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Workplace Sexual Harassment: From Mathura to Bhanwari

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WORKPLACE SEXUAL HARASSMENT: FROM MATHURA TO BHANWARI

Vishaka and Ors. Vs. State of Rajasthan and Ors. is one amongst the most visionary judgements that identified and recognised the problem of sexual harassment as being prevalent in the society. The idea of existence of sexual harassment as an offence was for the very first time recognised and the guidelines for the prevention of the same were laid down. This very judgement also analysed the vacuum in the legislature and looked at this through the lens of constitutionality for the first time. There were no such provisions in the penal law which outrightly pointed out sexual harassment as an offence. The only provisions available were s. 354 and s.509 which included words such as "outraging the modesty of women", which by the plain reading tells us how vague the interpretation of this phrase can be. It is not that sexual harassment could only be recognised by the way of coming of these guidelines; it was always prevalent in ways which had become acceptable and part of the daily routine. Bhanwari Devi, a saathin, went to obstruct a child marriage that was taking place. She was subjected to some unwelcome sexual harassment through words and gestures. Subsequently, she was gang-raped by the men of that community when her complaint against such acts went unacknowledged.[1] The courts in absence of any penal laws, on its own, gave out certain directions regarding prevention of sexual harassment at the workplace and defined in the judgement what counts as sexual harassment. This is a landmark judgement in the area of recognition of offences which are sexual in nature apart from the act of rape itself. A judgement giving legal recognition to sexual harassment of women at the work place in times where a few years back, a derogatory judgement on rape was passed can be said to be commendable without a doubt but, the question that comes into being is what happened after these guidelines regarding sexual harassment at work places was passed; Whether these guidelines were ever adopted in all its seriousness or did they just remain on paper even after the judiciary taking cognizance of such offences without there being any specific pre-existing penal laws? Isn't the absence of such laws violative of the constitutional guarantee of gender equality under Articles 14, 15 and freedom of life and personal liberty under Article 21 of Constitution of India, given the social realities of a country such as India?

The passing of these guidelines and the importance they hold cannot be emphasized enough by solely isolating the judgement of Vishaka and Ors. Vs. State of Rajasthan and Ors. It

[1] KAPUR, NAINA. "Workplace Sexual Harassment: The Way Things Are." *Economic and Political Weekly*, vol. 48, no. 24, 2013, pp. 27–29. *JSTOR*, www.jstor.org/stable/23527387.

becomes very necessary here to look at the history of cases which describe the prevailing ideology of judiciary when it came to cases pertaining to offences that were sexual in nature. In the case of Tukaram and Another v State of Maharashtra, Mathura, a girl of 16 years of age was raped inside a police station. The question here was to decide whether this act can be brought within the ambit of rape through deciphering whether the act between the two parties was consensual or not? The amendment of rape laws in 1983 which was the first after 1860 and the predecessor to the ones to come in India[2] but, the definition of rape and sexual assault was still not expanded, and it remained constricted to penal-vaginal penetration. The Mathura judgment had highlighted the fact that in a rape trial it is extremely difficult for a woman to prove that she did not consent 'beyond all reasonable doubt' as was required under the criminal law.[3] It can be observed how even in apparent cases of violation which are sexual in nature, it was difficult for the court to acknowledge the commencement of such offences due to reasons unacceptable. It can be said to be such due to the entrenched patriarchal attitudes that prevent sexual harassment from being a serious offence; worse, they invert the stigma of harassment on women themselves.[4]

The Vishaka guidelines is a first to recognise sexual harassment legally. It lists the formation of a complaints committee as one of the preventive measures for the sexual harassment of women. Its composition although should be such that it should be headed by a woman and not less than half of its member should be women, the provision does ensure that the problem at hand should be dealt by people who can understand it the most and the victim also feels comfortable in addressing the problem to the Complaints Committee. There are a few cases which delve into how such redressal of complaints turned out. A woman employee of NALCO, who accused its chairperson and managing director of molestation, was put through a harrowing investigation at the hands of the CC ('HC Stays 'Vulgar' NALCO Probe into Sexual Harassment', The Indian Express, April 23, 2004). The committee insisted on a 'physical demonstration' of the molestation and asked her prejudicial questions such as whether she had consumed liquor on the night of the incident. The high court finally threw out the findings of the committee saying they were 'vulgar', 'totally biased', and intent on proving that the petitioner was a 'liar' ('HC Slams Probe into NALCO Molestation Case', The Times of India, April

[2] Flavia Agnes. "Protecting Women against Violence? Review of a Decade of Legislation, 1980-89." *Economic and Political Weekly*, vol. 27, no. 17, 1992, pp. WS19–WS33. *JSTOR*, JSTOR, www.jstor.org/stable/4397795.
[3] Flavia Agnes. "Protecting Women against Violence? Review of a Decade of Legislation, 1980-89." *Economic and Political Weekly*, vol. 27, no. 17, 1992, pp. WS19–WS33. *JSTOR*, JSTOR, www.jstor.org/stable/4397795.
[4] Sheba Tejani. "Sexual Harassment at the Workplace: Emerging Problems and Debates." *Economic and Political Weekly*, vol. 39, no. 41, 2004, pp. 4491–4494. *JSTOR*, www.jstor.org/stable/4415633.

23,2004)[5] It is evident from such incidents that the stigma of sexual harassment doesn't go by setting up of internal committees, it is a problem which is deep rooted in the culture and will not so easily wash away just with the help of legislative enactments.

It cannot be denied through this real life example how the guidelines can be misused to become a double-edged sword; where they were put in place to protect women from such stigma of sexual harassment and are being used to create a prejudicial grounds making the victim more sensitive to negative limelight. This kind of environment hampers the constitutional guarantee of gender justice and violates the rights given under Articles 14, 15 and 21. The judgement referred to various international conventions and provisions of the constitution in formulation of these guidelines. It was recognised that "gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right".[6] Article 14 entails "equality before law"[7] and given the examples above where the environment for women becomes hostile due to non-acknowledgement of sexual harassment complaints or where the woman employ of NALCO was subjected to prejudicial questions in lieu of her complaint to the committee; all of it violates the guarantee of "equality before law" granted to us by the constitution. It also violates Article 15 of the constitution in which discrimination solely based on sex is prohibited unless it is done for the purpose of social advancement. In the case of Anuj Garg v Hotel Association of India[8], women were prohibited to work in places where liquor was served thereby infringing upon their right to freely "practice any profession, or to carry on any occupation, trade or business"[9] guaranteed by Article 19(1)(g). In regard to violation of Articles 14 and 15, the following can be quoted, the makers of the Constitution intended to apply equality amongst men and women in all spheres of life. In framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. Although the same would not mean that under no circumstance, classification, inter alia, on the ground of sex would be wholly impermissible but it is trite that when the validity of legislation is tested on the anvil of equality clauses contained in Articles 14 and 15, the burden therefore would be on the State. While considering validity of a legislation of this nature, the court was to take notice of the other provisions of the Constitution.[10]The test of reasonable classification was not passed and the provisions were found discriminatory hence, in violation of Art 14 and 15.

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[5] Sheba Tejani. "Sexual Harassment at the Workplace: Emerging Problems and Debates." *Economic and Political Weekly*, vol. 39, no. 41, 2004, pp. 4491–4494. *JSTOR*, www.jstor.org/stable/4415633.
[6] The Constitution of India, 1949
[7] The Constitution of India, 1949
[8] Anuj Garg and Others Vs. Hotel Association of India and Others, AIR 2008 SC 663
[9] The Constitution of India, 1949
[10] MURTHY, LAXMI. "From Mathura to Bhanwari." *Economic and Political Weekly*, vol. 48, no. 23, 2013, pp. 16–18. *JSTOR*, www.jstor.org/stable/23527202.

Where the environment has become hostile and by this nature can prevent women to not work in place of their choice or profession then the Right to life and personal liberty granted under Art 21 is violated as well.

The imperative question that still remains is that whether these preventive guidelines were able to work well in practice when adopted in The Sexual Harassment of Women at Workplace Act, 2013 or whether it suffered a slack as the greater challenge lies in the implementation of the act. It is to be noted here that the act came into force after a long period of 16 years, some definitions were expanded, for example, employee was defined as, "employee" encompasses a range of work situations including the informal/ unorganised sector: employee means a person employed at a workplace for any work on regular, temporary, ad hoc or daily wage basis either directly or through an agent, including a contractor, with, or without the knowledge of the principal employer, whether for remuneration or not, or working on a voluntary basis or otherwise, whether the terms of employment are express or implied and includes a co-worker, a contract worker, probationer, trainee, apprentice or called by any other such name."[11] But, what about some provisions that were diluted and the others which were added as an extra-ordinary safe guard against false complaints made by women. Section 14 of The Sexual Harassment of Women at Workplace Act, states the following-

14. (I) Where the Internal Committee or the Local Committee, as the case may be. arrives at a conclusion that the allegation against the respondent is malicious or the aggrieved woman or any other person making the complaint has made the complaint knowing it to be false or the aggrieved woman or any other person making the complaint has produced any forged or misleading document. it may recommend to the employer or the District Officer. as the case may be, to take action against the woman or the person who has made the complaint under sub-section (/)or sub-section (2) of section 9, as the case may be, in accordance with the provisions of the service rules applicable to her or him or where no such service rules exist, in such manner as may be prescribed: Provided that a mere inability to substantiate a complaint or provide adequate proof need not attract action against the complainant.

As per the guidelines there was a clear purpose of letting women come forward to address issues of sexual harassment at the workplace. The case of the NALCO woman employee tells as how difficult it can become for women to come forward with a complaint and continue being associated with the same organisation without falling into negative limelight. As the Report

[11] MURTHY, LAXMI. "From Mathura to Bhanwari." *Economic and Political Weekly*, vol. 48, no. 23, 2013, pp. 16–18. *JSTOR*, www.jstor.org/stable/23527202.

of the Justice Verma Committee observes, "such a provision is a completely abusive provision and is intended to nullify the objective of the law, we think that these 'red-rag' provisions ought not to be permitted to be introduced and they show very little thought".[12] In the case of Sakshi v UOI[13], the petitioner argued that the narrow understanding of s.375/376 IPC is contrary to contemporary understanding of rape and the government authorities view offences other than penal vaginal penetration as non-serious offences. S. 14 therefore, takes away the freedom to complaint without any duress before even giving it fully thereby, impacting the right granted under Art 21 and 14 completely. It is a big loophole which seems to overcompensate for the misuse before it can be fully brought to use for the benefit of women impacting the course of decision of other cases.

The court in the judgement of Vishaka laid down visionary guidelines which were required to fill the vacuum in the legislation and at the same time identify the offence of sexual harassment at the time where grave offences such as rape were not given much heed(Mathura Judgement). The only drawback which arose after the judgement is the prolong period in between of passing of the act. The act which has diluted the guidelines and has incorporated s.14 which will limit the freedom of a woman to address the issue at hand without the fear of social stigma being attached. The court can definitely make use of Article 73 and 141 when the legislation does not provide what is demanded by the prevailing social realities and this is what happened when these guidelines became legally binding in all the workplaces in the absence of legislation.[14] Some loopholes have already been identified in the previous paragraphs and it is certain that the Vishaka guidelines were well drafted as compared to the bill that came in lieu of it. Although, the definition of sexual harassment in the judgement was a bit narrow and vague and it was adopted in the act as it is without broadening the scope even after more than a decade had passed. The definition is as follows as given under 2 (n) of the act-

(n) "sexual harassment" includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely:- (i) physical contact and advances; or (ii) a demand or request for sexual favours; or (iii) making sexually coloured remarks; or (iv) showing pornography; or (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

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[12] KAPUR, NAINA. "Workplace Sexual Harassment: The Way Things Are." *Economic and Political Weekly*, vol. 48, no. 24, 2013, pp. 27–29. *JSTOR*, www.jstor.org/stable/23527387.
[13] Sakshi v UOI, AIR 2004 SC 3566
[14] KAPUR, NAINA. "Workplace Sexual Harassment: The Way Things Are." *Economic and Political Weekly*, vol. 48, no. 24, 2013, pp. 27–29. *JSTOR*, www.jstor.org/stable/23527387.

The definition provided in the judgement provides nothing more to offer than what is listed above. "Unwelcome acts", "sexually coloured remarks" etc. are all phrases which are vague and in todays changing technological and social scenario may invite much broader interpretation than what it possible through just these mere phrases. Therefore, I believe that the definition should have in the Act offered much more than what as a visionary step was offered by the Vishaka guidelines 16 years back.