of Theodore Dreiser expressed our dilemma when we heard the four cases together with all its manifestations but with a common thread of sexual harassment running

through them. Since the consequences of sexual harassment were the ultimate issue in all these cases, we heard it together even though in different Benches, but we are striving to lock together our thought process to be able to reach a common diagnosis. The persistent dilemma in these cases is of course, as Dresier had elementally pointed out, which god to pay obeisance to. What is the subtle difference between gender equity and gender equality and to what extent our Constitutional process is amenable to a perversion of these two matrixes and the requisite requirement of not perverting the matrix by over impact. Hence a delicate balance needs to be achieved.

2. These, in turn, bring us to an element of adjudicatory and justice delivery system. The word 'adjudicatory process' in Anglo-Saxon Law varies in degree with respect to the cause, effect and consequences, as for the most minor disputes of possession and engagement to the major disputes conflicting between opinions which may fall within the adjudicatory process. Keeping in mind these wide disparities, all over the world, the process has been so fashioned so that even though ultimate justice is secured through an adversarial process with equal emphasis given to both or several parties to the dispute. It was ensured and assured that these equally important clauses in the concept will produce the effect of **equality of consideration** among them regardless of the status and stature of the contestants.

3. To elucidate and illustrate the matter further, we propose to give a brief description of the four cases together so that the difference between the composition and the thread running though them can be appreciated more objectively.

4. The first one we have chosen is the case filed by Mrs. Poornima Jain, an employee in the Postal Department. She alleges that she is a GDS Post Master and while so, one Sri Palaniswami made threats to life against her and forced her to stay with him in his government allotted quarters in a time frame of one to two years and started to rape her regularly. The study reports that more than an year prior to her appointment they were living together. When the applicant brought the matter to the notice of Superintendent of Posts, Shri Koragappa also she alleges that, started molesting her. While so, she filed a police complaint and a complaint was sent to the disciplinary authority. She would say that the departmental authorities advised her caution and therefore she was forced to request a change of a committee member appointed as per the Vishaka ruling. Apparently, the committee advised her transfer based on the set and on her request, the respondents transferred her to Hassan Division. She would say that these were against the guidelines given by the Apex Court in Vishaka's Case, as reported in AIR (1997) 6 SCC 214. We had asked for a report from the Police and the respondents were allowed to file a reply.

5. The respondents would say that the applicant made a police complaint on 22/01/2013 alleging sexual harassment by one S. Palaniswamy and one A. Koragappa. She had also filed a representation before the Secretary, Department of Posts and the copy was endorsed to 17 officers and dignitaries, which were apparently simultaneously done, probably to put pressure for compliance which was forwarded to the respondents for action. It was referred to the Sexual Harassment Committee for inquiry vide order dated 22/02/2013. Apparently, the Committee examined 2 respondents, 39 witnesses and 54 documents were examined, and gave a recommendation that Palaniswamy should be awarded with one of the major penalties and appropriate action should be taken against Koragappa and the complainant Poornima Jain may be given a transfer out of Chikamangalore.

6. It is found that the hearing of the Committee took a little time and the respondents could not be questioned since ***following the police complaint of sexual harassment, Palaniswamy was send to judicial custody for more than six months.***

7. The applicant had been allegedly in a relationship with the respondent for a period of nearly 2 years or more. The case of the applicant seems to be that the party respondent Palaniswamy had promised her that he will get her the current employment if she would commence physical relationship with him and on her agreement, and after living with him for about

more than an year he got her the job and she was residing with him . But after 2 years, she found that he was thinking of marrying another woman and she felt compelled to give a complaint as somewhere along the line, hope began to rise in her that he might marry her and thereafter they may continue their life together as husband and wife. **She therefore has twin allegations that even though they were in a relationship, it constitutes rape. He had also allegedly taken Rs.1.5 lakh from her under some pretext or the other and had not returned it to her.** But the sum effect of her complaint was that the Palaniswamy found himself in jail for more than six months. After he was released on bail the Committee felt that he may also have reasons to think of taking revenge against her and to prevent it from happening only, the Committee had, in the best interest of the complainant, suggested her transfer to some place away. Challenging this, the applicant had come to the Court.

8. The fundamental question which would arise is under what premise of the law that the sexual harassment has been found when the parties were allegedly in a live-in relationship, as, **can a consensual relationship become non consensual and if so at what stage and under what circumstances?** At what point had the alleged rape commenced; whether inducements/sentiments were fructified for the sexual relationship that can be agitated as rape as

even admittedly the applicant had taken the benefit of her sexual submission.

If a price is offered for a sexual relationship and fructified can it thereafter become non consensual?

9. The next case is OA 649/2013. A senior officer of ESIC who had apparently an unblemished record of employment and due to retire soon is the applicant. He challenges his repeated transfer made at the behest of one of the trade unions based on a complaint made by a lady employee which was referred to a Vishaka Committee of a sort.

10. The allegation against him is that the lady employee had given a complaint against him that he shouted at her following an issue in the office. One Smt. Suma, whom we heard in great detail, is the complainant. According to her, she was ill on several days. Her husband is also an employee of the same organization. The applicant was in the habit of speaking harshly against the subordinate employees if even the smallest lacuna was found against them. He was so strict and exacting. But according to reports of the respondents, capable and honest. According to her he was being ridiculously strict. Since she was unwell, she did not report to her office for several days and only after she came back she could give a leave letter or inform the office. **According to her, for such a small thing, the applicant one Sri Jaganath threatened her that she would be**

departmentally dealt with and even removed from her employment. At this point, we heard the applicant also in person. following the unauthorized absence of Smt.Suma, he had marked in red ink all the days on which she was absent and after 8 days he found that on the top of the red marking she had signed on everyday and only thereafter a leave letter was produced. Smt. Suma has a case that she was actually ill and if there was any doubt the applicant could have asked for a medical certificate. However, the Trade Union took up the issue and Smt.Suma filed a complaint. **But Smt. Suma would say that she had not the intention of making any sexual harassment complaint. But the concerned authorities were scared. They would say through their counsel that they acted in the best interest of the organization in the current climate and since the complainant was a lady they decided to form a Vishaka Committee and examine two witnesses who allege that the applicant is always rude to everybody and unduly strict.** It was mentioned in her complaint that the applicant had enquired about the name of her husband and that she felt that the interrogative query to be calculated to diminish her husband by this enquiry. Further elucidation brought out that the respondents wanted to settle the matter somehow and following the recommendations as in the case of Vishaka, they transferred him to an office in Bangalore itself as a punishment. But then the Union sat in Dharna and demanded more punishment. **And alarmed**

by the reactions of the Union, who had apparently threatened stoppage of work. Senior officers decided to transfer him to Chennai so as to appease the Union. The fundamental question which would involve in this matter is **what is the relevance of Vishaka committee here especially in view of the fact that the complaint was only that the applicant had behaved in a rude manner but also contra, her behaviour was unbecoming of a government servant when she signed over the red markings made by her superior officer and it may amount to forger which is a criminal offence.** She had not informed of her absence even though her husband is also an employee there. **The degree of indiscipline shown by her was condemnable but since a woman had given a complaint, the entire hierarchy was terrorized and even though not a single word of the complaint would constitute sexual harassment, even according to the original complaint, a Vishaka Committee was formed and without giving due and appropriate opportunity, the applicant was penalized.**

11. The third case allegedly is of a whistle blower in OA 32/2012. The applicant who is a newly transferred employee to the concerned office had apparently informed the Chairman of the company when after taking charge of the store officer, he had apparently taken strong measures by restricting the movement of material contractors and rearranged factory arrangements to restrict

free access to contractors for a better inventory control. It is admitted by the Chairman himself whom we personally heard that the applicant had travelled to Bangalore and informed the Chairman about the happenings in the company. He would say that thereafter he was being repeatedly threatened by all these people. He had rearranged the seating arrangement of the employees and disallowed the contractors free access to the store. It has come out in evidence that the Central Industrial Security Force had intercepted 5 truckloads of coal being stolen from the company and had brought it back to the company where it lay for 25 days. But since the company did not lay any claim for it, after 25 days, the local magistrate had granted interim custody of the coal and the lorry to the contractor under section 451 of the Cr.P.C. Nothing is heard about it thereafter. But the Chairman who appeared before us would submit that even though there were allegations of Rs.400 crore worth of materials being stolen from the company, an audit was done and it was found in the audit that the allegations are not correct. **But the sole question that hit our head right here is that if everything is totally alright , then how were the 5 truckloads of coal accounted for? What about the pig iron lying at Panambur Police station?**

12. After his alleged return from the Chairman's office, apparently 3 women employees submitted a written complaint. One of the complaint is that one of the woman employee had lost her

Mangalasutra. At this, the applicant is said to have told her that if she had put her Mangalasutra inside her dress, she would not have lost it. This was alleged to be a sexually coloured remark to commence action against him. It also came out that after some time, she herself went and told the applicant that she had found it again. If she **had thought that the earlier statement was sexually coloured, surely the second instance would not have arisen as she would then not elect to speak to him again.** One lady had a complaint that the applicant while dictating letters for her to type on the computer, he would sit nearby and keep his hand on her Chair. A similar other complaint was made by another lady. One among these ladies goes to the main gate from the office pillion riding with a male colleague. There seems to be some conflict on the degree of sensitivity here as a pillion rider she can not avoid . Apparently the applicant had complained about the composition of the Committee and the Chairman of the Committee. Here also, the applicant would contend that there was a deep rooted conspiracy in the office along with contractors and it is at their behest that these untenable and silly complaints are made against him and in the nature of the complaint and in comparison with the punishment given, he would say are indicative of acute bias of the concerned authorities. **He would say that it was an act of silencing a whistle blower.**

13. The next case is filed by one Sri John Johnson, a Psychiatrist at the NIMHANS, Bangalore, originally filed as a Writ Petition No.13707/2008. It was transferred to the Tribunal and re-numbered as TA 162/2012. The facts of the case in brief are that an M-Phil student, Ms. Radhika came one day to confer with the applicant. Both sides agree that the applicant had directed the said student to wear her Dupatta properly. The applicant admits that he said so, and provides an explanation that there is a pre clinical discussion on methodology to be adopted before students are allowed to interview psychiatric patients and since she was about to interview a person with sexual issues, by way of a caution, he had advised her to put her Dupatta right. But she says that he had also said that the size of her breast or shape of her breast is annoying him or words to that effect. Apparently after this, they had a 15 minutes discussion and she went for the interview. Later on that day, she seems to have filed a complaint which after some time had been supplanted by another complaint. It appears that there are two units of psychiatry and apparently both units have long standing rivalry as alleged by the applicant. The complaint in issue was signed by 5 women students. The complaint was received by Dr.Reddemma, the Head of the Department and forming part of the other unit of the psychiatry. On receipt of the complaint a Vishaka committee was formed and an inquiry commenced. **Apparently, the original complainant i.e. Ms. Radhika did not take part in the inquiry.** Two

other male colleagues were also examined. Apparently their testimony was in favour of the applicant. Thereafter a report was filed against the applicant and ignoring the evidence in his favour and an inquiry officer was appointed. The applicant had apparently complained against the bias of the inquiry officer and finally one other person was appointed as inquiry officer after the intervention of the Hon'ble High Court of Karnataka, and a domestic inquiry commenced. During the inquiry, Dr.Reddemma had stated that the 5 girls had together given the complaint and supported the complaint and the finding of the committee. **The only two signatories to the complaint who could be examined admitted in the cross examination that they had in fact been in the State of Kerala some days prior to the incident and remained so some days after the incident also. Therefore their geographical proximity and access is proven wrong** says applicant. But yet Smt.Reddemma would say that they had given the complaint. In the enquiry also, Ms.Radhika was not present. **Therefore, having felt the need for her assistance in the matter, we had requested the institute to secure her presence. She refused to come but had sent an e-mail message which was later transmitted to the Registrar indicating that she has no wish to appear to assist the Tribunal but she stands by her original complaint.** There is no way of establishing the provenance of this e-mail but her disinclination to appear and face any question seems to be present.

14. After we started comparing all these cases together and examined the contemporaneous legal situation, **we assume that the stream of law may have taken a wrong path even though with good intentions.** We therefore held consultation with eminent people, some of them who have no objection of being quoted and some who do not want to be quoted. According to Smt.Prameela.Nesargi, Senior Advocate and former Chairperson of the Womens Commission, Karnataka, **there is a presumption that if a woman had complained then necessarily the man was guilty.** She hastened to add that of course embellishment may be there but essentially the guilt of a man could be established by a mere fact that a woman had given a complaint. She would say that a kind of social ostracism is obtained even when a woman gives a complaint that she has been negatively approached and all sorts of premises and presumptions could be laid against her and given the circumstances, if she would give a complaint, then there must be some guilt on the part of the man against whom she had complained. But then she would say that embellishments are always possible. But others at the consultation pointed out that in this instance, the applicant does not seem to be present to support her cause and thereby she had diminished the defence available to him. **True to her vigorous self she replied that unless the person is present before the inquiry and is ready to face cross examination it**

would be a one sided inquiry and no credence can be placed on the complaint.

15. Smt.Manjula, an experienced journalist, opined that in her line of work she had found that both men and women can lie. But she has noted that complainants are usually people in an economically higher strata but then it was pointed out to her that Smt Poornima cannot be said to be in economically good condition. She explains that while exceptions may be there, several factors exist for a woman to make a complaint. **Her emotional attributes at that point of time, the feasibility of an economic transition and a feeling of revenge are the three attributable matters in her opinion. But she opined that in thought process there is no fundamental difference between man and woman.** Therefore, singling out a woman or a man for a positive or negative treatment does not arise. Sri Vasudeva, author and former Software Executive opined that **there is generational gap between the legislative wisdom and executive imperatives and even the adjudicatory process. The present day generation, according to him, has different ideas about sex and sexuality, the mores and morals which agitated the present day older generation do not apply with the same vehemence with the present day younger generation. The law and legality of approaches are laid down by the older generation are without understanding or appreciating the concerns of the younger**

generation. He recounted the experiences in the corporate field where more equality in expression of feelings exist among men and women and while sexual favours were being claimed it was also offered in a remuneratory process as well. It is more of a free for all and each person dictates his or her own responses to it. Therefore, the element of compulsion for a sexual favour to be claimed for and if not given, sanctions to follow, has diminished to such an extent now, as according to him, conferment of sexual favours has limited price value these days. He says that the fundamental defect of legalism these days is that the substantial changes that have taken place in the psyche of the younger generation is as yet unknown to the older generation who clings to the earlier degrees of mores and morals, which according to him, is a sham. While advocating greater levels of morality, he would lament that the older generation is guilty of cultural strangulation more in nature and degree than the younger generation who is more open about their choices. He would thus advocate that more liberal approach should be brought about. He would bring the example of Bhils and Gonds of Madhya Pradesh as a fine example of lack of sexual tension and stress.

16. We also had the benefit of discussing these issues in consultation with several others, who wanted to remain anonymous. Among them are people in high levels of administration, judiciary

and legislature. Many among them are women. **The general trend of feeling is that while large tracts of Indian populace remain unaffected by any of the issues of gender equality only a minor portion of the populace seems to be affected by the effect of alleged patriarchy.** The consistent opinion seems to be that the idea of family and the hierarchy present in a rural set up makes it possible for a greater degree of harmonization even though in several parts of India these roles are more pronounced. But then depending on the geographical location while States like Haryana, UP and Bihar have a supposedly male dominance society. It is pointed out that the mother or the grand mother is still a focus of great power and benevolence. In States like North East, Kerala and Tamil Nadu, even traditionally women have exercised a more central role in social formation, many of these places having a matriarchal society. But the functions in these societies also are fundamentally based on functions rather than on sex alone. It is pointed out that historically speaking also, we have had great queens ruling the princely states with great efficacy and subjugation of the women in this respect was not seen as the subjugation to women but as the subjugation to the sovereign. Even behind the scene, historically, women had played a great part in moulding State policies throughout the history of India.

17. Economically speaking, in any social group, the fountain of economic progress will always have

a pre-eminence, and will consequently have more voice in social engineering. As in the case of the North East, economic progress is determined by womankind and therefore consequently she will have more say in determining responses to and from society. **Thus, these people opine that the gender inequality is merely a matter of economic contribution to social growth. Economic growth depends on the efforts put in by each individual and this effort or determination decides his or her value in the society. Therefore, equality as a concept they say is misunderstood.**

Therefore how do we draw the parallels ?

The unseen issues.

18. The infinitesimal chemistry between man and woman is possibly the law of nature. In the animal kingdom, elephants are credited with more herd instincts than any other animals in terms of bond with the group. In a study done in Kenya, it was found that the oldest matriarch is often the leader of the group and even though in physical sense she might also be the biggest, it need not always be so, but yet the group focus around her. But in a pride of lions, it is almost always the male who is the acknowledged leader. But it is almost always the female who starts round up of victims as prey for hunting. Using these as a comparative examples of group relationship, **it is stated that leadership in the group is in terms of his or her contribution in the group.** It is thus pointed

out in a rural set up, as certain studies in Tamil Nadu shows, in some households, the woman is the leader even though her husband may be a participant in the economic order. There can be a quantum, of contribution but the ability to manage, determine pre-eminence, rather than the sex of the person. Therefore, it is pointed that while we have gone through the edicts of Manusmriti and the rigidity of the caste system, **somewhere along the line we have recognized contribution as the most important element in the social engineering process.** If that be so, it is pointed out that there is no question of any equality or inequality. It is a variable system depending on your contribution. **In such a system of social engineering while determinant of eminence is fixed as contribution, there cannot be any discrimination on the basis of gender, it is stated.**

19. Anthropological studies indicate the nature of food gathering as human beings progressed from Neanderthal onwards. If we correlate all these information, we tend to find streams of human development. In ultimate analysis, given the proclivity and capabilities, division of labour rushes on the apparent principle of " to each person according to his needs and from each person according to his or her capabilities". It is to be noted that in no society, very young children are put to hard work/a female during confinement is protected , even in the most aboriginal society. **So**

from the historical perspective also contribution determines eminence in society.

20. Therefore, what is the effect of being patriarchal and matriarchal. Absolute patriarchy and absolute matriarchy are rare in human society. But in a seemingly patriarchal society, men seem to be the main contributors of economic progress. Whereas in a seemingly matriarchal society either woman would be the main contributor or at least she will have more control over the resources, thus in a way contributing to economic progress. More societies might be patriarchal in that sense due to anatomical difference in human beings between men and women. It is always more possible for male to be more productive than the females especially in a rural set up where hard physical labour is required. **But then even in those instances, the ability to manage the economic system in the households intrinsically varies the power structure within a family.** An interesting study was made among the Tamil Brahmins of Tamil Nadu. They follow with rigid certainty a pattern of religious and social behaviour. The man might be the provider but the management of the household is still with the female. She is the last word in determining where each pie would go even though the man might have earned it. Therefore, the question which was pointed out by these eminent people was that **we are now trying to understand through the western eye the idea of gender equality or inequality.** It is noted that in

Switzerland some of the cantons have not yet allowed the women with a vote. Therefore the theory of gender equality as we see advocated elsewhere is the result of fragmented ideologies which may not have relevance in Indian society.

The ideal of motherhood permeating to Indian society is so strong than the religious pantheon of India that is Bharat. The female deities have enjoyed a pre-eminence at all times, equal or more, with male deities. Therefore, in this historical, geographical and anthropological state of determination, where exactly do we find the reason for special protective status for women was the question which we have to think, they say,

21. The trinity of constitutional system in India are (1) the Preamble to the Constitution (2) the Fundamental Rights and (3) the Directive Principles of State Policy. Article 38 ensures a social order for the promotion of the welfare of the people. Speaking about these, the Hon'ble Apex Court in Nair Service Society Vs. State of Kerala, reported in AIR 2007 SC 2891, had said that the equality before law has many facets and is a dynamic concept. The law seeking to achieve the said purpose is to be interpreted not only on the anvil of Articles 14 & 16 but also the other requirements of constitutionalism. Article 39 (a) specifies that the State shall secure that the **operation of the legal system promotes justice on the basis of equal opportunity by suitable legislation to ensure that opportunities for**

securing justice are not denied to any citizen by any other disabilities also. This article has been described as having the object of securing a welfare state and may be utilized for construing provisions as to fundamental rights with particular regard to **Srinivasa Raghava Vs. State of Karnataka, reported in AIR 1987 SC 1518**, the **State of Tamil Nadu Vs L.Abu Kavur Bhai, reported in AIR 1984 SC 326**. Relating to Article 41, the Hon'ble Apex Court held that the Courts should so interpret an Act so as to advance Article 41, in **Jacob M.Puthuparambil Vs. Kerala Water Authority, reported in 1991 (1) SCC 28** the Apex Court held that “ but in essence, the attempt of the Court when interpreting a law must be in the social context of emergence of such a legislation, which must of course be in compliance with the constitutional safeguards and the edicts of the majority must not even be seen as trampling the life and security of even a minority”.

22 Then there is a case of exceptional legislation as a part of policy derivations and to attain salutary pattern, export import policy were streamlined by legislation. But then, these lead to large scale infractions which bled the Country of its resources. Smuggling became endemic and as pointed out in the Vohra Commission report, criminal/politics, police nexus enhanced the possibility of material benefits to be involved in implementation. It became necessary to bring in COFEPOSA and similar legislations. Hon'ble Apex

Court in view of the economic situation of the Country held initially that prevention detention is not to be treated as punitive. The basis was explained in Ibrahim vs. State of Gujarat in AIR 1982 SC 1500. A duty to inform the detenu about the extent of exceptional circumstances and if any delay in supply of ground of detention and consequential implementation were explained by the Hon'ble Apex Court. Thus as laid down in Puja Batra vs. Union of India reported in AIR 2009 SC 2256, Hon'ble Apex held that even supply of incomplete material which is either pending or inconclusive cannot be the basis of detention order. Therefore by experience we have brought down a little by little the edifice of a draconian legal formation which was found exceptionally necessary at that point of time. But because of inherent implementation problems it has to be brought down, even though all concerned agree that degree of arbitrariness in such allegations overrides the levels of accountability present in it and thus destroyed the test of fairness..

23. In Chowdrappu vs. State of Tamil Nadu reported in AIR 2007 SC 1416 the Hon'ble Apex Court held that it is for the Court to decide whether there is due and proper application of mind by the detaining authority and, whether relevant material had been considered or not. Karthar Singh judgement was not clear on this.

In Kubic vs. Union of India reported in AIR 1990 SC 606 the Hon'ble Apex Court held that in view of Article 22 (5)the supply of documents must

is with intent to advise detenu with sufficient facts and knowledge of facts and circumstances on which the order of detention is passed and it should be in the language understood by the detenu.

In Union of India vs. Vasanth Bharathi reported in AIR 1990 SC 1216, Hon'ble Apex Court held that detention can only be in conformity with Article 22 of the Constitution of India. These are also applicable in SAFEMA or FEMA also.

24. Therefore, on one hand we see exceptional methodology to be used after examining national interest which will otherwise be threatened or destroyed.. this is more illuminated by Hon'ble Justice J.S. Verma in his book "The New Universal Human Rights page-38. TADA was an instrument to combat insurgency and terrorism. In fact in TADA Apex Court had upheld validity of TADA. But in R.N Tiwari vs. Union of India, reported in AIR 1996 SC 2047, Hon'ble Apex Court had brought down its vigor based on reports by National Human Rights Commission. The NHRC held as follows: "for the above reasons, a consistent view that it took in response to TADA, Commission is unanimous in its considered view. There is no need to enact the law based on prevention of terrorism Bill 2000. as a solution can be found in the existing laws, if properly enforced, implemented and amended if necessary. The proposed bill if enacted would have the vitiated unnecessarily the system and led to gross misuse and violation of human rights which must be avoided,particularly in view of the existence of the

misuse in the recent past to TADA and MISA earlier to emergency days.

The Human Rights Commission informed the Court that it is opposed to law Commission in its 173 report recommendation of new laws based on the prevention and prohibition of terrorism bill 2000.

25. Two decades back, emerging of bride burning and cruelty to women was found to be on the increase on the basis of dowry deaths, media illuminated and law had stepped in with new set of legislative inputs as Section 498-A and cognate sections formulated to consider such views. But as found by the Hon'ble Apex Court, after about two decades of its operation, it was found that this has denigrated into a weapon for personal revenge and extraction of monetary benefits. While strong views and its need was understood, implementation of it left many innocent to languish in jail or subject to threat to incarceration, so that they were compelled to submit to black mail. But in practice, implementation of it has turned out to be a weapon for unruly and unjust and deviant as in most cases, these cases were settled on monetary considerations. Thus the law unwittingly provided a bargaining platform rather than sustenance for cultivated social engineering.

26. In the SC/ST prevention of atrocity Act, it was found necessary to bring in provision which have more penal teeth in light of the then visualised condition and the need for prevention of atrocities which were committed on the poor and hapless

SC.ST citizens. But then later experience provided a birds eye view that many a circumstances was motivated by notion other than actual occurrences. Thus the legislative wisdom became a tool in the hands of deviant for material benefits and instead of benefiting the society it added a social engineering negativity which detracted from harmony.

27. A reasoning may not be hard to find. The reciprocity which it requires in any penal solution was , one of the reason if any false complaint under any draconian legislation were made, the statute itself do not contain any methodology by which a falsity of the complaint can be expiated and expressed machinery which is required in case of such falsity was also left vague or blank. This was probably done due to the plea that victim of such alleged infraction may not be capable of calculatingly modulated in such scene where they can don the mantle of a victim even though not a victim, but will extract benefit out of fear of the alleged perpetrator, a law becomes draconian when ever the law is capable of such misuse , instead of being used by the society, it provided a platform for abuse.

28. Coming back to Act 14 of 2013, it was enacted out of necessity and Visakha judgement which narrated the methodology to provide for protection against sexual harassment to women. It was intended to eliminate on all fours any discrimination against women. As the Government found that when a women is sexually harassed, her right under Article 14 and 15 and right to live with

dignity under Article 21 is violated. It recognises that she has a right to safe environment free from sexual harassment. Under Section 2(m) sexual harassment was defined as an unwelcome physical contact and advances and unwelcome demand for sexual favours, making sexually colourable remarks, showing porno and any other unwelcome physical, verbal, non-verbal conduct of sexual nature. These have been paramateria noted, the notion of unwelcome act, as we need to say that human race will cease to exist from that moment onwards on the definition of this unwelcome act which is crux of the issue as found by the Parliament of India. Vide Section 4 an internal committee is formulated, wherein it provided that presiding officer shall be a woman at senior level. It also provided if such a women is not available, then such presiding officer will be nominated from other offices.

29. In sub Clause(b), it is stipulated that two members are to be from amongst employees preferably committed to the cause of women. But then there is no mention as to a definition of what is the cause of women, is it to be separate from cause of man or humanity as a whole or is there to be a gender specific application?. It is to be remembered that this committee shall be an adjudicatory committee and if members of the adjudicatory committee are to be committed to an ideology, their mental frame will be such that it would give opportunity for unwelcome bias and when their finding also will be in resonance to their personal commitment. Vide clause (c) one third person who

is committed to the cause of women or personally familiar with sexual harassment shall also be a member of such committee. Therefore on a preliminary examination of Constitution of India, it is intended for the purpose of giving a push the cause of women. Even though this law like socialism itself is hardly understood, what is the cause of women? might be. Even though it is provided at least half of the total members shall be women, going by A, B & C, their progression for adjudication will be limited to a particular cause.

Can we have a committed adjudicatory body?

Similar is the effect under Section 7, especially in view of the fact under section 9 (3), committee shall have the powers of a Civil Court.

Under Section 14 , even though methodology for reciprocity is provided, it is further circumscribed with a principle that mere inability to prove without established malice will not be considered as a lacunae. Then equity is destroyed as fair principles must guide even legislation.

The law locks up both man and woman

Who steals the goose from the common,

But lets the greater felon loose

who steals the common from the goose.

Anonymous.

30. What are the real differences?

Law says the judge as he looks down his nose.

Speaking clearly and most severely,

Law is as I've told you before law is as you know I suppose

Law is but let me explain it once more

Law is the law.

(W.H Auden Collected poems, 1976;208)

When we examine the development of legal traditions of India, we need to look in to ancient laws towards the Indian Constitution.

31. This earlier tradition has never really been subjected to systematic sociological exposition. The rishis had created very detailed and sophisticated doctrines and carefully reconstructed those doctrines into a coherent ideology which formed an intellectual basis from which to reason and develop a comprehensive and unified view of Indian society. What were the dharmasastris up to? What was their influence? What were the asymmetrical social relations created, consolidated, and where necessary, disguised by their prescriptions? The rishis had a very clear understanding of what they were doing as they carefully re-interpreted seemingly monolithic doctrine to meet the demands of competing inequalities. Despite their seemingly orthodox learning, they were men of the world reacting to the social changes and challenges of their society. Their rigour, ingenuity, and scholarship were matched by the profound influence of their writing, an influence which survived in unbroken waves till modern times. This is not to repudiate Nelson's powerful thesis that

the dharmashastra was not the actual law which governed local communities in their day-to-day folkways. The dharmashastra sought to create an enduring set of attitudes and beliefs rather than to actually supplant customary practices with the imperatives ordained by the rishis. It tried to house in its mansions a variety of practices which were confronted with similar problems and resolved them on the basis of a unified, even if seemingly amorphous, set of beliefs. The efforts of the rishis have been commented on, but not been sufficiently critically examined and evaluated. Kane's History of the Dharmashastra stands over twentieth century Hindu Law scholarship like a colossus. But, given the enormity of Kane's task, it is not surprising that this gigantic work did not develop sociological insights into the development of Hindu law. While a large number of scholars continue to write about pre-British Indian law, some of the work is mechanical, uninspired and demonstrates a rote learning rather than imaginative interpretation. Some of the work is marred with a 'wonder-that-was-India' or a modernity of tradition approach. A very small band of scholars-Indian, English, German and American-continue to sustain an interest in the development of earlier Indian law and the socio-economic, political and ideological dimension on which it is set.

32. As the legal and administrative system imposed by the British began to exercise an influence on social affairs and took over the

working of crucial aspects of the political economy, legal scholarship was self-protectively encapsulated in a 'black letter law' tradition.

33. The 'black letter law' tradition seeks to interpret law as a distinct, relatively autonomous reality. Within this tradition, 'law is separated from morality. It is understood and interpreted by esoteric rules known only to the initiated and critiqued on the basis of self-constituted legal principles and concepts. Such a tradition exists at two distinct levels. At a nobler and more insidious level it concerns itself with legal doctrine-seeking to redefine and reconstitute peoples' understanding of their social, political and economic relations. This reconstruction of society is guaranteed exclusiveness and derives strength from the notion of the 'rule of law'. Presenting itself as a 'fair' arrangement, the 'rule of law' draws support for the legal reconstruction of social reality while at the same time providing full power to the State to contain transgressions of the letter and spirit of the 'rule of law'. At a less sophisticated level, the 'black letter law' tradition is not concerned with doctrine but with servicing the narrow, technical day-to-day needs of the administrator and legal practitioner.

Although many lawyers and judges were prominent in the national movement, the 'black letter law' tradition in India survived virtually unscathed during the troublesome years that led to India's independence. The early lawyer and judge reformers emphasized the importance of the 'rule of

law' and propagated the need for an ordered and disciplined social reform to precede political and economic change in India. From 1909, following the granting of representation in the advisory political institutions of the Raj, a new breed of liberal constitutional lawyers concerned themselves with the mechanics of legal change and put forward plans for alternative constitutional structures for India. The advent of Gandhi did not alter the centrality of the 'black letter law' tradition. While the law and administration were criticized, the central thrust of the movement was to achieve legal and constitutional change. In its own curious way, civil disobedience urged respect for legal institutions and process while making political capital of their misuse. Constitution was established and the legal and administrative system reconstituted under its auspices, 'law' would develop within its own relatively autonomous field.

34. India's Constitution was the largest ever devised in the world. When the draft Constitution was discussed on the floor of the Constituent Assembly, most members were overawed by the document's complexity. Some members regarded the new Constitution as imitative and eclectic whilst others were appreciative of the detail of attention given to it. Even though the discussions on the Constitution seem neat and impressive to the undiscerning reader, the formal record does not do justice to the varying standpoints which were accommodated during the making of the Constitution. While the forces of emergent

capitalism have diluted and dissolved the basic political framework of the Constitution, lawyers have used the new legal and constitutional processes for both money and social and political mischief.

35. The new Constitution generated a new literature. Many of the ideas and idioms used in the Constitution were new. They were imported from various jurisdictions. . To be harsh on these imitative developments is to undervalue the enormity of the interpretative tasks assigned to lawyers and judges. The scheme which was characteristic of the early fifties represents both genuine attempts to come to terms with the newly posed constitutional questions as well as an intellectual camouflage to reinforce personal and class interpretations of the Constitution by reference to cosmopolitan scholarship. Some of the genuine attempts to reassess doctrinal aspects of Indian law are impressive, but these are rare and were developed more by practitioners rather than the emerging scholars on Indian law. The fact remains that the passing of the Constitution did not stimulate a revival in Indian studies of law. To the practitioner the new idiomatic phrases used in the Constitution were a means, and an opportunity, to reinforce their declining status. To the judge, the new constitutional doctrines provided an opportunity to display his cosmopolitan understanding and learning. A new comparative literature was developed which mechanically cross-referenced English, American, and Australian citations for analogous provisions in the Indian Constitution.

While Indian law was caught in its 'craze for foreign things', it was also being manipulated by the more advantaged sections. The result was as piquant as it was purposive. Dressed in Western garments, Indian public and private law served emerging interest with an untidy integrity.

36. Indian legal scholarship seemed to enter into its mechanical phase. After the rishis, the nineteenth century had witnessed a creative, even if patently false, re-interpretation of indigenous law, a carefully worked-through induction of Western law into India and a spate of litigation which gave this law social meaning. The rishis became reformers; and the reformers compilers of indexes. Connected more with the market place of litigation rather than the marked place of ideas, Indian publishing houses produced a plethora of law reports, legal digests, and practitioners' books.

37. Article 245 of the Constitution of India provides for legislative power to enact laws for the whole of India. The Hon'ble Apex Court in **Kishen Vs. State of Rajasthan, reported in AIR 1990 SC 2269** held that the power to alter the applicability of any Act, according to the change in local conditions, may be delegated, provided standards for guidance are provided in the Act. In other words, **unless an Act contains within it fundamental elements for determining compliance with constitutional safeguards, by implication, the legislation may fail.** In **Tinsukhia Electric Supply Company Limited Vs. State of Assam, reported in AIR 1990 SC 123**, the Hon'ble

apex court held that in exercise of a legislative power, all incidental and ancillary provisions to make the law effective could be enacted. But then this power would not extend to purposes which are ancillary. ***In other words, there must be perfect symbiosis and harmony between the avowed objective of the Act and constitutional compliance.*** But at the same time, the Apex Court held that an Act of the legislature represents the will of the people and cannot be easily declared as unconstitutional, as reported in **State of Bihar Vs. Bihar Distillery Limited AIR 1997 SC 1511**. But then, the Hon'ble Apex Court upheld through various decisions certain limitations of legislative power of the Parliament.

- a) ***The federal scheme of distribution of the legislative powers is a limitation, which flows from Article 246;***
- b) ***Fundamental Rights and other provisions of the Constitution is a limitation, which flows from Article 12, 13 & 335 of the Constitution;***
- c) ***The doctrine of non-delegation in matters of policy,***
which flows from the expressions in Article 245.

38. These matters are considered by the Hon'ble Apex Court in **D.C.Wadhwa Vs. State of Bihar, reported in AIR 1987 SC 579**; **State of Bihar Vs. Charusheela, reported in AIR 1959 SC 1002**; and the decision of the Hon'ble Apex Court in **Tata Iron**

& Steel Company Vs. State of Bihar, reported in **AIR 1958 SC 452**.

39. But the Hon'ble Apex Court held that whenever possible, a reconciliation could be attempted by giving a meaning which can be properly given to it, as reported in **Federation of Hotel & Restaurant Vs. Union of India**, reported in **AIR 1990 SC 1989**.

40. Article 13 of the Constitution of India provides that no laws which are inconsistent with the provisions of the Fundamental Rights or in derogation of it shall be valid. The object of Article 13 is to secure paramountcy of the Constitution in relation to the Fundamental Rights. Therefore, **the fundamental objective is to ensure that the instruments emanating from any source of law must be constitutionally applied**. In **Minerva Mills Limited Vs. Union of India**, reported in **AIR 1980 SC 1789**, the Apex Court held that whenever a constitutional amendment relates to a basic feature of the Constitution and points out as an example for exclusion of judicial review, it would be void. In **S.P.Gupta Vs. Union of India**, reported in **AIR 1982 SC 149**, it is stipulated that even a constitutional amendment cannot override a basic feature of the Constitution. **Therefore, it ensures that the tenet of equality and equal application of the laws are the basis of fundamental constitutionalism as a basic feature and they cannot be abridged without causing severe derogation of the constitutional compliance.**

41. The two tenets of equality, i.e. equality before law and equal protection of laws are not actually one and the same. As Dr.Jennings put it , ***"Equality before law means that among equals, the law should be equal and should be equally administered, that likes should be treated alike, the right to sue and be sued, to prosecute and be prosecuted for the same kind of action should be same for all citizens of full age and understanding without distinctions of race, religion, wealth, social status or political influence". (Jennings - Law of the Constitution, Oxford, Page 49, 3rd Edition).***

42. The word 'equal protection of the laws' is synonymous with the 14th amendment of the American Constitution. It says ***"nor shall any State deny to any person equal protection of laws"***. As early as in 1910, this is recognized as a fundamental principle in Lindsley Vs. Natural Carbonic Gas Company (1910 220 US 61). In Indira Nehru Gandhi Vs. Raj Narain, reported in AIR 1975 SC 2299, following the edict of the Court in Chiranjit Lal Vs. Union of India, reported in AIR 1951 SC 41, the Hon'ble Apex Court held that ***equality before the law is guaranteed to all without regard to race, colour or nationality and is available to even corporations as juristic persons.***

43. Relating to integrity in classification, a sea change was effected by the Hon'ble Apex Court

when it brought in new concepts of equality by eschewing arbitrariness. In E.P.Royappa Vs. State of Tamil Nadu, reported in AIR 1974 SC 555 and reiterated this in Maneka Gandhi Vs. Union of India, reported in AIR 1978 SC 597, when it held that ***to determine non-arbitrariness, principles of reasonableness must pervade like a brooding omnipresence. It stipulates that the basic tenet of rule of law is that justice should not only be done but it also must be seen to be done.***

44. The other side of this discussion can be that when we examine the premise in our legal system that ideas such as sustainable equality and distributive justice are at the heart of our understanding of the guarantee of the equal protection before the law. The State can of course treat unequals differently with the objective of creating a level playing field in the social, economic and political spheres. **The question then would be whether reasonable classification has been made on the basis of intelligible differentia and whether the same criteria bears a direct nexus with the legitimate government objective.** In this context, the Hon'ble Apex Court upheld that reservation of seats in Panchayat as an affirmative action and it is enabled by Part IX of the Constitution, as held in Union of India Vs. Rakesh Kumar, reported in 2010 (4) SCC 50. It held that when examining the validity of affirmative action, the inquiry must be governed by the standard of proportionality. But at the same time, the Hon'ble Apex Court held that any law providing for elections

on the basis of separate electorates for members of different religious communities offends against Article 15. It held that the constitutional mandate of the State not to discriminate against any citizen on the ground of religion extends to political as well, as held in Nainsukh Vs. State of U.P., reported in AIR 1953 SC 384. But the word '**equal protection of laws**' is being read as a positive obligation of the State, as was held in St. Stephen College Vs. University of Delhi, reported in AIR 1992 SC 1630. The Hon'ble Apex Court, as early as in 1950, held in A.K.Gopalan Vs. State of Madras, reported in AIR 1950 SC 27 that **judicial review of legislation in violation of Fundamental Rights is permissible.**

45. Therefore, when we examine the flow and stream of law and legality, in all these cases, some elements of consideration seem to be present in the resolution of the issue at the hands of the administrative authorities. Broadly speaking, these are (a) *a system seems to be engineered whereby view expressed by a complainant assumes a more than normal importance as her views are assigned an inviolability by denying a chance for cross examination as is possible in an inquiry but instead to provide for an inquiry;* (b) *it provides for an assimilation of factual situation, which is not open to challenge in the sense that subjective testimonies are held as secret documentation and not made available for further elucidation of the alleged guilt;* (c) *the term in the Vishaka judgment proposing a*

committee situation wherein rules do not provide for a particular lacunae to be covered seems to have led to a misunderstanding that by a compulsive process, a non-adjudicatory process is being imposed on all such situations; (d) by denying an opportunity of proper hearing which will include the right to cross examine the complainant, ability to understand the charge in the fullest effect, crystallized and specific form of charge etc denigrate these inquiries to a level of a salem witch hunt. Which the great playwright Arthur Miller illuminated in the play "crucible".

46. These seem to have been the cumulative reason which led to a statute being proclaimed by the Parliament in which a provision seems to have brought in of granting a presumptive affirmation to an expression made by a complainant (as explained in Act No.14 of 2013) Therefore, what was the compulsive features which energized the sovereign state into a frenzy of decisive action is the factum of consideration

47. The National Crime Record Bureau reports for the last decade indicates no special acute enhancement in the crimes against women but media studies conducted indicate the effect of sensationalism which have led to a feeling of terror which was akin to a situation which existed prior to amendment of the penal laws regarding Section 498A IPC. Decades long examination found that these salutary legal principles were misused

and mis-utilized for personal revenge or benefit if not most, at least in many cases. An appropriate tool for revenge or material benefit seems to have been found especially with the methodology of the operation of the law which provided for instant incarceration and for longer than usual. In a case of murder, the accused may, if the charge sheet is not filed in time, get bail within 90 days, even if it be a multiple murder. But the Supreme Court found that in many cases under 498A just based on a statement made by alleged victim, the accused and his family have to languish in jail for extended period together unless they succumb to material attraction or psychological satisfaction of the alleged victim. By the time the Hon'ble Apex Court enters the field and pass affirmatory orders restraining the beyond the pale interpretory process adopted in such issues, hundreds of thousands of people would suffer unnecessarily and against solitary constitutional principles.

48. The same situation seems to have existed here as well as we examine the case of Smt.Poornima. Apparently, **the police found that they were living together as consenting adults but her complaint to the President of India and other dignitories had an effect on him and he landed in jail for more than six months.** There is nothing in the Act which would indicate such brutal examination of the issue other than the pressure exerted by an inflamed social conscience generated by a feeling that society is permeated by

negative evils unprecedented. **Therefore allegation of sexual harassment has now become a tool to seek revenge or material benefit as these cases point**

49. The Crime Record Bureau do not indicate any phenomenal rise in crime against women. It is not to downplay the effect of several cases which have caught the public eye, the brutality of which is beyond compare and is to be condemned by all. But one case should not set the law in motion in a particular extreme stream so that thousands of innocents can suffer.

50. In all these four cases, what is more pertinent was the quick response of the system to the complaint. It was immediately as if the **administrative authorities, going by even their reply filed in the court, had found an invisible fortress against the allegedly guilty. It is as if a presumption had been drawn of the guilt of the accused even before he was found guilty. This is also characterized by the extremity of punishment. Only in one case punishment is yet to be imposed and that is because of the pendency of the criminal case. In all other three cases, dismissal from service was effected.**

51. To examine the case of a professor atNimhans.., who seems to have told a woman student to put her Dupatta properly or in other words to properly cover her body before going to interview a sexually disturbed psychotic patient. There is no allegation of molestation. He had not

demanded any sexual favours. Being a psychiatrist all the concerned would have understood that when he tells his student to cover herself properly, he would be in a parent ego. The immediate transformation to an adult ego wherein he would say that the size or shape of her breast annoys him cannot be psychologically possible if one understands Sigmund Freud at all. Why this cardinal issue has not appeared germane to the authorities at Nimhans is difficult to understand as they deal in human psychology. But we are conscious of the way the general public looks at all these. It would be proper to quote from the **great activist Smt.Prameela Nesargee on this point.** She said " If she has complained, then he is naughty". This is the presumption under which apparently the society operates. May be as a measure of patriarchal society, angelic innocence of women continues as guide post even in the Indian Penal Code. A woman is held as not capable of giving consent in a scene of seduction whereas the man is. Why this anathema has not been removed is not within anyone's knowledge. But these sort of pre-conceived notions along with statutory compulsions and improper understanding of Vishaka judgment has created a system of oppression, laments the applicant.

52. To take the case of a Stores Officer in a government company, it is admitted case of all that he might be a whistle blower even though the company denies any wrong doing. The State had

reasons to suspect the company of an infraction of Rs.400 crore and even though against evidence collected by CISF themselves it has been surmised that there is no wrong doing. It is claimed that almost immediately, apparently some of the conspirators in the alleged infraction allegedly fomented a sexual harassment complaint. We examined the nature of the complaint and found that it is ludicrously silly. The way in which the Vishaka Committee operated was beyond the pale of the law and propriety.(we have gone through the records with an eagle eye). Allegations were made that this Committee tries to suppress evidence. **But leaving all these aside, the punishment imposed was removal which seems to be an outrageous one going by the elements of infraction alleged leaving the applicant to lament that he is being punished for being a whistle blower.**

53. The examination of the fourth case is even more funny. An apparently honest and strict officer finds that his stenographer is unauthorisedly absent and without information. He marks her absence in red ink in the attendance register. After 8 days, she comes and signs on top of all the entries which in normal case has to be considered as a great insubordination and the conduct unbecoming of a government servant. Apparently he pulls her up and according to her, was rude when he said that he is going to take action against her. He has apparently told her that she will be dismissed from her service. She also alleges that

he has asked about her husband and she terms it as derogatory. **As stated by the respondent officers, in fear they have reacted.** They immediately appointed a Vishaka Committee, even though the complaint did not mention any sexual harassment. She would also appear in court and submit that there is no sexual harassment. She and two union office bearers were also examined by this committee and Union office bearers would depose that the applicant is rude to everybody and he is punished by a transfer to an office a little away but still in Bangalore. But then, the Union protests and sit in Dharna, Then after 1 $\frac{1}{2}$ months, he is punished once again by transferring him to Chennai even though he had very little time left for superannuation. It is admitted by all that his transfer is only due to this issue and no other. **How many a time can a man be punished ?, the applicant asks**

54. **Is there a system of testimonial eminence to be awarded to women when they allege infraction of law & Article 13, 14 & 15 prevents discrimination on the basis of gender and ensures equal application of laws.** While the State can provide benefits to bring up status of women and children and as explained by the Apex Court, the maternal situation of women and the future prospects of the children must be the soul of prerogative of the legislature and judiciary. **But then testimonial eminence does not seem to be covered as an objective of constitutionalism anywhere in the world. Reciprocity is the basis**

of constitutional adjudication. If a man complains against a woman, will his position as an alleged victim afford him a testimonial eminence as is provided in the Act and in public perception set alight by media frenzy is a question, the applicants asks.

Therefore, in this Background let us examine the detailed facts of each case.

55. The matter was taken up for consideration on 10.12.2013. After hearing the matter we felt that the lamentation of the applicant requires some how elucidation of the back ground factual matrix and therefore, directed the Superintendent of Police, Chikmagalur to file the report on the alleged incident in which the applicant claims that her life is in jeopardy following the alleged sexual assault. The report of the Superintendent of Police, explaining that the applicant had given a compliant that the alleged perpetrator who is a co-worker and had been sexually exploiting her and continuously raping her in a period which may range from 1 1/2 years to about 2 years. We have also gone through the report of the Sexual Harassment Committee which was produced by Shri Basavaraja, Additional Director , Legal Cell and we heard him also on the explanation of the report. After hearing this , we had permitted the counsel to file written argument notes explaining the significance of Article 13,14 & 15 in the matter and presumption to be drawn in favour of the women in case she contends at a later stage that though consenting to be in a relationship, in the

effect of the enabling provision in the statute to withdraw her consent unilaterally even though two years later.

56. We had also included in the party array the alleged perpetrator. Apparently, following the criminal complaint against him , he was arrested and kept in judicial remand for more than 6 months.

57. We have also heard the parties in person and they explained rival contentions. We have also gone through the report of the Sexual Harassment Committee. After going through the proceedings of the Committee, we are of the view that this is one Committee which has done an excellent job and had tried sincerely to resolve the issue as to us it appears that beyond the limits of legal parameters the anguish of human relationships was the issue and when the agony and ecstasy of human interaction got immersed in a legal situation, it apparently became more complicated. But, in spite of that the Committee seems to have made genuine efforts to bring in a situation of normalcy. The applicant laments that using his former proximity to her the said Shri Palaniswamy caused blank cheques of hers to be placed on the anvil of judicial consideration through the process of negotiable Instrument Act and she is facing untold jeopardy because of that. She would further say that the matter was actually settled by Shri Palaniswamy agreeing to pay her a quantum of amount which had been variously described as a compensation and also repayment

of loan taken of about Rs.1.5 lakhs. It seems that the Police had also very wisely advised to settle the issues, but then, when the events were overtaken by elements beyond their control, on the 2nd complaint they had no other option to take than cognizance of it and as a result of which Shri Palaniswamy went to judicial remand for a 6 months period and this resulted in immersing the parties into further conflict. But, then the Committee seems to have conducted themselves equanimity and with a sense of justice and propriety. But then human agony cannot be compartmentalised as emotions cannot be bridled or not amenable to legal parameters.

58. Whenever we legislate in the land of emotions it will always fail as social engineering is not complaint with absolutism at any level matters of mind are better left to the care of the parties than try to bridle it within a legal parameter. There cannot be any doubt that any form of discrimination against anybody must be suppressed. But one cannot ask any one to love anybody else nor can anybody take back the love which was offered at a point of time other than terminating it at one juncture. Similarly the case is that when consent has been given for a relationship for seemingly mercenary reasons, adjudging it as a capable of unilateral reconsideration if the ideas of possessiveness and jealousy fail then a penal teeth can be brought into a situation as opposed to all ideas of fairness and constitutional governance.

To insist on it will violate Article 13 and 14 of the Constitution.

59. Therefore what is the existing climate? Wherein the brutal murder of Nirbhaya the entire humanity was shocked by the way in which she was treated by the accused therein, it raised such a rage of protest and called with apparent government inaction as had the police followed the rule regarding vehicle control at that point in all probability the infraction could not be present for the offense. This therefore raised an avalanche of protest and it became necessary for palliative machinery to be in place, may be as cover of knee jerk reaction these amendments were brought out even though ostensibly under the guidance of Vishaka's judgment which was passed long back and justice J.S Verma's Committee report.

Therefore as cumulative analysis

But Hon'ble Justice J.S.Verma in his book canvassed view for proper implementation rather than bringing in extraordinary legislation to curbsocial evils. Therefore may be as it has been an improperly drafted legislation which had to be passed for the sake of the moment following popular unrest it failed the test of constitutionalism.

60. Whenever we legislate in land of emotion it is always predestined to fail, There is no cover or limit to emotional perquisite, even it be male or female. No one can draw a straight line in shifting sands because the very nature of the shifting sand will

produce only serrated impression. Legislation, therefore must be practical and well thought out.

61. After examining all these, we think that Section 4 and 7 of the Sexual Harassment Act No. 14 of 2013 can be termed as unconstitutional because once a adjudicatory body is to be determined as slanted in its sway. It destroys the fairness concept embedded in adjudication. This also is true of section 114(a) of the amendment Act of the evidence Act, there cannot be any functional basis for such presentations and which would appear to us to be against the constitutional provisions. But, then in national interest, we leave it to the Government to look into it afresh and take a decision in compliance with the constitution within a reasonable time frame

62. Therefore, we would again direct the Committee to look into the matter to see whether any factual resolution can be brought about in the economic situation alleged by the applicant. But, at the same time while inducing such a settlement, there need not be any penal damocles sword hanging over the party respondents also. On an understanding of a law seem to be formalised in a particular climate of public rage but which had now shown us that it will do less good than envisaged. But the transfer order of the applicant seems to be reasonable if the applicant apprehends threats to her. But then, if it is settled through the agency of the Committee as we think that this is one Committee which has done its job fairly. We are trusting it to resolve the issue at their level and to

enable it to do so all the proceedings from the finalisation of the report and handing over it to the authority including transfer order are hereby quashed. We direct the Committee to recognize the human elements involved in it and make justice available to the poor applicant as well in the matter of Rs.1.5 lakhs as well. OA is disposed of. No order as to costs.”

2. Apparently, this was not taken up in challenge either in the Hon'ble Apex Court or Hon'ble High Court. Therefore, this matter has become final.

3. Thereafter, the respondents herein filed a Miscellaneous Application No.527/2014 in OA.No.1524/2013 wherein the following order was passed.

“In our para-62 of the order we made it clear that among four cases heard together this was the one committee which we can appreciate but then even though we found that transfer order of the applicant was correct we thought that the committee had not approached the issue of economic deprivation allegedly suffered by the original applicant. It is trait that these elements are also taken into consideration even though by an extent of approach. But the fact that the party respondent used to extract money is opposed to good behavior expected of a Government servant therefore we decided to believe in the discretion of the committee to take appropriate steps. We quashed that report as they can then redo the process at their convenience and discretion. We

have no doubt that we expressed full trust and belief in the committee for continuing the process of the committee to just resolution. This made clear. MA is disposed of. No costs. “

The ambit of this order is that since the report and the proceedings are quashed on the grounds given in the order in OA. No.1524/2013, there has to be a redoing of the process and also we mention that the trust we have in the committee to do fair things will be reflected in their report. Now the applicant claims that this trust was misplaced.

4. Thereafter, the applicant had filed OA.No.52/2015 which was disposed off vide order dated 28.3.2016 which we quote:-

“ The applicant aggrieved by the order passed by the disciplinary authority dismissing him from service with immediate effect has filed this OA under Section 19 of the AT Act, 1985 seeking the following relief:

i) To quash the (a) Memo No.F/SP/Con/Dlgs dated at Chikmagalur-577 101 the 12.6.2014, issued by the respondent No.3, Annexure-A3, and (b) order No.SK/STA/9-3/18/2014/I dated at Bangalore-1 the 29.11.2014, issued by the respondent No.2 and communicated by the respondent No.3 vide letter No.F/App & Dlgs 2014 dated at Chikmagaluru-577101 the 17.12.2014, Annexure-A7,

ii) Direct the respondents to reinstate the applicant in service treating the interregnum period as on duty with continuity of service extending consequential benefits accordingly and

iii) Grant such other relief deemed fit, having regard to the facts and circumstances of the case.

2. The applicant while working as Sub-Postmaster, Sangameshwarapete Sub Post Office

in Chikmagalur Division faced the allegation of sexual harassment by one Kum.J.M.Poornima who was working as GDS Branch Postmaster in Kadavanthi Branch Post Office under the said Sub-Post Office. It was alleged that on the false promise of marriage, the applicant forced the complainant Kum.Poornima to stay with him in the quarters attached to sub post office and abused her sexually for over a year. He had also forcibly taken her savings and money from her mother amounting to Rs.1,50,000/-. She also lodged some complaints with the police making allegations against him which were investigated by the police authorities and criminal proceedings are pending with the Court. According to the applicant, none of the allegations pertained to official duty of the applicant nor the incidents occurred in the work place. On the allegation of sexual harassment made by Kum.J.M.Poornima, the Complaints Committee on Prevention of Sexual Harassment of Women Employees at Work Place was constituted who submitted a detailed report on 1.7.2013 (Annexure-A2) concluding that the applicant had harassed sexually the said Kum.Poornima. The Committee suggested imposition of major penalty on the applicant as well as transfer of both the applicant and Kum.J.M.Poornima from their place of posting. Thereafter, the respondent No.3 based on the findings of the committee, passed an order dt.12.6.2014 (Annexure-A3) dismissing the applicant from service. The applicant preferred an appeal dated 13.7.2014 to respondent No.2. In the meanwhile, Kum.Poornima challenged her transfer

order before this Tribunal in OA.No.1524/2013. The Tribunal passed an order dated 1.7.2014 in the said OA(Annexure-A5). According to the applicant, the said order of the Tribunal did not hold the findings of the committee as legally tenable. Thereafter the respondent No.2 passed an order disposing of the appeal and maintaining status-quo(Annexure-A7).

3. The applicant contended that since the Tribunal did not hold the report of the committee as legally tenable, the decision taken by the disciplinary authority based on the committee's report is therefore not sustainable and hence should be quashed.

4. The respondents filed a reply statement wherein they submitted that the applicant was already a married person and Kum.Poornima the complainant was forced to stay with the applicant on the false promise of marriage and was abused sexually. Based on the complaint of Kum.Poornima, the Committee for Prevention of Sexual Harassment at work place was constituted to enquire into the matter. The committee conducted enquiry through 7 sittings and had discussions with the complainant, respondents, witnesses and after going through all the documents and evidences, the committee found the applicant guilty of entering into a consensual relationship with the complainant who was his subordinate on the promise of a marriage. The inquiry report of the committee was sent to the applicant to submit his representation if any within

15 days. At that time, the applicant was in judicial custody and it was delivered to him in the Jail premises. The applicant sent a reply through jail authorities requesting time until he is released from jail. Accordingly, the case was kept pending. After the applicant released on bail on 9.12.2012, he was again asked to make a representation on the inquiry report. Thereafter the applicant submitted a representation. After taking into consideration the report of the committee and also the representation of the applicant, the disciplinary authority imposed the penalty of dismissal from service with immediate effect.

5. In the meanwhile, against her transfer order, the complainant, Kum.Poornima has filed an OA before this Tribunal. The OA was disposed of by holding that the committee has done its job fairly. But it did not consider the transfer as appropriate. Therefore, it ordered that it would trust the committee to resolve the issue at their level and the transfer order was quashed. Since the accused was found guilty of mis-conduct having exploited his subordinate by false assurance of marriage though he was a married with living spouse. Hence, he deserves the punishment meted to him. In view of the pendency of the matter before this Tribunal, the appellate authority disposed of the appeal maintaining status-quo of the department. Therefore, there is no merit in the OA.

6. During the hearing, the Ld.Counsel for the applicant emphasised on the fact that the penalty imposed on the applicant dismissing him from

service was based on the report of the Sexual Harassment Committee. However, the Tribunal in its order passed in OA.No.1524/2013 quashed the report and therefore, the punishment order which was based on the report of the committee cannot be sustained. He also pointed out the vagueness of the order of the appellate order and therefore he prayed for quashing of both the orders passed by the disciplinary and appellate authority.

7. The Ld.Counsel for the respondents, on the other hand, draw the attention to the inquiry report and its recommendation which found the applicant guilty of sexual harassment of his sub-ordinate and submitted that the punishment meted to him is perfectly in order. Kum.Poornima, the complainant had approached this Tribunal against the transfer order and not against the committee's report and therefore, only the recommendation of the committee pertaining to the transfer of the applicant was set aside by the Tribunal.

8. We have carefully considered the facts of the case and also the submissions made by either side.

9. It is an admitted fact that there was an allegation of sexual harassment against the applicant, to enquire into which a Committee on Prevention of Sexual Harassment of Women Employees at Work Place was set up. The Committee submitted a detailed report wherein it found the applicant guilty of entering into a consensual relationship with the sub-ordinate on a promise of marriage and misusing his position of

supervisor to force her to stay with him in the residence provided to him by the department. The committee recommended that the applicant should be awarded with one of the punishment falling under major penalties. However, it also recommended for transfer of the complainant out of the Chikmaglur Division to ensure the safety of the complainant and also as a rehabilitation measure. It seems that Kum.Poornima, the complainant therein was aggrieved by the transfer order which was based on the recommendation of the committee and therefore prayed this Tribunal in OA.No.1524/2013. During the course of hearing, the fact that the applicant took away Rs.1.5 lakhs from the complainant also emerged. Taking into this aspect and the issue of transfer, the Tribunal ordered as follows:

“Therefore, we would again direct the Committee to look into the matter to see whether any factual resolution can be brought about in the economic situation alleged by the applicant. But, at the same time while inducing such a settlement, there need not be any penal Damocles sword hanging over the party respondents also. On an understanding of a law seem to be formalised in a particular climate of public rage but which had now shown us that it will do less good than envisaged. But the transfer order of the applicant seems to be reasonable if the applicant apprehends threats to her. But then, if it is settled through the agency of the Committee as we think that this is one Committee which has done its job fairly. We are trusting it to resolve the issue at their level and to enable it to do so all the proceedings from the finalisation of the report and handing over it to the authority including transfer order are hereby quashed. We direct the

committee to recognize the human elements involved in it and make justice available to the poor applicant as well in the matter of Rs.1.5 lakhs as well. OA is disposed of. No order as to costs.

10. The OA.No.1524/2013 was filed by Kum.J.M.Poornima, the complainant in the sexual harassment case against the transfer order and not against the report of the committee which only substantiated her complaint. Therefore, from the said order, it can be concluded that the recommendation of the committee pertaining to the transfer was quashed and not the finding of the committee holding the applicant guilty of sexual harassment and misconduct. Therefore, the order of the disciplinary authority which was based on the findings of the sexual harassment committee appear justified keeping in view the details brought out in the report itself. When the applicant made an appeal before the appellate authority, the appellate authority observed as follows:

“I have gone through the appeal very carefully. Basically the case relates to the enquiry instituted by a committee constituted under administrative competency to look into the sexual harassment aspect. As per Govt. of India instructions and guidelines, the report of the SHC should be treated similar to the report of the Inquiry officer under Rule 14 of CCS (CCA) Rules 1965 to operate major disciplinary proceedings which has been done in the instant case exactly adhering to the Govt. of India instructions, the appellant questions the way in which the inquiry was conducted and completed by the SHC. Since there is an intervention by the Judicial forum for the impact and operations of the report of the SHC and the Department has further challenged the intervention which is in progress as

on date, it would not be appropriate and in order to comment on the enquiry conducted by the SHC and the subsequent action in accordance with the findings of the committee, till the outcome of the judgment of the competent judicial forum.

Accordingly, I dispose of this appeal with the following order.

Order

I L.K.Dash, DPS SK Region, in exercise of powers conferred by Rule 27 of CCS(CCA) Rules 1965 order that the appeal by Sri Palaniswamy is disposed of maintaining status quo.”

11. It would appear from the order of the appellate authority that only because the matter was pending before the Tribunal, it did not take a final decision and disposed of the appeal passing the order to maintain status quo. The order of status quo does not carry any meaning and is not conclusive. The appellate authority should have disposed the appeal on its own merit taking into consideration the report of the sexual harassment committee and the decision of the disciplinary authority. Therefore, after detailed consideration, we hold that the order of the appellate authority which directed for maintaining status quo does not provide any clarity and therefore cannot be sustained. Therefore, we quash the order of the appellate authority dated 29.11.2014 and remanded the matter back to the appellate authority for taking a final decision on the representation made by the applicant against the order passed by the disciplinary authority and pass a reasoned order. This should be done within

a period of two(2) months from the date of receipt of copy of this order.

12.The OA is disposed of with the aforesaid direction. No order as to costs.”

5. In paragraph 4 of this order we have found that the committee found the applicant was guilty of entering into a consensual relationship with the complainant who was his subordinate on the promise of a marriage. But then the respondents had produced annexure-R-4. The questions and answers registered by the Committee wherein a question is asked to the applicant as to why he is pressurizing Smt.Poornima into marriage when at one time Smt.Poornima had refused marriage and the applicant answered that he is not pressurizing her. Now, apparently, it seems that they have started living together once again after submerging their differences.

6. Some times it happens that human being may have differences of opinion but it is the duty of the adjudicating authorities as well as departmental authorities to view all these things dispassionately and not enter into personal differences of opinion. It is not their job at all. From the evidence already on record it cannot be said that there can be any amount of sexual harassment involved in it. The Hon'ble Apex Court time and again held that if a man and woman live together in consensual relationship it is their issue and none others. But the Committee through evidence already found that they were living in a consensual relationship. The extension of severe morality and its lapses on the part of the Committee as well as the

other authorities are therefore going against the spirit of feeling of the Hon'ble Apex Court judgement above cited. Therefore, there cannot be factually or legally any kind of sexual harassment involved in this case. We have explained this matter and matrix with extreme carefulness in the matter after analyzing of this matter in OA.1524/2013 which is not challenged and has become final. The respondents have no business or right to go against the spirit of this judgement and to hold that there might be sexual harassment and especially so in the present circumstances the applicant and the said lady are living in a marital relation even now. All these orders are hereby quashed.

7. At this point of time Shri M.Rajakumar points out that OA.1524/2013 was allowed. It is true that was filed by Smt.Poornima requesting for a transfer to get away from the applicant in this case, following their difference. These are personal matters wherein neither the govt nor any other authority need enter into. If at all any succor to be given to any party the family court in India are quite capable of giving justice. It is also pertinent to note that Smt.Poornima had withdrawn the complaint also and the learned counsel now says that it is subsequent to the disposal of the OA that will not alter anything. Discretion is a required must for any authority for wield of authority. The Department should not have entered into lives and matter of any of its employees. At this point it is brought out that in the colonial days all these were found factors enough for government interference. After at least a century has passed by we have formed new moves

and morals now. If a man and woman want to live together it is their business alone and not the government's business. All these orders are hereby quashed and the applicant be reinstated back in service and since it was done without reason and against the logic profounded by the order in OA.1524/2013, he will be entitled to full benefits for the above period. OA is allowed. No order as to costs.

8. At this point of time Shri M.Rajakumar presses on another point in OA.1524/2013, we had imposed a cost on the applicant because that cost has a bearing not on the case related but on the fact that during their consensual relationship Shri Palani Swamy had taken a loan from Smt.Poornima and had not returned it. The cost refers this factor and nothing else. We felt that being adjudicator we need to do complete justice to both parties. Therefore, while holding that there is no sexual harassment we had also directed Shri Palani Swamy to return this amount. It is now submitted that the amount is already been returned. Therefore, OA is allowed. Applicant to be reinstated back in service with full benefits. No order as to costs.

(CV.SANKAR)
MEMBER (A)

(DR. K.B. SURESH)
MEMBER (J)

bk.

Annexures referred to by the Applicant in OA.No.734/2017

Annexure.A1- Copy of letter dated 30.1.2013

Annexure.A2- Copy of the judgment dated 23.07.2014 in Spl Case No. 108 of 2013.

Annexure.A3- Copy of the report of Complaints Committee dated 01.07.2013

Annexure.A4- Copy of Order dated 12.06.2014

Annexure.A5- Copy of applicant's appeal dated 13.07.2014-

Annexure.A6- Copy of order dated 01.07.2014 in OA.1524/2013

Annexure.A7- Copy of applicant's letter dated 31.07.2014

Annexure.A8- Copy of the letter dated 17.12.2014 and the order dated 29.11.2014

Annexure.A9- Copy of order dated 28.03.2016 in OA.52/2015

Annexure.A10- Copy of order dated 08.07.2016

Annexure.A11- Copy of applicant's revision petition dated 07.11.2016

Annexure.A12- Copy of the order dated 18.09.2017

Annexures referred to by the Respondents in the short Reply

Annexure-R1- copy of OA copy.

Annexure-R2- Copy of order dated 28.03.2016 in OA.52/2015

Annexure-R3- Gazette of India No.14/2013 dated 22.4.13

Annexure-R4- copy of proceedings dated 30.4.13

Annexure-R5- Copy of letter dated 10.1.2014.

Annexure R-6: Copy of representation dt.15.1.14

Annexures referred to by the Respondents in the Reply Statement

Annexure-R1- CCS(Conduct) Rules, 1964 – Guidelines regarding prevention of Sexual harassment of working women in workplace dated 16.09.2009.

Annexure-R2- Copy of letter dated 7/21.8.2009

Annexure-R3- copy of Request for transfer – case of Kum. J M Poornima, GDS BPM kadavanti BO a/w S.G Pete So as GDS BPM, Heragu BO a/w Dubba SO under Hassan Division. Dated- 10/09/2013

Annexure-R4- copy of MA No: 527/2014 IN, OA No: 1524/2013 dated 24/04/2015

Annexure-R5- copy of OA No: 170/00052/2015 dated 28/3/2016

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