M/S. Isg Novasoft Technologies Limited vs Ms. Gayatri Balasamy on 8 August, 2019

Author: R. Subbiah

Bench: R. Subbiah, Krishnan Ramasamy

OSA No. 5

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on : 16.04.2019

Judgment pronounced on : 08.08.2019

Coram

The Honourable Mr. Justice R. Subbiah
and
The Honourable Mr. Justice Krishnan Ramasamy

Original Side Appeal Nos. 59 and 181 of 2015

O.S.A. No. 59 of 2015

M/s. ISG Novasoft Technologies Limited
rep. by the Managing Director
(formerly was rep. by Chairman of the Board)
Tek Towers - 3rd Floor
11, Rajiv Gandhi Salai
Thoraipakkam
Chennai - 600 097 .. Appella

Versus

1. Ms. Gayatri Balasamy
2. Mr. Justice T.N.C. Rangarajan (Retd)
   Blue Lotus # 103, Road No.3
   Banjara Hills
   Hyderabad - 500 034 .. Respond

O.S.A. No. 181 of 2015

Ms. Gayatri Balasamy .. Appella

Versus

1. M/s. ISG Novasoft Technologies Limited
   Represented by the Chairman of the Board
   Sucons Oki Info Park ES4, IT Highway

(OMR) Near SIPCOT
Chennai - 603 103

2. Mr. Justice T.N.C. Rangarajan (Retd)
Blue Lotus # 103, Road No.3
Banjara Hills
 Hyderabad - 500 034 .. Respond

Appeals filed under Clause 15 of the Letters Patent and under X of the Original Side Rules against the Judgment and Decree dated 02.0 passed in O.P. No. 463 of 2012 on the file of this Court.

O.S.A. No. 59 of 2015

For Appellant : Mr. Arun Khosha
for Mr. S.K. Chandrakumar
For Respondents : Mr. M.V. Swaroop for R1

O.S.A. No. 181 of 2015

For Appellant : Mr. M.V. Swaroop
For Respondents : Mr. Arun Khosha
for Mr. S.K. Chandrakumar for

COMMON JUDGMENT

R. SUBBIAH, J Both these appeals arise out of the Judgment and Decree dated 02.09.2014 passed by the learned single Judge in O.P. No. 463 of 2012. By the said Judgment, the learned single Judge allowed the original Petition No. 463 of 2012 filed by the petitioner therein by modifying the award passed by the Arbitrator under claim No.12 to the effect that the petitioner therein is entitled for an additional amount of Rs.1,68,00,000/- (Rupees One Crore Sixty Eight Lakhs Only) payable by the first respondent therein.

2. Aggrieved by the order dated 02.09.2014 passed by the learned single Judge, the first respondent therein namely M/s. ISG Novasoft Technologies Limited has filed O.S.A. No. 59 of 2015 questioning the correctness of the order passed by the learned single Judge in enhancing the compensation amount in relation to claim No.12.

 OSA No. 59 of2015

3. As against the very same order dated 02.09.2014 passed in O.P. No. 463 of 2012, the petitioner therein/claimant has filed O.S.A. No. 181 of 2015 seeking further enhancement of the compensation with respect to disallowed portion of the claim petition.

4. Thus, both these appeals are inter-twined and/or inter-related with each other and therefore, they are taken up for hearing together and disposed of by this common Judgment.

5. For the sake of convenience, the parties shall be referred to as 'appellant' and 'first respondent' as they were arrayed in O.S.A. No. 181 of 2015.

6. A perusal of the claim made by the appellant in her claim petition before the Arbitrator would indicate that she has filed the claim petition seeking compensation under 12 heads to the tune of Rs.28,88,55,500. The foundation for the appellant to file the claim petition is elucidated in the following paragraphs.

7. According to the appellant, she entered into an employment agreement with the first respondent company on 10.03.2006, as per which she was appointed as Vice President (M&A Integration Strategy) with effect from 27.04.2006. As per the said agreement, the first respondent company would impart training to the appellant in various subjects such as general management, finance, business strategy and project management during the first year of employment. The agreement also contemplates that during the first year of employment, the http://www.judis.nic.in OSA No. 59 of2015 appellant has to work in Chennai and thereafter, she would be transferred to United States of America. The agreement also contains an arbitration clause, with the seat of Arbitration at Chennai. Clause 6 of the employment agreement deals with procedure for termination of employment, while Clause 6.2 stipulates that the employer is entitled to terminate the employment agreement by giving notice to the other party (120 days in advance) in writing and a severance compensation equivalent to one year's gross salary inclusive of maximum bonus payouts at the time of severance from the company. However, clause 6.3 indicates that if either of the party to the agreement intends to terminate the agreement within three months of employment due to dissatisfaction or disagreement or discontentment, as the case may be, the employee shall receive four months gross salary as compensation.

8. According to the appellant, within a few months of her joining the first respondent company, she noticed that there was a change in the behaviour pattern of Krishna Srinivasan, who was working as Chief Executive Officer in the company and he made sexist and derogatory remarks about her physique and dress sense. The appellant, unable to tolerate the behaviour of Krishna Srinivasan, tendered her resignation on 24.07.2006. Surprised by the letter of resignation of the appellant, the said Krishna Srinivasan apologised to the appellant and insisted the appellant to revoke her letter of resignation by stating that she was a valuable and irreplaceable asset to the first respondent company. Moved by such gesture, the appellant accepted the apology and continued her employment. However, shortly after re-joining the company, one Venkatesan was newly recruited as Vice- http://www.judis.nic.in OSA No. 59 of2015 President - Global Human Resource. The aforesaid Krishna Srinivasan and Venkatesan have indirectly colluded together, exerted pressure on the appellant in discharging her duties and thereby attempted to bring disrepute to the appellant. The duo have issued contradictory instructions to the appellant and had humiliated her with unwarranted remarks. The appellant was also deprived of her upward revision in her salary purportedly by Krishna Srinivasan during March 2007. According to the appellant, she was made to confront numerous difficulties in discharge of her duties by the aforesaid Krishna Srinivasan and

Venkatesan purportedly as a measure of punishing the appellant for not responding to their sexual overtures. The appellant also informed the Senior Executives in the company in United States about the sexual harassment to which she was subjected to by Krishna Srinivasan, which was aided and abetted by Venkatesan, however, no action was initiated. The appellant also received several e-mails containing derogatory and indecent remarks from the duo, which made her to inform the management that she was willing to leave the company provided her termination benefits were settled in terms of the Employment Agreement dated 10.03.2006. As there was no response, the appellant sent an e-mail dated 14.12.2017 to the Management along with the earlier e-mails she had sent to Krishna Srinivasan and Venkatesan. In the meantime, two letters of termination were issued by the first respondent company on 17.10.2007 and 12.12.2007. Subsequent to the e-mail dated 14.12.2017 of the appellant, one more letter of termination dated 20.12.2007 was also sent by the first respondent. According to the appellant, the Management, instead of responding to her e-mails, denied admission to her into the office on 21.12.2007 and escorted her out of the office in full view of her co- http://www.judis.nic.in OSA No. 59 of2015 workers. In this context, the appellant has filed a complaint before the R-4, Pondy Bazaar Police Station, T. Nagar, Chennai against the Chairman and Director of the Company based on which a case in Crime No. 824 of 2007 was registered for the offences of sexual harassment, cheating, criminal breach of trust, misappropriation of company funds and criminal intimidation etc., On the basis of such complaint, the appellant was enquired by the Police officials and she had narrated in her statement the manner in which she was subjected to sexual harassment during the course of her employment and the inaction on the part of the higher officials to deal with the offenders. Notwithstanding the filing of the complaint which culminated in Crime No. 824 of 2007, the appellant also sent a legal notice dated 05.02.2008 through her counsel to all the accused in the criminal case, but there was no response to the notice which would indicate that all the accused have entered into a conspiracy to ensure that no action is taken against Krishna Srinivasan and Venkatesan for their misdeeds.

9. In the meantime, the first respondent/Management has also filed criminal complaints against the appellant complaining defamation and extortion.

10. The various criminal proceedings initiated by the appellant as well as the first respondent company need not be reiterated hereunder inasmuch as they were set aside by the Honourable Supreme Court, by order dated 18.03.2011 by observing that after the termination of the appellant, the only remedy available to her is to seek for payment of compensation, which she has to work out before an Arbitrator. Accordingly, by the said order dated 18.03.2011, the Honourable http://www.judis.nic.in OSA No. 59 of2015 Supreme Court, while quashing all the criminal complaints or criminal proceedings initiated by both sides, directed the parties to approach an arbitrator for adjudication of the dispute.

11. Pursuant to such direction issued by the Honourable Supreme Court on 18.03.2011, the second respondent herein was appointed as an arbitrator to resolve the dispute between the appellant and the first respondent and the second respondent/arbitrator entered into reference on 29.04.2011.

12. Before the second respondent/arbitrator, the appellant filed the Claim Petition for recovery of a total sum of Rs.28,88,55,500/- under 12 heads. The first respondent company also made

counter-claim, claiming a sum of Rs.4 crores as damages for defamation of four persons employed in the first respondent company and another sum of Rs.23 crores as damages for loss of reputation of the company and its senior executives.

13. The second respondent/arbitrator, considering the rival claims, rejected the counter claim made by the first respondent/management, while accepting claim Nos. 1 to 4 made by the appellant and awarded a sum of Rs.2 Crore. In all other respects, the claim made by the appellant under Claim Nos. 5, 6, 7, 9, 11 and 12 were rejected.

14. Aggrieved by the rejection of the counter-claim, the first respondent has not filed any Original Petition under Section 34 of The Arbitration and http://www.judis.nic.in OSA No. 59 of2015 Conciliation Act, 1996. However, the appellant/claimant has filed O.P. No. 463 of 2012 under Section 34 of the said Act before the learned single Judge questioning the correctness of the award passed by the Arbitrator/second respondent herein in so far as it relates to disallowing the claim Nos. 5, 6, 7, 9, 10, 11 and 12 made by her. In so far as the claim Nos. 8 is concerned, the counsel for the appellant, who appeared before the learned single Judge, has not pressed the same and it was also recorded by the learned single Judge in para No.14. Therefore, what was questioned by the appellant in the Original Petition is with reference to rejection of claim Nos. 5, 6, 7, 9, 10, 11 and 12 by the arbitrator.

15. The learned single Judge independently considered the various heads under which the appellant made her claim. With reference to claim Nos. 1 to 4, the learned single Judge found that the claim under the head 1 to 4 was already considered by the learned Arbitrator in para No.19 of the award.

16. As far as other claims are concerned, the learned single Judge concurred with the Arbitrator and held that claimant is not entitled for compensation under claim No. 5, 6, 7, 9, 10 and 11. However, for claim No.12 relating to non- constitution of committee as directed by Honourable Supreme Court in Visaka case to enquire into the allegations of sexual harassment, the learned single Judge concluded that non-constitution of committee, had prejudiced the appellant.

17. In effect, the learned single Judge modified the award passed by the Arbitrator to the effect that apart from the compensation of Rs.2 crores awarded by http://www.judis.nic.in OSA No. 59 of2015 the Arbitrator in respect of claim Nos. 1 to 4, the appellant will be entitled to an additional amount of Rs.1,68,00,000/- (Rupees one crore and sixty eight lakhs only) towards compensation for the 12th head of claim. The learned single Judge directed the first respondent company to pay such amount determined within a period of two months from the date of receipt of a copy of this order. It is this order dated 02.09.2014 of the learned single Judge, which is challenged in these appeals.

18. Assailing the order of the learned single Judge, the learned counsel for the appellant would contend that the rejection of claim Nos. 5, 6, 7, 9, 10 and 11 by the learned single Judge is legally not sustainable. According to the learned counsel for the appellant, claim No.5 relates to exemplary damages for non-revision of salary at the end of first year of employment. Even though the arbitrator/second respondent, in para No.18 and 19 of the award observed that the claimant is entitled to revision of salary it was concluded that claim No.5 is based on clause 3.3 of the

employment agreement and non-consideration of the same by the company is proper. Thus, it is submitted by the learned counsel for the appellant that the arbitrator, despite making a factual finding in favour of the appellant, did not consider the claim to award any amount towards damages. In this context, reference has been made to the decision of the Calcutta High Court in the case of Sheik Jaru Bepari vs. AG Peters & others reported in AIR 1942 Calcutta 493 wherein it was held that if an element of fraud, oppression or malice, is found, law does not envisage payment of compensation merely proportionate to any pecuniary loss actually suffered, but exemplary damages by way of punishment to the wrong http://www.judis.nic.in OSA No. 59 of2015 doer. When the employment agreement clearly envisages that the employee shall receive a minimum annual remuneration of USD 150,000.00 from the second year onwards, the findings of the second respondent/arbitrator in not considering the fraud, oppression and malice committed by the first respondent company is contrary to clause 3.3 of the employment agreement. Despite such an express understanding, the arbitrator as well as the learned single Judge erred in holding that claim No.5 is legally not sustainable. Similarly, the claim No.6 relates to damages for non-relocation of the appellant to U.S.A. during the second year of employment and when such a breach has been clearly established by the appellant, she is entitled for damages for non-relocation. In fact, in Para No.20 of the award, the Arbitrator has held that ".....No doubt, it is possible to regard the failure to transfer her to US as a breach of the contract. By remaining in India she had at that point condoned the breach. Even assuming that such condonation was only temporary and she was still expecting to be transferred to USA, the failure to transfer her to USA could at best be regarded as a breach of the agreement by the company." The arbitrator, having concluded that there was a breach, is not justified in not awarding adequate compensation under the claim No. 6.

19. With regard to claim No.7, the learned counsel for the appellant proceeded to contend that under Article 6.2 of the Employment agreement, 120 days notice is stipulated, in writing apart from severance compensation equivalent to 1 year gross salary and maximum bonus payout at the time of severance from the company. In the present case, even though the first respondent served two letters on 12.12.2007 and 20.12.2007, such notices do not fulfil the conditions laid http://www.judis.nic.in OSA No. 59 of2015 down in Article 6.2 of the Employment agreement especially when the letter dated 20.12.2007 proceeds on the basis that the appellant is guilty of breach of contract. Even though the Arbitrator/second respondent concluded that there is no breach of contract by the appellant, the arbitrator did not consider claim No.7 and it is contrary to his own findings. The learned counsel for the appellant also relied upon para No.19 of the award wherein it was held that ".....in view of the fact that at the relevant time there had been no complaint against the service of the claimant and in view of the fact that her services were terminated without cause, the respondent can gracefully grant bonus at the maximum rate of 40%". The learned single Judge though found that the arbitrator is not correct in rejecting the claim No.7, failed to correct such error committed by the learned arbitrator. According to the learned counsel for the appellant, public policy demands that when there is an error of law, the Court performing supervisory jurisdiction under Section 34 of the Act has to correct such errors and failure to do so vitiates the findings of the learned single Judge with respect to claim No.7.

20. The learned counsel for the appellant also would contend that claim No.10 relates to failure to provide stock under the Employee Stock Option Scheme as per Clause 3.1 and 3.3 of the

employment agreement. As per clause 3.1, the employee shall receive equity as per the Company's Stock Option Scheme and clause 3.3 stipulates that the employee shall also receive equity as per the Company's Employees Stock Option Scheme as decided during the first year of employment subject to an increase in the second year. According to the learned counsel, the first respondent made a false representation in the above clauses http://www.judis.nic.in OSA No. 59 of2015 when in fact, there is no such stock option scheme in vogue. Even the learned Arbitrator, in para No.26 of the award, recorded that such a scheme does not exist. In fact, in the e-mail dated 14.11.2007 of the appellant addressed to the Chief Executive Officer of the Company, it was clearly stated that "Believing your words and trusting in you, I gave up my HIB US Visa and came to ISGN with promised assurance that I will do very well in my career, receive significant wealth (USD 1 million) in the form of stock options and continue with my US lifestyle after a year of working with ISGN India." This letter dated 14.11.2007 was sent by the appellant much before the invalid termination notice dated 20.12.2007. In any event, the appellant relied on the promise of the stock options to take up employment with the first respondent company, but the first respondent company committed breach of such assurance and therefore, the appellant is entitled for damages for a sum of USD 1 million which is equivalent to Rs.4,50,00,000/- at the exchange rate prevailing at the time of filing the claim.

21. As far as claim No.11 is concerned, which pertains to Loss of employment opportunity, the appellant was in a very senior position in the first respondent company and drawing Rs.67,50,000/- per annum plus bonus and other benefits. However, by the notice dated 20.12.2007, the claimant was unceremoniously terminated from service as if she had committed breach of contract. Even though the learned Arbitrator in para No.18 of the award found that there had been no complaint against the service of the appellant, yet he failed to award appropriate compensation. In fact, the unceremonious termination of the appellant from the services of the company had dented her job prospects. http://www.judis.nic.in OSA No. 59 of2015 Therefore, according to the learned counsel for the appellant, the learned Arbitrator ought to have considered awarding compensation for a period of five years during which period, the appellant could not secure any employment between 20.12.2007, the date of illegal termination and 21.03.2012, the date of award passed by the arbitrator. The learned counsel for the appellant, therefore, prayed for enhancement of compensation, which were disallowed by the learned single Judge with respect to claim Nos. 1, 2, 3, 4, 5, 6, 7, 10 and 11.

22. Countering the submissions of the counsel for the appellant, the learned counsel for the first respondent would contend that the learned single Judge traversed beyond the scope of Section 34 of The Arbitration and Conciliation Act, 1996 and modified the well considered award of the learned Arbitrator/second respondent. It is his contention that in exercise of powers conferred under Section 34 of the Act, the learned single Judge is only empowered to either confirm or set aside the award passed by the learned Arbitrator for the reasons to be recorded. However, the learned single Judge has no power to make modifications in the award passed by the arbitrator. But in the instant case, the learned single Judge has erroneously modified the amount under Claim No.12 by doubling the compensation for non-constitution of a committee as per the direction of the Honourable Supreme Court in Vishaka case.

23. The learned counsel for the first respondent relied on the decision of the learned single Judge himself in the case of R. Narayanan vs. M/s. India Info Line Securites Private Limited pronounced on 13.06.2013 wherein it was held http://www.judis.nic.in OSA No. 59 of2015 that in exercise of power under Section 34 of The Arbitration and Conciliation Act, the Court has no power even to remit the matter back to the Arbitrator and therefore allowed the petition. Further, in yet another decision of the learned single Judge himself rendered in A. Chandrasekaran vs. Yoha Securities Limited, it was held that the Court can either set aside the award or sustain it. While so, the learned single Judge grossly erred in modifying the award in relation to claim No.12 by assuming the role of the arbitrator in making an independent assessment of the claim.

24. The learned counsel for the first respondent further submitted that the learned single Judge grossly erred in seeking corroboration for a pre-conceived notion of interfering with the arbitrator's award to the extent of not seeking to modify any claim adjudicated upon by the Arbitrator but to assume the role of the arbitrator in making independent pronouncement. In this context, the learned counsel for the first respondent relied on the decision of the Honourable Supreme Court in (i) Gautam Constructions and Fisheries Limited vs. National Bank for Agricultural and Rural Development reported in (2000) (6) SCC 518 wherein the Honourable Supreme Court interfered with the award to the extent of modifying the rate per square feet at which the Contractor's built up space is to be compensated, but in that case the question of the Court's power of modification of the award was neither raised nor questioned. Similarly, in the case of Hydero Electric Power Supply Co., Ltd., vs. Union of India reported in 2003 (4) SCC 172 the Apex Court interfered with the award only to the extent of restricting the interest on the awarded amount from the date of the award and not from the date of submissions of bills. http://www.judis.nic.in OSA No. 59 of2015 Therefore, it is contended that in exercise of power under Section 34, the Court is empowered to either dismiss the petition or set aside the award but not to make modifications in the award.

25. The learned counsel for the first respondent also relied on the decision of the Honourable Supreme Court in McDermott International Inc., vs. Burn Standard Co., Ltd., reported in 2006 (11) SCC 181 wherein it was held that the Court cannot correct errors of arbitrators. It can only quash the award leaving the parties free to begin the arbitration again, if it is desired. The scheme of the Act provides for keeping the supervisory role of the Court at minimum level and this can be justified as the parties to the agreement makes a conscious decision to exclude the Court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.

26. The learned counsel for the first respondent relied on the decision of the Delhi High Court in Cybernetics Network Limited vs. Bisquare Technologies Pvt Ltd., reported in (2012) III AD (Delhi) 161 wherein it was held that under Section 34 (2) of the Act, the Court is empowered to set aside an award on the grounds specified therein. It was further held that remand to the arbitrator under Section 34 (4) is to the limited extent of requiring the arbitral tribunal to eliminate the grounds for setting aside the arbitral award. It was also held that there is no specific power granted to the Court to itself allow the claims originally made before the Arbitral Tribunal where it finds that the Arbitral Tribunal erred in rejecting such claims. If such a power is recognised as falling within the ambit of Section 34 (4) of http://www.judis.nic.in OSA No. 59 of2015 the Act, then the Court will be acting no different from the appellate Court which would be contrary to the legislative intent behind

Section 34 of the Act. By quoting the above decision, the learned counsel for first respondent would contend that the learned single Judge can either uphold or reject the award but ought not to have modified the award. The allowing or disallowing of the award is within the domain of the Arbitrator and the court while exercising the powers under Section 34 of the Act has no jurisdiction to do so. Even if the arbitrator did not allow any one of the claims or allowed the claim partially than what was claimed, the Court can set aside the award and in that event it does not imply that the entire claim amount stands allowed. It only means that the award to the extent of the claim not allowed by Arbitrator stands quashed leaving the parties to institute further arbitral tribunal for settlement of the balance portion of the claims or else be satisfied with the amount awarded by the Arbitrator. For this purpose, the learned counsel for the first respondent relied on the decision of the Division Bench of this Court in the case of Central Warehousing Corporation vs. A.S.A. Transport reported in 2008 (3) MLJ 382 Madras (DB) wherein it was held that the Court can only uphold or quash the award or a portion of it but cannot grant any relief beyond what was granted by the Arbitrator. The Court, in exercise of power under Section 34 of the Act has no jurisdiction to investigate into the merits of the case or examine documentary evidence and substitute its own evaluation to come to a conclusion that the Arbitrator had acted contrary to the bargain between the parties.

27. The learned counsel for the first respondent company, on merits, would contend that non-constitution of a committee as directed by the Honourable http://www.judis.nic.in OSA No. 59 of2015 Supreme Court in Visaka case has not in any manner prejudiced the appellant. The appellant had relentlessly prosecuted the first respondent company both by initiating Criminal prosecution as well as the present claim made before the arbitrator and she was not left remediless. Even otherwise, when the appellant had sent a letter dated 14.12.2007 alleging certain misconduct by the Director of the company, there was no demand made by her for constitution of a committee as directed by the Honourable Supreme Court in Vishaka case. At any rate, the learned single Judge failed to consider that the appellant never ventilated her grievance through several in-house mechanism made by the first respondent company such as feedback box, board of network, suggestion boxes, stand-in meetings etc., The learned single Judge also did not consider as to what would be the consequences or damage caused to the appellant by not constituting a committee when the company had provided a safe working of environment to the women employees. However, in para No.133 of the impugned order, the learned single Judge has recorded the fact that the existence of a grievance redressal committee and an ombudsperson in the first respondent organisation is no substitute for a Vishaka committee. Therefore, it is clear that there are adequate mechanism made available by the first respondent company to ventilate the grievance of the women employee, though not a substitute or in accordance with the directions issued by the Honourable Supreme Court in Vishaka case. In such event, the compensation awarded by the learned single Judge at Rs.1,68,00,000/- for non-constitution of committee is wholly unjust, arbitrary and unwarranted. Therefore, the learned counsel for the first respondent prayed for setting aside the order passed by the learned single Judge in so far as it relates to award of http://www.judis.nic.in OSA No. 59 of2015 compensation of Rs.1,68,00,000/- for non-constitution of a committee as per the directions of the Honourable Supreme Court in Vishaka case.

28. We have heard the learned counsel appearing for both sides at length and also perused the materials placed on record. Admittedly, the appellant was appointed in the first respondent

company on 27.04.2006 in an executive position and the terms and conditions of such appointment of the appellant is preceded by an employment agreement dated 10.03.2006. The employment agreement dated 10.03.2006 stipulate several conditions governing the employment of the appellant with the first respondent company. Prominent among the conditions are Clause 3.1 which contemplates employment of the appellant during the first year at India and the remuneration payable to her during the first year. Clause 3.3 relates to re- locating the appellant to United States in the second year of her employment and the remuneration payable thereof. Clause 6.2 indicates that the employment of the appellant is terminable by giving notice 120 days in advance, in writing and in such event severance compensation equivalent to one year's gross salary, inclusive of minimum bonus, will be paid to her apart from salary and other benefits during the period of notice. However, clause 6.3 indicates that if the service of the appellant is not satisfactory to the company, the employment agreement will be terminated and in such event, the appellant will be entitled for four months gross salary as compensation. These are some of the important conditions governing the employment of the appellant contained in the employment agreement, which according to her have been breached by the first respondent company entailing the management to pay compensation to her.

http://www.judis.nic.in OSA No. 59 of2015

29. Admittedly, after three months of the employment of the appellant, she submitted her resignation on 27.04.2006 purportedly on the ground that she was subjected to sexual harassment by Krishna Srinivasan, who was working as Vice-President - Mergers and Acquisitions in the company. However, her resignation was not accepted and she was convinced to withdraw it and assured of a safe work environment in the company. Therefore, the appellant withdrew her letter of resignation and continued to work in the appellant company. The woes of the appellant did not end after she re-joined the company. Rather, it was alleged that she was subjected to continued harassment by the aforesaid Krishna Srinivasan along with one Venkatesan, who joined as President. The appellant had also taken up the issue with the higher management, but it is alleged that there was no action taken on her complaint. Ultimately, the appellant was terminated from service by virtue of three letters served to her, one on 17.10.2007, the next on 12.12.2007 and the last was dated 20.12.2007. In the first letter dated 17.10.2007, it was stated that the Management decided to pay to the appellant four months gross salary in lieu of the notice period. By the second letter dated 12.12.2007 it was stated that the employment agreement dated 10.03.2006 stands terminated. By the last letter dated 20.12.2007, it was informed that the letter dated 12.12.2007 stands withdrawn and a revised letter of termination was issued to the appellant subject to certain conditions with respect to the terms of settlement. Shortly thereafter, the appellant launched criminal prosecution, the details of which were narrated hereinabove and they are not required to be elaborated any further as they are not the subject matter of this appeal. This is more so that all the criminal proceedings initiated by the appellant as well as the management against each http://www.judis.nic.in OSA No. 59 of2015 other have been set aside by the Honourable Supreme Court in the order dated 18.03.2011 and as per the directions of the Honourable Supreme Court, the second respondent/arbitrator was appointed to resolve the dispute between the parties.

30. Before the Arbitrator, the appellant filed her claim petition containing 12 claims, which are tabulated by the learned single Judge in para No.7 of the order dated 02.09.2014, which is impugned in these appeals. For the purpose of clarity, the claims made by the appellant is reiterated hereunder:-

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S.No. Nature of Claim Amount claimed

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1. Bonus for completion of the first year Rs. 21,60,000.00

2. Arrears in Salary Rs. 11,62,500.00

3. Severance payouts Rs.1,17,00,000.00

4. Bonus for the second year of employment Rs. 18,00,000

5. Non-revision of salary after the end of the first year of employment Rs. 67,50,000

6. Failure of the Respondent to transfer the Claimant to the Unites States of America Rs. 3,51,00,000

7. Non-compliance of procedures by Respondent while purportedly terminating the Claimant Rs. 3,51,00,000

8. Not providing bonus in the second year of employment Rs. 18,00,000

9. Not providing learning & training opportunities Rs. 26,10,000

10. Failure to provide stock under Respondent's Employee Stock Option Scheme Rs. 4,50,00,000 http://www.judis.nic.in Loss of employment opportunity Rs. 5,76,00,000 OSA No. 59 of2015

12. Damages for non-constitution of Committee to inquire into allegations of sexual harassment Rs. 9,07,00,000 Total Rs.28,88,55,000.00

31. The learned Arbitrator, upon extensive consideration, allowed claim Nos. 1 to 5 and arrived at a sum of Rs.1,68,00,000/- as compensation. However, in the penultimate paragraph No.35, the arbitrator concluded that "taking into consideration the benefit that the respondent enjoyed by retaining the amount, I consider it fit to award a round sum of Rs.2 crores to be paid by the respondent to the claimant as compensation. The amount already paid is to be adjusted and the balance

is tobe paid. The balance amount shall carry interest at 18% p.a. from 01.04.2012 till date of payment." The learned single Judge, concurred with the conclusion arrived at by the learned Arbitrator and held that the learned Arbitrator is right in deciding the claim Nos. 1 to 5 made by the appellant and there is no error in such a conclusion of the arbitrator. The claim No.5 relates to non-revision of salary after the end of the first year of employment. Admittedly, within three months of employment of the appellant, she resigned her employment, however, her resignation was not accepted and she rejoined the employment. Among the claim Nos. 1 to 5, the third claim relates to severance pay out for which the learned Arbitrator has awarded a sum of Rs.1,68,00,000/- and rounded it off to Rs.2 crore as compensation. Therefore, we are of the view that the learned Arbitrator as well as the learned single Judge have considered the claim Nos. 1 to 5 and concluded that the sum of Rs.2 crores awarded is sufficient compensation for the claim Nos. 1 to 5. The learned single Judge has also dealt with claim No.5 in detail and concluded that there is no error in awarding such amount. We are fully in http://www.judis.nic.in OSA No. 59 of2015 agreement with such findings arrived at by the learned single Judge. Therefore, we hold that the compensation of Rs.2 crores awarded by the learned Arbitrator, which was affirmed by the learned single Judge, will be a just and fair compensation for the claim Nos. 1 to 5 made by the appellant.

32. The Claim No.6 relate to failure of the management to transfer to United States of America. As we could infer from the pleadings, even before completion of one year of employment, the appellant herself sent an e-mail dated 21.03.2007 agreeing that re-location can be postponed or dropped for some time.

Therefore, the learned arbitrator as well as learned single Judge, by relying on the e-mail dated 21.03.2007 sent by appellant herself, concluded that when the appellant herself wanted to be retained in India, there cannot be any breach on the part of management in not sending her to United States of America. The intention of the appellant to retain her in India is also reiterated in her subsequent e-mail dated 23.04.2007, which was marked as Ex.C-15 before the learned Arbitrator. The learned single Judge also elaborately pondered over this documentary evidence to conclude that there was no breach on the part of the management warranting them to pay compensation to the appellant. We are also, therefore, of the view that the appellant is not entitled to any compensation for not sending her to United States of America by the first respondent management.

33. The claim No.7 made by the appellant relates to damages for non- compliance of the procedure prescribed under the employment agreement for termination of the contract. The learned single Judge, by referring the clauses http://www.judis.nic.in OSA No. 59 of2015 contained in the employment agreement between the appellant and the first respondent has concluded that before terminating the services of the appellant, the first respondent management has paid four months salary in lieu of notice. The learned single Judge, by referring to para No.23 of the award passed by the learned Arbitrator has rightly held that if the compensation payable by the employer in the case of a lawful termination is a specified amount, the same amount would be paid even for illegal

termination. Admittedly, in the present case, the management had, in lieu of four months notice, paid a sum of Rs.14,85,225/- representing four months salary, as could be evident from the letter dated 20.12.2007 of the management. Therefore, we hold that the rejection of claim No.7 by the arbitrator, which was affirmed by the learned single Judge, does not call for any interference by us.

34. The appellant sought for compensation for not providing learning and training opportunities under claim No.9. In Para No.101 of the order passed by the learned single Judge, it was stated that this claim was based on the assumption that if training would have been given to the appellant, it would have benefited her in her career and denial of the same would give rise to a claim for compensation. The learned single Judge, in our view, has rightly found that the training, if any, imparted, would not only benefit the appellant but also the management of the company in getting the work done by the appellant precisely. The reasoning assigned by the learned single Judge that no employer would impart training to an employee at their cost without getting benefited by the outcome of such training through the employee is wholly justifiable. As rightly pointed out by the learned http://www.judis.nic.in OSA No. 59 of2015 single Judge, by not giving employment training, the employer also would incur loss. Furthermore, within three months of the employment of the appellant in the first respondent company, the relationship between the appellant and the management of the company had strained and in such circumstances also, the management cannot be expected to impart training to the appellant. Therefore, the learned arbitrator as well as the learned single Judge have rightly rejected the claim of the appellant under this head.

35. Similarly, for claim No.10, which relates to failure to provide stock under the employee stock option scheme, as per clause 3.1 of the employment agreement, the learned Arbitrator rejected the same by concluding that there was no such scheme in vogue at the relevant point of time. The learned single Judge concluded that even though clause 3.1 indicates that the structure of salary and relevant components shall be defined by the employer in a separate annexure and agreed to by both sides, there was no such annexure enclosed in the agreement of employment. At any rate, it was held that when the agreement does not indicate any such option to be exercised by the employee/appellant herein, the consequential breach of such clause will not arise. This aspect has been rightly dealt with by the learned Arbitrator as well as the learned single Judge by relying upon clause 3.1 of the employment agreement. Therefore, we do not find any reason to interfere with such conclusion of the learned single Judge.

36. The 11th claim made by the appellant is with respect to loss of employment opportunity due to the unceremonious termination by the employer. It http://www.judis.nic.in OSA No. 59 of2015 is to be mentioned that there were criminal proceedings launched by the appellant as well as the first respondent management against each other and this had consumed considerable length of time. Ultimately, the criminal proceedings came to be quashed by the Honourable Supreme Court on 18.03.2011 and thereafter, a reference was made to the learned Arbitrator and the arbitration proceedings were confirmed by the order dated 02.09.2014 of the learned single Judge, which had culminated in the present appeals. It is also to be mentioned that the appellant was terminated during December 2007 and till such time the matter was taken up by the learned Arbitrator, it is not known whether the appellant had in fact got any employment. There is no material produced before this Court to substantiate the same. There is also no material placed before the learned single Judge

to show that soon after the termination of the appellant during December 2007, whether she was unreasonably prevented by the management to take up any other employment. In the absence of such material, the appellant cannot be compensated for the so- called loss to get adequate opportunity after her termination. Even otherwise, on the one hand, the appellant claimed compensation under several heads, particularly for breach of employment agreement and she has also partially succeeded in getting compensation. While so, it cannot be gainsaid that the appellant must be compensated for loss of employment opportunity. This aspect was dealt with by the learned arbitrator as well as the learned single Judge and we see no reason to find fault with such conclusion reached by the learned single Judge. Therefore, we hold that the learned single Judge is wholly justified in rejecting the claim for compensation made by the appellant herein under Claim No.11.

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37. The claim No.12 made by the appellant relates to award of compensation for non-constitution of a committee as directed by the Honourable Supreme Court in Vishaka case to enquire into the allegations relating to sexual harassment during the course of employment of the appellant. The learned Arbitrator had come to the conclusion that the appellant lodged the complaint relating to sexual harassment only after she left the employment even though, according to the appellant, she was subjected to harassment soon after her employment in the first respondent company. Therefore, it was concluded that the appellant had in fact prosecuted the Directors and other officers of the first respondent company only to extract higher amount. In para Nos. 32 of the award, the learned Arbitrator held as follows:-

> "27. The last two claims are 1) for Rs.5,76,00,000 for loss of employment opportunity and 2) for Rs.9,07,00,000 for damages for non-constitution of a committee to enquire into allegations of sexual harassment. According to the Claimant she was sexually harassed by CEO of the company and she had made a complaint to 8 persons shown as members of Board of Directors in the website of company and they had not taken any action. Consequently, she had to initiate prosecution of those people under the Tamilnadu Prohibition of Harassment of Woman Act. It is claimed that because of involvement in consequential litigation and the failure of the company to give a No Objection Certificate, she was not able to get any further employment till now. It is also claimed that she had to spend a lot of time and money on the litigation which has been consequence of a failure of the Board of Directors to enquire into a complaint and find a solution. The defense of the Respondent is that there is a grievance redressal committee in the company and she had not made any complaint of harassment at any time. It is pointed out that even in the e-mail message referred to above there is no complaint of sexual harassment. In the FIR filed on 26th December 2007, one week after her employment was terminated on 20th December 2007, the allegations were made with reference to three SMS messages sent in May 2006. It was submitted by the counsel for the respondent that the SMS messages should not be read in isolation and should be read int http://www.judis.nic.in he context of hundreds of other SMS messages exchanged OSA No. 59 of2015 between the two persons in the course of their official work and applied for taking on record the phone

and a transcript of all the messages sent from that phone of the CEO. The Claimant objected and I have declined to take them on record because there is no issue before me about sexual harassment as such and I am not required to see them. It was then submitted by the counsel for the respondent that the accusation was motivated by the desire of the Claimant to get a large amount as termination compensation. It was also submitted that the entire litigation was started only by her and she cannot blame the company for the consequence of her not being able to get an alternate job.

28. The Supreme Court recognised the fundamental right of women for safe working environment. Since there is no legislative protection for women, the Supreme Court framed a scheme in the case of Visaka and others vs. State of Rajasthan (AIR 1997 Supreme Court 3011) setting out the minimum standards for maintaining safe working environment. The Court held it shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

29. The argument of the learned counsel for the claimant is that the respondent company failed to provide a safe environment or set up a committee for resolution of the complaint and therefore compelled the Claimant to seek other remedies. Apart from the fact that as pointed out by the learned counsel for the respondent, the company did have a grievance committee, the absence of a redressal mechanism does not indicate any injury to the claimant.

30. There is a natural right to a safe working environment for any worker and if it is not provided, the worker can claim that there is a fundamental breach of contract and terminate the employment on failure to provide safe environment and seek damages. Considered in this light also the measure of damages cannot be more than a year's salary as discussed earlier and cannot be given in addition to the severance pay already given as the consequence of termination is only one even if there are several breached.

31. Even if look outside the contract and there is no statutory law, there is always a common law of torts which recognizes the duty of care by the employer to the employees and right of the employee for seeking damages, if there is a failure on the part of the employer to discharge that duty to take care, results in some injury. In the case of harassment by a co-worker the direct liability can only be of that of the offending co-worker. There is no question of vicarious liability on the part of employer, http://www.judis.nic.in unless the offense was committed by the offending employee in OSA No. 59 of2015 the discharge of his duties and authorised by the employer. In a case where co-worker harasses another worker, the remedy can be only against offending co-worker. Even that remedy is possibly only when the harassment has resulted in some injury. If the employee has not suffered any injury,

physical, mental or emotional, by reason of the offending behaviour of the co-worker there will be no cause of action even against the co-worker. Yet the work environment may be uncomfortable. It is only to make the work environment alright that the Supreme Court had suggested creating a mechanism for a complaint and redressal. Such redressal will take a form of either removing the offending employee or punishing him. The redressal will not include any question of compensating the victim, because that liability is that of the offending employee and cannot be that of the company. Therefore, the mechanism of complaint and redressal is of no consequence to the employee after his employment is terminated. The learned counsel for the Claimant referred to decision of Supreme Court in D.S. Grewal vs. Vimmi Joshi and others (2009) 2 Supreme Court Cases 210 submitted that even after the employee had left the organisation, the Supreme Court had ordered for an enquiry against the offending employee. But, that was not for the benefit of the victim but only for the benefit of the other people working in the organisation. Learned counsel then submitted that even a breach of statutory duty can give rise to damages. Again, such a breach must be shown to have caused an injury. For instance, when there is a statutory duty to fence dangerous machinery and because of lack of such a fance, a worker is physically injured, definitely the injured workman can ask for compensation. But if the workman has not suffered any injury at all, there is no cause of action for claiming damages.

32. In the present case, the Claimant has not alleged or proved any physical, mental or emotional injury on account of receiving the three SMS messages and any inappropriate behaviour. All that she says is that she started prosecuting the directors of the company because of the receipt of SMS messages and improper behaviour of the CEO and he had to incur heavy financial cost and also lose the opportunity of getting an alternate job. We need not go into question whether three SMS messages were offensive or not, because, it is a subjective reaction of the Claimant. Even if she felt offended by the SMS message, she had not made any complaint in May 2006 itself when she received them, but filed the FIR only in December 2007, one week after she left the job. The case of the claimant is that the behaviour of CEO of the company was improper even from the beginning and she had even resigned in May 2007, but later withdrew the resignation because he had apologised and promised to improve behaviour. But there is no proof of the http://www.judis.nic.in covering letters supposed to have been sent by her withdrawing OSA No. 59 of2015 the resignation. On the other hand the trailing email messages from that date onwards indicates that there was a continuing discussion about the compensation payable for termination. As seen from Article 6.2, had she resigned, she would not have been eligible for any compensation at all. In all probability, that was the reason why she had withdrawn the resignation as she was willing to leave the company with some compensation particularly because she was not sent to USA. The email message from May 2007 and particularly from October 2007 till the date of termination shows that there was a continuous discussion about her 'transition' meaning leaving the company with compensation. The discussion was only about how much to

> compensate. A termination order was given with 4 months pay on 17th October 2007 and it was withdrawn and substituted with another on 20th December 2007 offering one year pay as compensation. She was still not satisfied and did not accept the notice of termination and sent an email dated 13.12.2007 stating that she will continue to be an employee until she receives all her dues. In all these email messages she had not complained of any harassment. There are references to shabby treatment but they could be an expression of her frustration at not getting as much as she wanted particularly after losing the chance to go to USA. Even in the email to the eight person stated to be directors of the board she had not mentioned anything about the offensive SMS messages or even hinted at sexual harassment, but only complaint against bad treatment. It is only after she left the organisation that she prosecuted the directors of the company under the Tamil Nadu Prohibition of Harassment of Women Act, 1998 leading the company to think that it was an attempt to extract higher amount of compensation, particularly, when she demanded Rs.20 crores and then increased it to Rs.32 crores."

38. Thus, the learned Arbitrator came to the conclusion that there was no committee constituted by the first respondent company as per the decision of the Honourable Supreme Court in Vishaka case, but a grievance committee was constituted by the management where the appellant could have putforth her grievance and accordingly refused to award compensation under claim No.12.

39. As against this finding of the learned Arbitrator, the learned single Judge http://www.judis.nic.in concluded that the first respondent management had an obligation to OSA No. 59 of2015 constitute a committee as directed by the Honourable Supreme Court in Vishaka case and their failure to constitute such a committee had caused acute prejudice to the appellant and therefore, awarded a sum of Rs.1,68,00,000/- under this head. This is strenuously assailed by the learned counsel for the first respondent by contending that under Section 34 of The Arbitration and Conciliation Act, 1996, the learned single Judge has no jurisdiction to modify the award passed by the Arbitrator. By relying upon Section 34 of the Act, it was contended that the learned single Judge can either accept the award of the Arbitrator in entirety or set aside it and he has no jurisdiction to partially or fully modify a claim which was rejected by the Arbitrator. Before dealing with this issue, we are inclined to verbatim extract the relevant portion of the order passed by the learned single Judge with respect to claim No.12, which reads as follows:-

> 113. The 12th head of claim is for compensation of Rs.9.07 Crores towards exemplary damages for non compliance with the law laid down by the Supreme Court of India in Vishaka. According to the petitioner, she suffered harassment at the hands of her superior by name Mr.Krishna Srinivasan, which actually forced her to tender her resignation on 24.7.2006. It was the case of the petitioner in her claim statement before the Arbitrator that the sexual harassment given to her by Mr.Krishna Srinivasan never stopped. The petitioner sent a mail dated 14.12.2007 to the Board of Directors complaining about the inappropriate behaviour of Mr.Krishna Srinivasan. But, the company did not constitute a Complaint's Committee as required by the decision of the Supreme Court in Vishaka.

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114. In the reply statement filed by them, the first respondent claimed that there was no occasion to constitute a committee, as there was never any complaint of any nature. According to the first respondent, the first whisper of any harassment came in the form of a first information report lodged six days after the termination of employment and that it was later amplified to include about half a dozen senior most Executives of the company and about 12 outsiders not even connected with the company. The first respondent also claimed in their reply statement that the mail dated 14.12.2007 was never addressed to the Board of Directors. The first http://www.judis.nic.in respondent further claimed that the company encouraged OSA No. 59 of2015 employees to share their ideas, concerns and grievances through several channels such as a feedback box on the mail, a board of network, suggestion boxes, companywide stand-in meetings, ombudspersons, etc. It was further claimed by the first respondent that the guidelines issued in Vishaka were required to be put in place only till a law was passed and that since the State of Tamil Nadu enacted a law, the guidelines issued in Vishaka ceased to have force.

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118. But, I am afraid that the entire reasoning given by the Arbitrator from paragraph 30 onwards is completely perverse and does not at all reflect the correct position in law. The first conclusion reached by the Arbitrator in paragraph 30 of the award that even if the natural right of an employee to a safe working environment is breached, the measure of damages cannot be more than a year's salary, is certainly not in tune with the Public Policy in India. The fact that a sexually harassed woman employee, has a right, in addition to other rights, to walk out of the company on the ground of breach of contract, is not a ground to hold that the measure of damages cannot be more than that fixed for a breach. This conclusion of the Arbitrator that the petitioner always had a right to go out, is simply akin to affixing a seal of approval upon the decision of Mr.M.F.Hussain to leave the country on the ground that if he did not have a safe living atmosphere in India, it is always open to him to move out. In paragraph 15 of its decision in Vishaka, the Supreme Court quoted its earlier decision in Nilabati Behera vs. State of Orissa [1993 (2) SCC 746], wherein it was held that #an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. Therefore, the finding that the measure of damages is to be limited to the one provided in the contract for its breach, is to belittle the guaranteed right to a safe working environment.

119. Similarly, the finding with regard to vicarious liability in paragraph 31 of the award is not in tune with the Public Policy in India. As a matter of fact, the very directions contained in the judgment of the Supreme Court in Vishaka impose an obligation upon every employer to have a committee constituted for the redressal of the grievances of women employees. If the finding with regard to vicarious liability

> given by the Arbitrator in paragraph 31 of his award is accepted, then no employer need to constitute any committee, since a victim can always be directed to take recourse individually against the offending employee.
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> ....
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> 123. Likewise, the finding of the Arbitrator that the delay on the part of the petitioner in lodging a criminal complaint, especially after moving out of the company, indicated that she was only interested in compensation, is completely perverse. If the company http://www.judis.nic.in had failed in its legal duty imposed in terms of the decision of the OSA No. 59 of2015 Supreme Court in Vishaka, then the employee cannot be expected to lodge a police complaint even while continuing in employment.

The existence of a grievance committee or an ombudsperson can never be an excuse for violating the mandate of law as laid down by the Supreme Court. The failure of the petitioner to raise the issue of sexual harassment from May 2006 onwards till December 2007 and the repeated claims made by the petitioner for compensation in her correspondence during this period, cannot belittle a complaint of this nature.

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124. What is more shocking is the finding of the Arbitrator in paragraph 32 of the award that the petitioner had not alleged or proved any physical, mental or emotional injury. What is res ipsa loquitor needs no proof. Emotional or mental injury for a woman is an automatic and natural result of sexual harassment at work place, unless it is pleaded by the offender that the woman in question was happy about it. It was not the case of the first respondent that the petitioner was happy about the harassment and actually welcomed it. The moment harassment is established, emotional and mental injury is to be presumed. It was for the first respondent to rebut the presumption.

125. Moreover, all the above issues fall into insignificance in the light of one important fact. The Arbitrator was not called upon to decide whether there was sexual harassment or not. A careful reading of the claim petition would show that the 12th head of claim was actually for damages for non constitution of a committee to enquire into the allegations of sexual harassment. All that was required of the Arbitrator, was just to see whether the requirement of law had been complied with by the first respondent or not and whether the non compliance of the requirement gave rise to a claim for compensation and if so, to what extent. This has been completely lost sight of by the Arbitrator.

126. The fact that no committee was constituted as per the dictate of Supreme Court has become an admitted fact. Therefore, all other issues such as the delay in lodging the first information report, the focus on monetary compensation in the correspondence during the pre-litigation stage and the lack of pleading about the sufferance of an emotional or mental injury etc., were beyond the scope of the actual issue to be decided.

127. Once it is admitted that there was no committee constituted as per the law declared by the Supreme Court in Visakha, the Arbitrator ought to have addressed himself only to the question as to whether such non constitution resulted in an injury to the petitioner and as to whether she is entitled to any compensation on account of such non constitution of the committee.

128. The claim of the first respondent that there was an ombudsman and that there was a grievance committee, deserves to http://www.judis.nic.in be simply thrown out of the window. If the law requires a particular OSA No. 59 of2015 act to be done in a particular manner, it shall be done only in that manner and not otherwise. No ombudsman can be a substitute for a committee as required by the Supreme Court to be constituted.

129. As per the decision of the Supreme Court in Vishaka (paragraph 17.7), the committee to enquire into such complaints, is to consist of the following persons :

(i) Should be headed by a woman;

(ii) Not less than half of its members should be women; and

(iii) Should contain a third party either NGO or other body, who is familiar with the issue of sexual harassment.

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132. Therefore, it is clear (i) that the constitution of a committee as per the guidelines contained in paragraph 17 of the decision of the Supreme Court in Vishaka is mandatory; (ii) that if such a committee is not constituted, there is no use in contending that an ombudsman or a grievance committee is in place; and (iii) that the Arbitrator failed to understand that the primary grievance of the petitioner is that no such committee was constituted in the office of the first respondent.

133. The finding of the Arbitrator in paragraph 31 of the award that there is no vicarious liability for the employer, even in cases of sexual harassment of a woman employee, strikes at the very root of Vishaka, which, in turn, is based upon the #Convention on the Elimination of All Forms of Discrimination against Women#, which was read into Articles 14, 15(1), 15(3), 19 and 21 of our Constitution. The vicarious liability, even if it does not arise directly out of such harassment, cannot be avoided, at least in cases where the employer fails to constitute a committee as per the mandate of law. The contention of Mr.Arun Khosla, learned counsel for the first respondent that Vishaka guidelines would cease to exist, after the enactment of the Tamil Nadu Prohibition of Harassment of Women Act, 1998, is wholly unsustainable. A comparison of the guidelines and norms laid down in paragraph 17 of the decision in Vishaka with the object and scheme of the 1998 Tamil Nadu Act would show that the 1998 Act was not intended nor it actually occupied the field, delineated in Vishaka. In paragraph 18 of its decision in Vishaka, the Supreme Court made it clear that the directions issued therein will be binding and enforceable in law, until suitable legislation is enacted to occupy the field. That the 1998 Tamil Nadu Act did not occupy the entire field created by Vishaka, is made amply clear from the very contention of the first respondent before the criminal court and

the tacit approval given to the same by the Arbitrator that the expression 'precincts' in Section 5 of the Act is narrow in its scope and ambit. The first respondent cannot approbate and reprobate, by contending on the one hand in a prosecution under the Tamil Nadu Act that the case does not come within its purview and on the other hand in an http://www.judis.nic.in arbitration, that Vishaka guidelines evaporated with the sunrise of OSA No. 59 of2015 the 1998 Act. The finding of the Arbitrator in paragraph 32 about the lack of pleadings and proof regarding any physical, mental or emotional injury suffered by the petitioner, goes completely contrary to the accepted notions of sexual harassment of woman. The entire process of reasoning of the Arbitrator in paragraph 32 was also completely faulty. Merely because the petitioner laid stress on compensation in all her correspondence till the date of termination of the contract and merely because she launched prosecution only after the termination, the complaint of sexual harassment cannot be rejected or belittled. The existence of a grievance redressal committee and an ombudsperson in the organisation, is no substitute for a Vishaka committee. Therefore, the findings of the Arbitrator with regard to the 12th head of claim, are contrary to the Public Policy, as per the definition of the expression #Public Policy# enunciated in paragraph 31 of the decision in ONGC Vs. Saw Pipes. The non constitution of a Vishaka committee is illegal. The finding that the 12th head of claim is taken care of in the stipulation contained in the clause relating to termination, is contrary to justice and morality. Since the Supreme Court held in ONGC that an award will be contrary to public policy, if it is contrary to justice and morality or it is patently illegal, the impugned award is liable to be set aside at least in so far as the 12th head of claim is concerned.

134. Once it is held that the finding of the Arbitrator with regard to the 12th head of claim is completely contrary to law and that it cannot stand scrutiny in the light of the Public Policy of India, the same becomes liable to be set aside under Section 34. Therefore, as a corollary, the next question to be decided is as to whether the petitioner should be compensated and if so, to what extent. This I think is the most difficult of all questions that I have considered so far, here and elsewhere.

135. As I have indicated earlier, the 12th head of claim is for compensation, not claimed directly for the injuries suffered on account of the alleged sexual harassment, but claimed on account of the failure of the first respondent to constitute a Vishaka committee. If the first respondent had constituted a Vishaka committee, perhaps the parties would have avoided a series of litigation including civil and criminal and the consequent legal harassment to each other. Two things could have happened, had a committee been put in place. The petitioner could have complained to the committee and got her grievance vindicated. If the committee had found her allegations to be untrue, the matter would have ended there. In the first alternative, the petitioner would have continued in employment and the offender thrown out of employment. In the second alternative, the petitioner would have been legally compelled to go out without any legitimate claim against the company.

136. But, the non constitution of the committee, has actually resulted in the damage suffered by the petitioner being http://www.judis.nic.in unquantifiable. Therefore, all that an Arbitrator could have done, had OSA No. 59 of2015 he arrived at the correct conclusion with regard to the 12th head of claim, is to have awarded an ad hoc amount as compensation, without any scientific formula being available with mathematical precision. What the Arbitrator should have done but failed to do, is

what I can do now.

137. Therefore, considering the status occupied and the position in which the petitioner was employed in the first respondent organisation and considering the opportunities that she lost on account of the non constitution of the committee, I am of the view that the grant of an amount equivalent the severance benefit of Rs.1,68,00,000/-, as compensation towards the 12th head of claim, would be appropriate.

40. It is evident that the learned single Judge concluded that non- constitution of a committee, by the first respondent, as directed by the Honourable Supreme Court in Vishaka case, had prejudiced the appellant. It was further concluded that had it been constituted, the appellant could have ventilated her grievance before such committee. At the same time, the learned single Judge also rejected the argument of the first respondent management that constitution of a grievance committee and Ombudsperson is no substitute for constitution of a committee as directed by the Honourable Supreme Court in Vishaka's case. Thus, by concluding that the non-constitution of a committee is a breach on the part of the first respondent management, a sum of Rs.1,68,00,000/- was awarded as compensation. Whether the learned single Judge is entitled to make such a modification of the award of the arbitrator in exercise of powers conferred under Section 34 of The Arbitration and Conciliation Act, 1996 has to be examined. Therefore, it is necessary to look into Section 34 of The Arbitration and Conciliation Act, 1996, which reads as follows:-

> "34. Application for setting aside arbitral award - (1) Recourse to a Court against an arbitral award may be made on an application for setting aside such award in accordance with http://www.judis.nic.in sub-section (2) and sub-section (3).
>
> OSA No. 59 of2015 (2) An arbitral award may be set aside by the Court only if-
>
> (a) the party making the application furnishes proof that-
>
> (i) a party was under some incapacity; or
> (ii) the arbitration agreement is not valid under t which the parties have subjected it or, failin
>
> indication thereon, under the law for the time being in force, or
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case; or
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted

to arbitration may be set aside, or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this part, or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or

(ii) the arbitral award is in conflict with the public policy in India Explanation:- Without prejudice to the generality of sub- clause (ii) it is hereby declared for the avoidance of any doubt, that an award is in conflict with the public policy of India, if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or 81 (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33; from the date on which that request had been disposed of by the arbitral tribunal;

provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months,it may entertain the application http://www.judis.nic.in within a further period of thirty days, but not thereafter. OSA No. 59 of2015 (4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

41. It is no doubt true that the legislators did not intend to use the word "modify" anywhere in Section 34 of the Act but what was contemplated is only to "set aside" an award passed by the Arbitrator if it falls within the realm of Section 34 of the Act. It is trite that an arbitrator being a Judge chosen by the parties, his decision would ordinarily be final unless one or the other conditions contained in Section 34 of the Act is satisfied for the purpose of setting aside his award. The Court's jurisdiction in this behalf is to see whether the arbitrator has exceed his jurisdiction or not and therefore, the scope of judicial review of the arbitral award is a narrow one.

42. In order to arrive at a conclusion as to whether the Court, in exercise of power under Section 34 of the Act is entitled to modify or vary the award passed by the Arbitrator, the learned single Judge relied on several decisions. In para No.30 of the order passed by the learned single Judge, reliance was placed on the decision of the Honourable Supreme court in Gautam Constructions and Fisheries Limited vs. National Bank for Agriculture and Rural Development reported in 2000 (6) Supreme Court Cases 519. In that case, a single Judge of this Court upheld the claim for award of Rs.400/- per square feet which was modified by the Division Bench of this Court and reduced it to Rs.150/-.

When the matter reached the Honourable http://www.judis.nic.in Supreme Court, the rate was modified further to Rs.250/- per square OSA No. 59 of2015 feet. By placing reliance on this decision, the learned single Judge held that the Court exercising jurisdiction under Section 34 of the Act has power to modify or vary the award passed by the Arbitrator. Similarly, reference was made in para No.32 of the order of the learned single Judge to the decision of the Honourable Supreme Court in Tata Hydero Electric Power Supply Co Ltd., vs. Union of India 2003 (4) SCC 172 in which also the Honourable Supreme Court, while reversing the judgment of the High Court, interfered with the award passed by the arbitrator in so far as it relates to payment of interest. For the very same proposition that the Court is empowered to modify or vary the award passed by the arbitrator, reliance was placed on the decision of the Honourable Supreme Court in Hindustan Zinc Limited vs. Friends Coal Carbonisation (2006) 4 SCC 445 to drive home the point that the Court has power under Section 34 to modify the award passed by the Arbitrator. We are also in entire agreement with the reasoning of the learned single Judge that merely because the word "modify" or "vary" is not indicated in Section 34 of the Act, it will not take away the jurisdiction of the Court exercising under jurisdiction Section 34 of the Act to interfere with the award passed by an arbitrator partially. If such a power is not vested with the Court, it will only lead to multiplicity of proceedings, which is not intended by the legislature while framing Section 34 of the Act. A reasonable interpretation to Section 34 would only lead to an irresistible conclusion that the Court can modify or vary the award of the arbitrator if it is contrary to the material evidence adduced by the parties. Even otherwise, as contemplated under Section 34 (2) (v) (b) (ii) of the Act, when the award passed by the Arbitrator is in conflict with the public policy in our Country, reversal or modification of such award passed by the arbitrator is well within the provisions http://www.judis.nic.in OSA No. 59 of2015 contained under Section 34 of the Act itself. In the present case, as rightly observed by the learned single Judge, the non-constitution of a committee as per the direction of the Honourable Supreme Court in Vishaka case is to be regarded as a statutory violation and contravention of public policy prevailing in India and therefore, the appellant is entitled for a just and fair compensation.

43. The learned single Judge, having held that the Court is empowered to modify or vary the award passed by the arbitrator, in our opinion, rightly, proceeded to conclude as to what would be the compensation payable to the appellant under claim No.12. In order to arrive at the quantum of compensation the learned single Judge proceeded to discuss the material evidence available to conclude that there is a breach on the part of the Management in not constituting a committee. We have gone through the reasoning given by the learned single Judge, particularly, in paragraph Nos. 134 to 137. In para No.137 of the order dated 02.09.2014, the learned single Judge concluded that "considering the status occupied and the position in which the petitioner was employed in the first respondent organisation and considering the opportunities that she lost on account of the non constitution of the committee, I am of the view that the grant of an amount equivalent the severance benefit of Rs.1,68,00,000/-, as compensation towards the 12th head of claim, would be appropriate.".

44. We find that the learned single Judge has not made any arithmetical calculation while awarding compensation under Claim No.12. Even though the learned Arbitrator has awarded a sum of Rs.2 crores under Claim No.3 towards http://www.judis.nic.in OSA No. 59 of2015 severance compensation, the learned single Judge proceeded to award a sum of Rs.1,68,00,000/- towards

non-constitution of a committee as directed by the Honourable Supreme Court in Vishaka case. We wish to observe that the Court, in exercise of jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996 shall vary or modify the amount awarded without disturbing the factual finding and such a course is legally permissible under Section 34 of the said Act. We also reiterate that the appellant is entitled for compensation under Claim No.12, however, we feel that the quantum of compensation awarded by the learned single Judge is excessive and onerous. It is needless to mention that the appellant is entitled for a just and reasonable compensation for non-constitution of a committee as held by the Honourable Supreme Court in Vishaka case. However, such compensation cannot be a windfall or bounty and it should have reasonable nexus to the breach. Having regard to the above, we feel that the amount of compensation awarded by the learned single Judge towards claim No.12 shall be modified and the appellant is entitled to a sum of Rs.50,000/- (Rupees Fifty Thousand Only) as against Rs.1,68,00,000/- awarded by the learned single Judge. This, in our opinion, will be a fair and reasonable compensation which the appellant is entitled to.

45. In the result, we confirm the Judgment and Decree dated 02.09.2014 passed by the learned single Judge, except modifying and/or reducing the amount of Rs.1,68,00,000/- awarded under Claim No.12 to Rs.50,000/- (Rupees Fifty Thousand Only). Consequently, O.S.A. No. 59 of 2015 filed by the first respondent/Management is partly allowed to the extent indicated above. O.S.A. http://www.judis.nic.in OSA No. 59 of2015 No. 181 of 2015 filed by the appellant/claimant is dismissed. There shall be no order as to costs.

(R.P.S.J.,)

08-08-2019

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Index : Yes

OSA No. 59 of2015

R. SUBBIAH, J
and
KRISHNAN RAMASAMY, J

rsh

Pre-delivery Common Judgment

in

OSA Nos. 59 and 181 of 2015

08.08.2019