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CASE COMMENT ON VISHAKA & ORS VS STATE OF RAJASTHAN & ORS ON 13 AUGUST, 1997

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The predominant climate under which the fundamental rights of women are being violated is very common. And this writ petition is been filed for implementation of fundamental rights mentioned under Article 14, 19 and 21 of Indian Constitution which is related to working women. The need to safeguard violation of fundamental rights and the awareness about gender equality and justice is increasing day by day. To understand the true concept of gender equality social activities and NGOs have brought this present petition before the court aiming for societal aberration and to prevent sexual harassment in the working places against women.

A brutal gang rape in the village of Rajasthan of a social worker is the instantaneous cause which led to the filings of this writ petition. The occurrence of gang rape showed the hazard against a working woman and how immortally sexual harassment can degenerate and the need and urgency of an alternative mechanism for safeguard of women in absence of legislative measures.

Fundamental rights of gender equality and right to life and liberty is been violated in each such cases. There is clear violation of rights mentioned under article 14, 15 and 21 of Indian Constitution. There is also violation of article 19(1)(g), right to practice any profession or carry out any occupation trade or business which is a fundamental right. Under article 32 of Indian constitution violation of fundamental rights can draw attention for a remedy for the enforcement of the fundamental rights. Under article 32 of Indian constitution a writ of mandamus can be issued in such situation which needs to be accompanied by preventive direction, if it needs to be effective as it is recurring in nature because it is violating fundamental right. Safe working environment is a part of fundamental right to carry on any occupation, trade or profession. And the right to live with dignity is included in right to life. The legislative and the executive is responsible for enforcement mechanism creation whereas the vital

responsibility is of Legislative for certified safety and dignity through legislative actions. For filling the legislative vacuum there is a need of some guidelines which has to be laid down for the protection of violation of rights under article 14, 19 and 21 which can be addressed under article 32.

The state of Rajasthan and the Union of India were given the consideration of the petition. From the side of Union of India, the learned Solicitor General appeared and helps us to find a proper solution by providing valuable help in concordant as a law officer to the social problem. Shri Fali S Nariman who appeared as Amicus curiae along with Ms. Meenakshi Arora and Naina Kapur has assisted the court and has provided assistance. It is been placed on record for great appreciation for all the counsels who helped and enabled the court in dealing with such unusual case in a deliberate appropriate manner.

Some other provision from the international convention other than Article 14, 19(1)(g) and 21 and article 32 we can give pertinence to the following articles of international convention which can image of judicial intervention of social evil for destruction.

Under article 15¹ it has been stated that Prohibition of discrimination on Grounds of religion, race, caste, sex or place of birth.

- (1) the state shall not discriminate against any Citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
- (3) Nothing in this article shall prevent the state from making any special provisions for women and children.

Article 42², provision for just and humane conditions of work and maternity relief- the state shall make provision for securing just and humane conditions of work and for maternal relief.

Article 51(A)³ Fundamental duties- it shall be the duty of every citizen of India

- (a) to abide by the constitution and respect its ideas and Institutions.

¹ Article 15 of constitution.

² Article 42 of constitution.

³ Article 51(A) of constitution.

- (e) to promote harmony and the spirit of common Brotherhood amongst all the people of India transcending religious, linguistic and regional delicious interesting and sectional diversities to renounce practices derogatory to the dignity of women.

Article 51⁴, promotion of international peace and security the state shall endeavour to

- (b) Foster respect for international law and treaty obligation in the dealing of organised people with one another.

Article 253⁵ legislation for giving effect to International agreements, notwithstanding anything in the foregoing provision 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.

Seventh schedule

List 1 Union list, 14⁶ entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

Some other provisions in the Indian constitution which allows the same use other than International Convention and norms which have same relevance in this particular field and they also expect application significance and judicial analysis in a particular conduct.

For the implementation of the contents of measures against sexual harassment International Convention and norm are been used and are considered as important in the truancy of domestic law pervading the field which keep a check on evils of sexual harassment at the workplace for all the women and all are used for the purpose of implementation of guarantee of rights mentioned under article 14, 15, 19(1)(g) and 21 of Indian constitution which guarantees gender equality and right to work with human dignity. To promote the objective of the constitution guarantee any International Convention which is not inconsistent with the fundamental rights and which are in harmony with the spirits should be gathered with these provisions for the meaning and contents. Article 51 (c) and the enabling powers of the constitution of Parliament

⁴ Article 51 of constitution.

⁵ Article 253 of constitution.

⁶ Entry 14, union list.

implement the Indian convention and norms by the virtue of article 253 which when read along with the entry 14 of union list mentioned in seventh schedule of constitution. Under article 73 it is mentioned that the executive powers vested with the union shall also extends to the matter where the Parliament has the power to make laws. Therefore until the Parliament expressly provided measures to curb the evil executive powers of union are accessible.

The confrontation to assure the women against sexual harassment the working environment the court has the potential. Under article 32 that can enforce the fundamental rights and the executive power of the union that it can make the fundamental rights of women consequential. A common perception which was exercised by the court in this particular matter which was shared with the Learned Solicitor General and with the other members of the bar who provided valuable assistance for this difficult task which was in public interest.

To curb the social evils at the workplace some norms and guidelines were accepted by the Union and Solicitor General which was affirmed by the court after hearing progress which should be used to govern the performance of employers.

A universally accepted and recognised basic human right, that is; gender equality includes preservation from sexual harassment and right to work with dignity. International conventions and norms have a great significance in the alignment of the guidelines for this particular purpose. And this right has been globally accepted and recognised.

The obligation by this court for the enforcement of fundamental right under article 32 in absence of legislation has to be used with the aspect provided to Judiciary which is being envisaged in the Beijing statement of principles for the independence of the judiciary in the region of law Asia. For effective functioning and independence of Judiciary Chief Justice of Asia and the Pacific at Beijing in 1995 has accepted principles that delineating the minimum standards which are required to be observed.

Objectives of Judiciary are - the objective and the functions of Judiciary relevant to this particular case includes

- (a) It must ensure that each and every person is able to live actively and securely under the rule of law.

- (b) It must advertise within the required limits of Judiciary to discover and attain Human Rights.
- (c) It must carry out the law of land accurately between persons and the state and also the persons.

Some other provisions from the convention on the elimination of all forms of discrimination against women, which are of importance from the present case content.

Article 11⁷, States parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure on basic of equality of men and women the same rights in particular

- (a) the right to work was an inalienable right of all human beings;
- (f) the right to protection of Health and to safety in working conditions including the safeguarding of a function of reproduction.

Article 24⁸, state parties undertake to adopt all necessary measures at the national level aimed at achieving the full realisation of the right recognised in the present convention.

Violence and equality in employment is the generic guidance of CEDAW with respect to article 11 content.

If women are subject to violence that are gender specific for example sexual harassment at the workplace equality in employment must be seriously taken.

Physical association and advances, sexual coloured remarks, exhibit pornography and sexual demand that can be either by work or conduct all these unwelcome sexual behaviours are included in sexual harassment. All these behaviours and conducts are considered as humiliating and can establish health problems and safety problems. It is a discriminate for a woman who knows that her objection will be a disadvantage for her in connection to her employment which includes recruitment, promotion. It is considered that there must be effective complaints procedure which includes compensation.

⁷ Article 11 of constitution.

⁸ Article 24 of constitution.

State must include all the facts about sexual harassment and what all measures it takes to protect women from sexual harassment and violence in the workplace, in a report.

On June 25, 1993 the Government of India has approved the above resolution include some reservation which are not included and the material in the present contest. The Government of India at fourth world conference on women which has held at Belgium made a official engagement that for the women's right they will formulate and a practical policy at a national level that will continue to help and guide women and will inform about the action at every level and every sector. Therefore, we have no uncertainty for the above purpose as gender equality is guaranteed in our constitution.

Avoidance from sexual harassment and abuse is been included in ambit of all the facts related to gender equality and the extent is sufficient for the meaning and content of fundamental rights which are included and guaranteed under our constitution. Judicial Independence is been included in constitutional scheme. The international conventions and norms and the accomplished domestic laws which are been occupied in the fields and there is no deviation between them are to be read together. Whenever there is inconsistency between International conventions and norms and the domestic laws and where the domestic laws are void, a law of judicial construction is accepted.

In *Minister from Immigration and Ethnic Affairs v. Technology*⁹, the high court of Australia has acknowledged the concept of legitimate exception where there was absence of Legislative provisions, even when there was absence of a constitutional bill related to Australia.

In *Nilabati Behera v. Orissa*¹⁰, a public law remedy under article 32 which is included under the concept of enforcement of guaranteed right under the constitution is not unusual from the provision in ICCPR, which referred with the view as an enforceable right to compensation and it is different from the private law remedies in tort. Therefore we can say that these International conventions and norms can be used in constructing the guarantee Fundamental Rights in the Indian Constitution where the basic concept of gender equality is embodied in all spheres of human activities.

⁹ 128 AIR 535.

¹⁰ 1993 (2) SC (746).

Keeping in view the above situation and seeing the absence of enacted law which could provide effective enforcement of gender equality which is considered as basic human right and it is right guaranteed against sexual harassment and abuse at the working places. We here laid down some guidelines and norms which will protect the woman at the working places till legislative enact for the purpose. This power is been exercise under article 32 which gives right to enforce fundamental rights and it will be treated as a declared law by the court under article 141.

Following are the guidelines and norms which are prescribed under this case-

Having note of the fact that even after Human Rights been defined under section 2(d) of protection of human rights act, 1933, there is no specific protection for women against sexual harassment in the present Civil and penal law and legislative to provide enactment for the same will take considerable time. And the safety of women is very important at all the places and institutions.

1. It is the duty of the Employer and all the responsible person at the workplace to forbid the commission of act related to sexual harassment and if such acts takes place a procedure for settlement must be mentioned with all the required step to be taken.
2. Definition of sexual harassment includes all the unwelcome sexual acts and behaviours which can be direct or by implication.
 - (a) physical connection
 - (b) a trade of sexual support
 - (c) sexually coloured remarks
 - (d) showing pornography and
 - (e) unwelcome physical conduct and behaviour which a verbal or nonverbal.

Where there is commitment of these act where she is doing any work such acts can be humiliating and can create health and safety problems. She may consider the disadvantage that she could face in connection to her employment which include recruitment and promotion.

3. Preventive checks - whether it is a private sector or public sector all the employees and the public in charge must take appropriate steps which can prevent sexual harassment at the workplace.
 - (a) prohibition of sexual harassment must be in all officers notified, published and circulated as defined above.

- (b) all the rules and regulations in government and public sector seeing with discipline must combine rules and regulations hindering sexual harassment and should provide for penalties for the culprit.
 - (c) Under industrial employment act, 1946 steps must be taken to include banning as regard to employer that are private.
 - (d) The working condition must be healthy hygienic and liberal and women should not feel disadvantage in regard to employment.
4. Criminal proceeding - if there is any such act that amounts to a definite offence under IPC or any other law it is the duty of the employer to take appropriate steps and actions and must file a complaint with appropriate authority. It must be ensured that the victim and the witnesses are not disfavoured while dealing with the charge relating to sexual harassment. The victims must have the right to seek transfer themselves or of own.
 5. Discriminatory actions - appropriate discriminatory actions have to be taken by the employer in the case of misconduct.
 6. Compliant mechanism- appropriate compliant mechanism should be present in all the organisation to redress the complaint against sexual harassment made by the victims.
 7. Complaint committee must be directed by a woman and at least half of its member should be woman. To avoid situations of Under Pressure or from seniors a third party to such complaints must be included. Third party can be NGO or any person familiar to the issue of sexual harassment. The complaint committee should make an annual report to government department with the employer and the person in charge.
 8. Workers initiatives- in employer employees meeting employees should be acknowledged advanced issue relating to Sexual harassment.
 9. Awareness- the rights of women must be given awareness in particular by especially notifying the guidelines.
 10. If there is a case of sexual harassment because of a third party or outsider the employer have to take all the necessary steps to initiate a preventive action.
 11. The central government or the state government must ensure that guidelines mention here are followed by the private sector also.
 12. No rights mentioned under protection and human act will be narrowed by these guidelines. The above guidelines must be strictly recognise at all the workplace for the protection of women rights and gender equality. All these guidelines are binding at all the workplaces until legislation enact on this matter.