

MANU/JK/0922/2018

IN THE HIGH COURT OF JAMMU AND KASHMIR AT SRINAGAR

CMP No. 31/2012

Decided On: 15.10.2018

Appellants: **Court on its own motion**

Vs.

Respondent: **State of J&K and Ors.**

Hon'ble Judges/Coram:

Gita Mittal, C.J. and Alok Aradhe, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Farah Bashir, Adv. vice and B.A. Bashir, Sr. Adv. Learned Amicus Curiae

For Respondents/Defendant: Asifa Padroo and Asif Ahmad Bhat, A.A.Gs.

ORDER

1. This PIL is borne out of a Habeas Corpus Petition No. 15/2012 titled Mohammad Amin Beigh v. State of JK & Ors. filed before this Court way back in the year 2012, seeking quashing of the detention order No. DMS/PSA/53/2011 dated 26.12.2011, passed by the District Magistrate under the J & K Public Safety Act of 1978, (PSA hereafter) against the petitioner therein (Mohammad Amin Beigh) for his alleged involvement in immoral activities.

2. The petitioner therein already stood booked under FIR 40/2011 u/s. 376/2011, 451/506 RPC, before passing the impugned detention order. The case of the State for detaining the said petitioner in the detention order was as follows:

"You are a resident of Kherwan Kulgam and are aged about 40 years. Reports collected from various sources indicate that you do not possess a good moral character and have a notorious track record.

When your anti-social activities came to fore and you stood exposed before people of your area, you shifted to Srinagar. Even after shifting from your native place, you could not remain away from immoral activities. In Srinagar you started a private security agency under the name of Swello Security Agency and established its office in Rajbagh and Anantnag. Your modus operandi was to provide security/helping staff to various hospitals which included female workers also.

Under the garb of business, you hired a good number of poor and needy female workers from various parts of the valley and put them to various jobs relating to security and assistance in different hospitals including L.D. Hospital. Since most of these workers come from very humble and poor back ground, you not only exploited them monetarily but physically also. Not only did you coerce them to have physical relations with your but have also reportedly supplied these girls to others. A group of these workers have already narrated their woeful tale before the police authorities.

On 02/11/2011 one Mst. Fameeda w/o. Mohammad Sidiq Watloo lodged a written report in police station Kral Khud stating therein that you have been making sexual advances towards her and her friend since a long time and on the afore-stated day came to the residence of her friend Nahida at Barbarshah, Srinagar, trespassed into the residence and tried to rape her.

However, both of them succeeded in locking you inside the residence and reported the matter to Police Station. In this regard, case FIR No. 40/2011 u/s. 451, 506, 376/511 RPC was registered in Police Station, Kral Khud, Srinagar.

You were arrested from the spot on the same day and are presently under arrest and lodged in Police Station Kral Khud under proper remand. Though, you are presently under arrest you have applied for bail, which is under adjudication in the court and there is a likelihood of your being admitted to bail.

In case, you are admitted to bail at this stage, there is a well-founded apprehension that you will again indulge in similar immoral activities. In addition the victims of your immoral activities will feel betrayed and keeping in view the sensitivity of the issue and the trauma the victims have undergone, there is a credible belief that the situation may take a serious turn and disturb maintenance of public peace.

In fact, the victims have already given such indications of resorting to protest (which will definitely affect the peace and tranquility) in case appropriate action is not taken against you. In this regard, repeated complaints were received from the respectable citizens of the area demanding stern action to be taken against you.

Taking a wholesome view of the situation coupled with the reports received regarding your activities, it is believed that the normal law which stands already invoked against you is no sufficient to deter you from indulging in immoral activities, which have a bearing upon maintenance of public order. In order to stop you from indulging in such activities and to prevent breach of peace, your detention under the provisions of Public Safety Act, at this stage has become imperative."

This scandal thus surfaced on 2nd November 2011 when one such female employee lodged a report in Police Station Kral Khud and the above-mentioned FIR, came to be lodged.

3. While considering the matter at length as to whether the said acts of the said petitioner therein (accused) apart from being a crime under the penal law, amounted to threat to public order as well so as to warrant his preventive detention under the PSA, this Court took a holistic and serious view of the case since it involved a grave question of exploitation of the girls. Thus, while upholding his detention, this Court dismissed the said habeas corpus petition. However, taking into account the larger public and serious issue of corruption, the court took suo-moto cognizance of the case of such destitute girls and directed the Registry to diarize this case afresh as a Public Interest Litigation which stands registered as CMP No. 31/2012, the present case. The same was done vide a detailed judgment dated 9th July 2012.

4. We may extract relevant portions of the judgment dated 9th July 2012 which reads as follows:

"Kashmir is popularly known as land of "Sufis" and "Saints". The people of this place have maintained strong moral behavior in their day to day affairs. The people of this place are hypersensitive and react sharply to the activities, like one attributed to the petitioner in the grounds of detention. The ethos of this place does not admit of the activity like of which has been attributed to the petitioner in the grounds of detention. The specific act as is attributed to the petitioner, viz that under the garb of launching of an agency the poor and hapless girls are being monetarily and physically exploited, would definitely have drastic impact on the public tempo. The acts of the like nature have potential of disturbing the public order and public peace. The girls coming from humble background would be afraid to do the jobs, which, otherwise, they crave for, and thus, normal life of society at large will be disrupted. What shocks conscience is that in a well-planned and well thought out manner the poor and hapless girls are being subjected to all kinds of physical, mental and physiological exploitation. Under the garb of providing employment to the innocent and hapless girls they are being unabatingly pushed and coerced into abominable and undesired field of activity. Such activity of the petitioner has definitely great potential to cause disruption in the normal life. The activity of the petitioner is like a spark which when put in the heap of dry grass, would by its nature and potential put it on fire. Looking to the sensitivity of the issue and the earlier people's reaction towards such activities, the public order would definitely be adversely affected.

The case projected in the grounds of detention is alarming one and it does work as an offence to the conscience. The exploitation of poor, innocent and hapless girl(s) cannot be shelved and one cannot turn his back towards such startling revelation. The Constitution of State of J & K as also the Constitution of India represent the will of the people. The people in the shape of the constitutional documents have provided for running of the affairs of the State in accordance with the mechanism provided therein. The constitution created different organs of the state.

Section 22 of the Constitution of J & K is taken note of:

"Right of women:-the State shall endeavor to secure to all women-

- (a) the right to equal pay for equal work;
- (b) the right to maternity benefits as well as adequate medical care in all employments;
- (c) the right to reasonable maintenance, extending to cases of married women who have been divorced or abandoned;
- (d) the right to full equality in all social, educational, political and legal matters;
- (e) special protection against discourtesy, defamation, hooliganism and other forms of misconduct.

Human life has to be honorable and dignified. The State is, thus, duty bound to create avenues for poor and hapless woman for earning their livelihood in a dignified way and to live an honorable life. The State of J & K is further under constitutional obligation in view of the mandate protections to poor and hapless

woman and to devise a mechanism which would enable such class of people to earn their livelihood and lead the meaningful and dignified life.

The corruption is denuding the poor and hapless women of the State, the support which they are to be, otherwise, provided."

5. While dismissing HCP No. 15/2012, this Court had issued certain directions to the State of J & K through Chief Secretary vide judgment dated 9th July 2012. Para (c) (d) & (e) reads as follows:

"xxx

c) the State of J & K through Chief Secretary is directed to take immediate steps for conferring powers on all the Courts of Additional District Judges in the State of J & K, excepting that of District Srinagar and Jammu, and confer powers on these courts under Prevention of Corruption Act, SVT. 2006 (1949 A.D.). The Chief prosecutors of the Districts be initially assigned the job of prosecutors in these courts in the cases covered by Prevention of Corruption Act, SVT. 2006 (1949 A.D.).

d) the State of Jammu and Kashmir to take steps for amending the P.C. Act or make new laws for retrieving the money/wealth and for confiscating properties which have been accumulated through corrupt practices.

e) the Chief Secretary to file compliance report within three months from the date copy of this order is served on him by the Registry of this Court. Registry to serve the copy of this order on Chief Secretary and Commissioner Secretary to Govt. Social Welfare Department forthwith. The Registry is directed to register the copy of this judgment as Misc. petition and list the same before appropriate Bench, in accordance with the orders of Hon'ble Chief Justice, on 11th Oct. 2012 for ensuring compliance of the directions contained in paragraph (a) to (d).

xxx"

6. We find that so far as the amendment of the Prevention of Corruption Act is concerned, the same has been engaging the attention of this Court for several years. A series of directions came to be passed by this Court thereafter from time to time, till date, details whereof shall be provided hereinafter, which deal primarily with the two issues which can be summed up thus:

i) Upliftment of the destitute girls by providing them State assistance monetarily as well as for vocational training so as to enable them to lead a dignified life.

ii) Amendment in the Prevention of Corruption Act, 2006 so as to make its provisions more stringent, especially with regard to grant of sanction for prosecution and penalty.

7. On 2nd of November, 2012, Mr. B.A. Bashir, Sr. Advocate was appointed to assist this Court.

8. Certain pertinent observations made in the order dated 19th December 2012 deserve to be considered in extenso and read as follows:

"The Court is pursuing this matter as, in its wisdom, the menace of corruption, if left unchecked, would destroy every democratic institution of the State".

9. Again on 4th of July 2013, this Court expressed its anguish as follows:

"After hearing Mr. B.A. Bashir, learned senior advocate and Mr. J.A. Kawoosa, learned Sr. AAG, the Court in its pursuit to ensure that the poor and hapless girls of the State are provided succor to sustain themselves in a dignified manner, and in our crusade against the menace of corruption, the Court, on the basis of compliance report/s filed by the respondents, issue further directions and seeks following information at this stage:

"xxx

e) The Chief Secretary of the State to consider suggestions made at the bar in respect of the proposed amendment to be made in the Act of 2006, which are briefly summarized as under:

i. The maximum punishment u/s. 5(2) of the Act of 2006 shall be 20 years;

ii. Minimum 07 years;

iii. The bail provision shall be stringent and in pari materia to Narcotic Drugs and Psychotropic Substances Act 1988;

iv. In case after receipt of report/record from the Vigilance Organization, the competent authority does not accord Sanction for prosecution within a period of one month, it shall be deemed that sanction for prosecution has been granted;

v. More trained Investigating Officers shall be posted/appointed in Vigilance Organization and outer time limit may be prescribed for concluding the investigation;

vi. Amendment shall be made in the Act of 2006, which would ensure that once the charge is framed, the trial shall continue on day today basis till its conclusion;

vii. The Investigating Officer shall be responsible to ensure attendance of the prosecution witness/s before the trial Court and shall remain available before the Court as and when the case, which he has investigated, is taken up for consideration during the trial of the case."

10. On 4th July 2013, after noting the status report and the seriousness of the problem, the Court had inter alia directed as follows:

a) The Committee/s, constituted in terms of Government Order No. 65-SW of 2013 dated 09.03.2013, will positively submit its report to the Government in the Social Welfare Department within one week from today.

b)

c)

d) The State Vigilance Commission, to whom the suggestions in respect of making amendments in the J & K Prevention of Corruption Act, Samvat 2006 (for short Act of 2006) have been forwarded, to submit its report to the Chief Secretary of the State within one week from today and the Chief Secretary to submit status report in respect of steps taken for amending the Act of 2006 by or before next date.

e) The Chief Secretary of the State to consider suggestions made at the bar in respect of the proposed amendment to be made in the Act of 2006, which are briefly summarized as under:

viii. The maximum punishment u/s. 5(2) of the Act of 2006 shall be 20 years;

ix. Minimum 07 years;

x. The bail provision shall be stringent and in pari materia to Narcotic Drugs and Psychotropic Substances Act 1988;

xi. In case after receipt of report/record from the Vigilance Organization, the competent authority does not accord Sanction for prosecution within a period of one month, it shall be deemed that sanction for prosecution has been granted;

xii. More trained Investigating Officers shall be posted/appointed in Vigilance Organization and outer time limit may be prescribed for concluding the investigation;

xiii. Amendment shall be made in the Act of 2006, which would ensure that once the charge is framed, the trial shall continue on day today basis till its conclusion;

xiv. The Investigating Officer shall be responsible to ensure attendance of the prosecution witness/s before the trial Court and shall remain available before the Court as and when the case, which he has investigated, is taken up for consideration during the trial of the case."

(emphasis by us)

11. On 29th August 2013, it was pointed out by the then Sr. AAG Mr. J.A. Kawoosa, that the Government had complied with the directions passed by the Court and issued SRO 368 dated 19th August 2013 conferring powers on the Additional District and Sessions Judge to try the cases. It was also noted that in para 6 of the status report that respondents have taken steps with regard to amendments in the J & K Prevention of Corruption Act, Svt. 2006 and had constituted a Committee comprising officers detailed in para 6 itself. The Court gave six weeks' time to the Government to do the needful.

12. On 7th October 2013, the Court noted that the steps to amend the Prevention of Corruption Act had not been taken. So far as the proposed amendments were concerned, the Court had conveyed to the learned State Counsel that "in the amended Prevention of Corruption Act, there should be no provision in respect of sanction for prosecution".

13. On 13th November 2013, the Court had noted the suggestions for amending the Prevention of Corruption Act had been discussed threadbare by the Committee

constituted by the Government headed by the Chief Secretary and its recommendations stand sent to the Law Department. The learned Advocate General had submitted that the recommendations made shall be sent within a week to the General Administration Department for submission to the Cabinet.

14. In the order dated 30th December 2013, the Court had noted in para 6 of the order as follows:

"6. To us, the recommendations made by the Committee to the Government for making amendments in the Prevention of Corruption Act, appear to be an eye wash. The State Government shall have to re-consider the whole issue in the light of suggestions made by the Court in order dated 4th July 2013."

The State Government was required to consider the whole issue in the light of the suggestions made in the order dated 4th July 2013. In para No. 7 of the order, it was hoped and trusted that "the State Government will take lead and guide rest of the country by making Prevention of Corruption Act more stringent, more effective and more deterrent". The Court had thereafter directed as follows:

"9. The State of J & K, through Chief Secretary, to take into consideration the observations made in this order and proceed in the matter so as to secure the public interest, which is of paramount importance to all the constitutional authorities."

15. On 5th May 2014, the Supreme Court of India rejected the Special Leave Petition No. 3427/2014, whereby the State had challenged the order dated 30th December 2013 and directed as follows:

"We are happy to note that the State Government is doing a laudable work for improvement of the fate of destitute girls. Over and above, the High Court has also given some directions. We find no illegality in those directions.

While appreciating the work done by the State Government for carrying out various schemes for the betterment of the girls, let them also give effect to the directions given by the High Court for a comprehensive scheme for the betterment of the girls, which will be in accordance with Article 21 of the Constitution.

With the aforesaid observations, the special leave petition is disposed of."

16. We find that thereafter even on the 14th of May 2016, vital issue about the amendment of corruption laws, the learned Advocate General assured the Court that appropriate steps in this behalf will be taken. Learned counsel submitted that whatever developments in this behalf take place would be brought to the notice of the court before next date. This has not been done till date.

17. The record shows that Mr. B.A. Bashir, learned senior counsel had submitted that the Anti-Corruption Law had to be the most powerful enactment. In this background, the Court had directed the State of J & K through the Chief Secretary to take into consideration the observations made in this Court and to proceed in the matter so as to secure the public interest which is of paramount importance to all constitutional authorities.

18. It is pertinent to mention here that so far as the aspect of upliftment of the

destitute girls is concerned, the State did come up with two schemes: the HUNAR and STATE MARRIAGE ASSISTANCE SCHEMES, albeit after great efforts by this Court.

19. As regards the second aspect of bringing about an amendment in the provisions of Prevention of Corruption Act's with regard to the sanctions and the prescribed penalty was concerned, the State went in appeal before the Supreme Court and had got that particular direction of this Court stayed. However, despite the dismissal of the leave petition by the Supreme Court as back as on 5th May 2014, nothing has happened for a period of over six years.

20. Concerned with the form of corruption by private person as brought out in HCP No. 15/2012, we requested Ms. Farah Bashir who stands appointed as amicus curiae on the 19th September 2018 and thereafter Ms. Asifa Padroo who appears for the State as well to examine such illegal acts in the context of existing laws as well as the international position and to inform this Court as to whether any law existed on the subject of exploitation of women by persons in authority who seek sexual favours for discharge of their functions and for anything else. Ms Farah Bashir & Ms Asifa Padroo have on 3rd October 2018 handed over extensive notes and written submissions after conducting a detailed research into the existing law in India as well as the international position on the subject.

21. We have considered the notes submitted by Ms. Farah Bashir Amicus & Ms. Asifa Padroo, learned AAG and given our thoughtful consideration to the same.

22. In their notes, Ms. Bashir and Ms. Padroo have placed extensive reliance on a research Toolkit prepared by the International Association of Women Judges, an association of judges, academicians and lawyers from across the globe which is available on its website. This Tool Kit points out that since time immemorial, people who occupy positions of authority, have often abused their positions. Their power to grant or withhold something of importance makes others vulnerable to their corrupt attempts to extort things of value. The International Association of Women's Judges, (IAWJ hereafter), has named it "Sextortion" which lies at the intersection of sex and extortion under the overarching ambit of corruption. It is a form of corruption in which sex, rather than money, is the currency of the bribe. Sextortion is thus an institutionalized system of blatant abuse of power.

23. The IAWJ, in partnership with the Association of Women Judges in Bosnia and Herzegovina, the Philippine Women Judges Association, and the Tanzania Women Judges Association, have even started a three years program on "Stopping the Abuse of Power through Sexual Exploitation: Naming, Shaming and Ending Sextortion."

24. Ms. Farah Bashir points out that "sextortion" can take various forms depending upon the age, background, societal and financial position of the victim. Being an increasing menace world over, some of the cases of sextortion reported internationally include;

- i. A Canadian immigration adjudicator tried to extort sex in return for approving a young woman's refugee application.
- ii. A Philippine judge demanded that the victim becomes his girlfriend, as a condition for signing a book binders appointment papers.
- iii. A Tanzanian teacher demanded sexual favours from a female for giving higher marks in his class.

iv. A Chinese professor accepted sexual bribe from a female student seeking a Ph.D. Degree in a course that he oversaw.

v. Tanzanian Police Officer promised a female inmate to be released if she engaged in sex with him.

vi. A high School Principal in Montana, threatened to withhold the student's diploma unless she succumbed to his sexual demands.

(Ref :-A research Tool Kit on SEXTORTION by IAWJ)

25. It is noteworthy that, just as the complainant in FIR No. 40/2011, in each of such cases, the victim is in a highly vulnerable position and the offender mostly is a person exercising some kind of authority over the victim, which authority he abuses for gaining sexual favours.

26. In her note, Ms. Bashir has pointed out that etymologically, 'sextortion' as the word itself suggests, is a combination of two basic words; 'Sex' and 'extortion'.

Individually, the offences relating to the said two terms are quite apart since one relates to offences against human body and the other relates to offences against the property.

Ms. Bashir has submitted that sex, per se not being a crime, but as we know, becomes so if done without consent upon the victim in any form whatsoever, and is known as the crime of rape u/Sec 375 of RPC, or as defined in other sections in the RPC.

Intentionally, extortion on the other hand is defined under Section 383 RPC/IPC, as an act of putting a person in fear of injury to that person or to any other, and thereby dishonestly inducing the person so put in fear to deliver to any person any property or valuable security.

A fortiori, the concept of sextortion means extortion of a sexual favour rather than that of a property or valuable security.

As in case of extortion of property, there is no physical force applied but a psychological force, whereby the victim, due to the fear of injury, himself/herself delivers the property to the assailant. Likewise, in case of sextortion also the assailant does not necessarily force the victim to concede to a sexual favour, but the victim is coerced into relenting to concede that favour because of certain compulsion or fear of loss/deprivation/injury to.

Due to this reason, it appears to be all consensual and thus not an offence because in most such cases, the act of 'sextortion' remains confined to the knowledge of just the assailant and the victim, who is thereby handicapped for want of witnesses or other tangible evidence.

27. We examine hereafter whether "sextortion" is covered under any existing legislation in India and is punishable thereunder. The above Toolkit defines the problem and its contingent factors and provides a framework to assess legal and institutional structures traversing national and international territories. It has thus been a pertinent resource reference while framing the laws on the subject in several jurisdictions.

Current statutory legal position in the State of Jammu and Kashmir Legislation on Sexual exploitation.

28. With the assistance of Ms. Farah Bashir, Adv. Amicus & Ms. Asifa Padroo, learned AAG, we have undertaken a close examination of the existing laws on to examine whether the existing legal structure would cover these situations. It has been pointed out that the Jammu and Kashmir Protection of Women from Domestic Violence Act, 2010 aims at protecting women from abuse in the domestic sphere. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 strives to provide protection against sexual harassment of women at the workplace. The Ranbir Penal Code also has various provisions to tackle sexual crimes. Section 354 (a to d) stipulate punishments for different types of sexual offenses. Laws against insulting the modesty of woman and defamation also exist. Section 375 and 376 deals with the offence of rape. Section 376 C talks about sexual intercourse due to abuse of authority in specific situations. Furthermore, there also exist separate laws on extortion as delineated in Section 383. The Protection of Children from Sexual Violence Ordinance, 2018 works towards addressing issues of sexual exploitation of children. Various provisions of the Information Technology Act, 2000 also cover certain sexual offences dealing with Cybercrime and electronic commerce.

Corruption:

29. Let us also examine as to whether the existing statutes penalizing corruption engage with 'sextortion'. In the arena of corruption, the Prevention of Corruption Act, Svt. 2006 is the principal anti-corruption law in Jammu and Kashmir. The J & K State Vigilance Commission Act, 2011 sets out parameters under which the goals of the parent Act can be achieved. The Companies Act 2013 contains certain provisions to prevent corruption and fraud in the corporate sector. The Lokpal and Lokayuktas Act 2013 establishes the offices of the nodal ombudsman for the central and state governments and attempts to unearth and investigate cases of corruption in the public sector. The Prevention of Money Laundering Act 2002 aims to prevent instances of money laundering and prohibit use of the proceeds of crime in India. The Foreign Contribution (Regulation) Act 2010 regulates the acceptance and use of foreign contributions and hospitality by corporate entities and individuals. However, none of the above statutes take into their fold or make punishable the obnoxious acts noted by us hereinabove which would be described as "sextortion".

The position internationally

30. It would be useful to undertake a brief examination into the position which exists in other jurisdictions. Many international anti-corruption provisions use broad language to encompass non-financial inducements. In Canada, for example, the Immigration and Refugee Protection Act makes it an offense for an employee of the federal government, to accept or demand a bribe or "other benefit." Taiwan's anti-corruption law requires a bribe or 'unjust enrichment', with the latter interpreted by the Supreme Court to mean 'any tangible and intangible interests that can meet one's needs or satisfy one's desire'. Further, the term 'benefit' in Kenya's Anti-Corruption and Economics Crimes Act includes in its meaning "any form of gratification for himself."

31. Some criminal codes also contain broader offenses to prosecute misconduct by persons in power. The law in Australia applies to general prohibitions on corrupt conduct by public officials in cases similar to sextortion. In the United Kingdom, if existing anti-corruption legislation prove insufficient, the courts may charge under the common law offense of 'misconduct' in public office. Similarly, in Brazil, many laws on abuse of authority cover offenses that fall outside the narrower confines of anti-corruption laws.

32. We find that some sexual harassment laws seemingly target the kind of abuse that is under discussion. For instance, in Kenya, sextortion cases that occur within employment are prosecuted as sexual harassment under Kenya's Employment Act and those dealing with abuse of authority otherwise in the 'Sexual Offences Act'. Also, under Mexico's Federal Criminal Code, sexual harassment occurs when a person, repeatedly harasses another person 'based on his hierarchical position'. The sexual conduct involved in sextortion also brings it within the potential reach of various gender-based violence statutes. Argentina's Criminal Code, sexual abuse expressly includes non-physical forms of coercion and extends to various contexts.

Adequacy of legislation

The question would be, do these sufficiently address the issue underlined and being considered by this Court from 2012?

33. Justice Thurgood Marshall's dissent in *Dothard v. Rawlinson* (433 U.S. 321, 97, S. Ct. 2720) emphasizes the significance and impact of punitive measures with regard to offenders who were misbehaving with women guards, instead of enforcing the bar on employment of females in such position in the Alabama state penitentiary system. In this case, the prison facility housed sexual offenders. The majority of the Supreme Court of United States of America on this basis upheld the bar of appointment of females to the positions of guards or correctional counsellors. The dissent of Justice Marshall is illuminating so far as the present consideration is concerned. The learned Judge had written as follows:

"It appears that the real disqualifying factor in the Court's view is 'the employee's very womanhood.' The Court refers to the large number of sex offenders in Alabama prisons, and to 'the likelihood that inmates would assault a woman because she was a woman.' In short, the fundamental justification for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women that women, wittingly or not, are seductive sexual objects. The effect of the decision, made I am sure with the best of intentions, is to punish women because their very presence might provoke sexual assaults. It is women who are made to pay the price in lost job opportunities for the threat of depraved conduct by prison inmates. Once again, 'the pedestal upon which women have been placed has upon closer inspection, been revealed as a cage.' It is particularly ironic that the cage is erected here in response to feared misbehaviour by imprisoned criminals."

34. Justice Marshall has also noted the nature of protective discrimination in the following terms:

"The Court points to no evidence in the record to support the asserted 'likelihood that inmates would assault a woman because she was a woman.' Perhaps the Court relies upon common sense, or 'innate recognition'. But the danger in this emotionally laden context is that common sense will be used to mask the "romantic paternalism" and persisting discriminatory attitudes that the Court properly eschews. To me, the only matter of innate recognition is that the incidence of sexually motivated attacks on guards will be minute compared to the 'likelihood that inmates will assault' a guard because he or she is a guard.

The proper response to inevitable attacks on both female and male guards is not to limit the employment opportunities of law-abiding women who wish to

contribute to their community, but to take swift and sure punitive action against the inmate offenders. Presumably, one of the goals of the Alabama prison system is the eradication of inmates' antisocial behavior patterns so that prisoners will be able to live one day in free society. Sex offenders can begin this process by learning to relate to women guards in a socially acceptable manner. To deprive women of job opportunities because of the threatened behavior of convicted criminals is to turn our social priorities upside down."

The Standard of Judicial Scrutiny

44. It is to be borne in mind that legislations with pronounced "protective discrimination" aims, such as this one, potentially serve as double edged swords. Strict scrutiny test should be employed while assessing the implications of this variety of legislations. Legislation should not be only assessed on its proposed aims but rather on the implications and the effects. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role. The perspective thus arrived at is outmoded in content and stifling in means."

(emphasis supplied)

The finding that punishing the obnoxious behavior would address the apprehended malaise is of significance as also that, the disqualification on account of sex, was premised on myths and unwarranted.

35. The demand for a sexual favour even in India from a woman to, for instance, enable her to secure a job or a promotion or passing a test for a student pursuing education or even for routine work from persons in authority (not only in public service) is not unheard of or unusual. Such situations includes places, where engagement or advancement depends on discretion which vests in the perpetrators.

36. The facts leading to the registration of the FIR No. 40/2011 by P/S Kral Khud manifest that such obnoxious and unwanted demands, acts and practices are rampant even in the State of Jammu and Kashmir and for a long time. The case highlights exploitation of vulnerabilities of women who were pitched against perpetrators wielding complete power and occupying a position of authority vis-À-vis their extreme need. These acts by the private person would not be covered under the Prevention of Corruption Act.

37. We also note that the financial capacity and physical strength of the woman is completely irrelevant and insignificant so far as such exploitation is concerned. These are situations where being a woman itself places her in an unequal field without any bargaining power over the choices, so far as her lawful entitlement is concerned. These are the instances where her capitulation to the unwarranted demands is compelled by the power wielded by someone in authority and, hence, has to be considered involuntary.

38. It is noteworthy that the situations noted by us herein and the unwarranted contact are relatable to the predominantly patriarchal slant pervading society and the misplaced sense and notions of the male gender ipso facto being a privilege bringing with it a huge spirit of dominance and entitlement.

39. The above discussion brings out a critical issue which seems to have been hitherto completely overlooked. Though rampant, certain obnoxious acts go unpunished for the

reason that they are not covered under the definition of penal acts under the existing statutes.

Conclusion

40. So what would be the way forward? On deeper reflection of the existing legal provisions, one may note that most either deal with sexual violence and harassment per se and that too in distinctly defined contexts pertaining to venue, form, relation, gender, nature of authority or with monetary dimensions of corruption. Even laws traversing the area of sexual offences due to abuse of authority fall short of addressing the magnitude of the issue. Corruption laws in India are relatable to public officials. Thus, gender-based violence laws are yet to contemplate situations in which the victim yields, albeit not voluntarily, to the coercive power of a corrupt 'authority'.

41. The UN definitions of "sexual exploitation" and "sexual abuse" attempt to fill this gap by recognizing the coercive force of an unequal power relationship and seek to recognize the myriad form of sexual coercion, the harm to the victim and also that these are actual forms of corruption.

42. The lack of a legal framework would be a complete barrier to effective prosecution. One must further note that this phenomenon is not limited to the employment or familial context but has actually pervaded multiple avenues of everyday life, including education and the very day to day existence of women as is evident from the international experiences.

43. It is also essential to bear in mind that most women would minimize such experiences or keep silent about it. Some may even go into denial fearing reprisal, shame, ostracization, character assassination or victim blaming - all sources of extreme secondary traumatization of the women who have been at the receiving end of devastating experiences. Any legislation must bear in mind that such a sense, which experience has shown is a reality, would, in many instances, prove to be a complete barrier to the women's access to justice.

44. As noted above in the present case since 2012, this Court has noted the insufficiency of the provisions of the Prevention of Corruption Act, 2006, to deal with this situation. The Court has emphasized the need to adequately address such corruption and the dire need to amend the law or to frame a new law. The developments on the above issue, however, has not been placed before the court till date.

45. In this regard, the internationally developing concept of 'sextortion' could be examined in the Indian context and to see whether the State is required to either legislate a separate law on the subject or to make necessary amendments in the existing penal laws or undertake a combination of both so as to create a requisite deterrent effect in the Society against the sexual exploitation of women in any form whatsoever, as has been done in the various South African Countries, Manilla, and other countries as also recognized by the United Nations.

46. The proposed definition would have to include a sexual and a corruption component. It would involve a request-whether implicit or explicit-to engage in any kind of unwanted sexual activity and the person who demands the sexual favour occupies a position of authority, vis-à-vis the person who is abused. The underlying idea is the element of quid pro quo where the perpetrator demands and accepts the sexual favour in exchange for a benefit that he is empowered to withhold or confer. The

imbalance of power between the perpetrator and the victim allows the perpetrator to exert of psychological pressure, which most significantly is not very different from that of monetary corruption.

47. It is also significant and any definition must notice that a sexual favour could encompass anything from an inappropriate suggestion, improper touch to sexual intercourse.

48. It is the duty of the State to ensure circumstances of emotional and physical security which inspire confidence in women to live freely and to ensure the Constitutional goal of equality by creating a level playing field for them in all circumstances. It cannot be denied that prescription of a statute rendering the afore-noticed obnoxious acts as penal offences would go a long way in achieving this Constitutional goal so far as girls and women are concerned.

49. It therefore cannot be denied that it is absolutely imperative that the illegal acts, unwarranted demands and in appropriate contacts are given a legal nomenclature, clearly defined and also made specifically punishable in law and that the critical vacuum in the legislation in this regard is immediately addressed.

50. Let this order be placed before the Chief Secretary of the State of Jammu and Kashmir to examine the above issues, and take appropriate steps.

51. Let a status report be placed before us before the next date of hearing.

52. List on 23rd October 2018.

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