

Article on Vishakha vs. State of Rajasthan- International law perspective

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Abstract: *The law declared in the Vishaka's case needs special mention in details. A writ petition was filed before the Supreme Court for enforcement of fundamental rights guaranteed under Articles 14, 19 and 21 of Indian Constitution by certain social activists and NGOs. The basic cause for filing the petition was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. The Court issued notices to the Government of Rajasthan and Central Government to appear before it to render needful legal assistance to deal with the matter. The whole issue which drew the attention of the Court is whether the existing legal provisions in India are sufficient to deal with all facets of gender justice including prevention of sexual harassment or abuse. To answer this question the Court examined various constitutional and penal provisions existing in India. It is submitted that the present penal law in India is insufficient and inadequate to check the evil of sexual harassment of women at all work places. Therefore, the Court relied upon some of the provisions in the Convention on the Elimination of All Forms of Discrimination against Woman to ensure appropriate measures to eliminate discrimination against women in the place of employment.*

Keywords: *International law perspective, India, Indian States*

1. Background of the study

Though all forms of crimes against women constitute problems of great personal and societal importance but rape is the most reprehensible form of barbarity inflicted upon purity, youth, motherhood and femininity. The Constitution of India along with international legal framework has provided enough ground for the legislature to erect a strong artifice of gender justice. Furthermore, number of times through illuminating techniques, such as reliance on the international mores, the judiciary has tried to fill the gaps left by the legislature.

The Court observed that each attempt of sexual harassment at work place results in violation of the fundamental right to gender equality and courts are under obligation to protect and preserve these fundamental rights. In cases involving human rights of women, the courts must remain alive to the International Conventions and Instruments and give effect to the principles contained therein. The message of international instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women, is loud and clear. The Supreme Court condemned the conduct of the accused as "wholly against moral sanctions decency and was offensive to her modesty." In this case, the court laid down that actual assault or touch is not required. In such cases, the courts are required to examine the broader possibilities of the case and not get swayed by insignificant

discrepancies or narrow technicalities or the dictionary meaning of the expression 'molestation'

As regards the review of laws, implementation of treaties, and other international instruments of human rights, the Commission conducted a review of them and made a number of recommendations. The Commission observed that India has become a party to a number of International Conventions on human rights

In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of international Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Arts. 14, 15, 19 (1) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit from Art. 51 (c) and the enabling power of the Parliament to enact laws for implementing the International Conventions and norms by virtue of Art. 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the Parliament enacts legislation to expressly provide measures needed to curb the evil

Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right. The common minimum requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve this purpose

Before we refer to the international conventions and norms having relevance in this field manner in which they assume significance in application and judicial interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are:

Article 51

Promotion of international peace and security. The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised people with one another

Article 253

Legislation for giving effect to international agreements. Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

The Supreme Court of India in their judgement in August, 1997, in the case of Vishaka and others Vs. State of Rajasthan and others, recognizing the International Conventions and Norms, interpreted gender equality of women, in relation to work and held that sexual harassment of women at the workplace, which is against their dignity, is violated of Article 14, 15 (1) and 21 of the Constitution of India. It is also the violation of the fundamental rights under Article 19 (1) (g) to practice any profession or to carry out any occupation, trade or business.

In Nilabati Behera v. State of Orissa,¹ a provision in the ICCPR was referred to support the view taken that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right', as a public law remedy under Art. 32, distinct from the private law remedy in torts. There is no reason why these international conventional and norms cannot, therefore, be used for construing the fundamental rights expressly guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.

In cases involving violation of human rights, the Courts must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. In the instant case, the High Court appears to have totally ignored the intent and content of the

international Conventions and Norms while dealing with the case.

2. Relation Between International Law And Municipal Law

Apparently, it might appear that there is hardly any relationship between the two systems (between international law and municipal law) as they constitute the two different legal systems each of which is designed to operate in its own sphere and they are applied distinctly to their subjects by different courts, but it is not so.

The problem of relationship between the rules and municipal law is the most controversial questions of legal theory. Originally it was a matter of legal theory alone but as and when time passed it has acquired practical significance as well. When there exists a conflict between the rules of International Law and municipal law, a court is faced with the difficulty of arriving at a decision. Before an international tribunal, the question is one of primacy over, municipal law, or vice versa. If the conflict arises before a municipal court then the answer depends upon how far the constitutional law of the state allows International Law to be applied directly by the courts. Almost every case, in a municipal court, in which rule of International Law is asserted to govern, the decision raises the problem.

In the instant case of *Vishakha v. State of Rajasthan AIR 1997 Supreme Court*, the attention of the apex court was focussed towards prevention of sexual harassment of working women in all work places. The Court took a serious note of the matter and held that each incident resulted in violation of the fundamental rights of "Gender Equality" and "Right to Life and Personal Liberty" enshrined in Art 14, 15 and 21 of the constitution of India. It was also held to be violation of the victim's fundamental right under Art 19(1)(g) to practise any profession or to carry on any occupation, trade or business, as a "safe working" environment was devoid.

The Apex Court observed: Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally accepted basic human right [s.2(d) of the Protection of Human Rights Act, 1993]. In the absence of suitable legislation in the sphere, international convention/norms, so far as they are consistent with the constitutional spirit can be relied on, viz. CEDAW. They can be read with into those rights for interpreting them in the larger context to promote objective of the Constitution.

3. Guidelines And Norms Given By Supreme Court Of India

Having regard to the definition of 'human rights' in Section 2 (d) of the Protection of Human Rights Act, 1993,

Taking note of the fact that the present civil and penal laws in India do not adequately provide for specific

¹(1993) 2 SCC 746 : (1993 AIR SCW 23

protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time,

It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women.

²Duty of the Employer or other responsible persons in work places and other institutions

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.

For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

- Physical contact and advances;
- A demand or request for sexual favours;
- Sexually coloured remarks;
- Showing pornography;
- Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where-under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

4. Preventive Steps

- All employers or persons in charge of work place whether in public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps: Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.
- The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.
- As regards private employers, steps should be taken to include the aforesaid prohibitions in

the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

- Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

5. Criminal Proceedings

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

6. Disciplinary Action

Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

7. Complaint Mechanism

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organisation for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

8. Complaints Committee

The complaint mechanism, referred to above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the Government department concerned of the complaints and action taken by them.

The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department

WORKER'S INITIATIVE

²1997 (7) SC 384)

Employees should be allowed to raise issues of sexual harassment at a workers' meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. Awareness

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. Third Party Harassment

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1999

11. Conclusion

Treaties are made to be performed"

The self-induced belief of the courts earlier was that treaties are not and cannot be the "law of the land" unless incorporated by Indian law officially. However this assumption has proved false and misleading. First, Indian courts in a marvelously innovative stream of cases culminating in the "Vishaka v. State of Rajasthan" on gender discrimination have signaled that some human right and justice related treaties may be part of Indian law without being enacted. Equally,

treaties not inconsistent with Indian law are vulnerable to recognition by India's courts. So treaties entered into by India do not invariably have to be incorporated into law by Parliament to receive legal recognition. Parliament does not have a post-entry control on whether a treaty is binding in all cases.

Hence, from these cases we may safely conclude that there is a "paradigm" shift in the approach of the court which has not been achieved in a single case but through a series of cases starting from Jolly Varghese and finally culminating into the marvelous judgment given in Vishakha case. These cases providing a breakthrough in the sense that where treaties first had to go through the "Transformation" into domestic law this view has changed over a period of time and one can see the trend shifting towards "Incorporation" doctrine for at least those who care for such classification). However this should not confuse us into leading to a conclusion that consistency has been maintained throughout. Taking into consideration that there is no consistency in the approach of the court one is persuaded to agree with V.S Mani when he states that the "Indian Judiciary has not been able to evolve a uniform approach to construction of treaty implementing statutes and that it tends to be seriously inhibited by its essentially municipal law orientation."

A virtual judicial incorporation of treaty law into the "corpus juris" has been the Supreme Court decisions in "Vishaka v. State of Rajasthan" wherein the court held that international conventions and norms were to be read into fundamental rights in the absence of enacted domestic law occupying the field. The court held that it could rely on international conventions in case of a void in the domestic law.

¹AIR 1997 SC 3011. as Quoted in Dr. Y.F. Jaya Kumar, 'The Law Declared by Supreme Court in Vishaka v. State of Rajasthan: A Judicial Legislation towards Gender Justice', 1999 Cri.L.J. 55.