

Case Name Vishaka & Ors v State of Rajasthan & Ors

Topic Protection from sexual harassment in the workplace required

Category EQUALITY - discrimination (sex);
WOMEN - discrimination;

Tribunal Supreme Court

Country India (Asia)

Case Date 13 Aug 1997

Judge(s) J S Verma CJ, Sujata V Manohar J, B N Kirpal J

The petitioners were various social activists and non-governmental organisations concerned with finding suitable methods for the realisation of the true concept of 'gender equality', preventing the sexual harassment of working **women** in all workplaces through the judicial process and filling the vacuum in existing legislation. As a result of the brutal gang rape of a publicly-employed social worker in a village in Rajasthan, they filed a class action under Art 32 of the Constitution seeking the court's enforcement of the fundamental rights provisions relating to working **women**, namely the right to equality (Art 14), the right to practise one's profession (Art 19(1)(g)) and the right to life (Art 21). Other issues raised by the petition included: the fundamental right to non-discrimination (Art 15); India's international obligations under Arts 11 and 24 of the **Convention on the Elimination of All Forms of Discrimination against Women** (CEDAW) to *inter alia* 'take all appropriate measures to eliminate **discrimination against women** in the field of employment' (Art 11) and to 'undertake to adopt all necessary measures at the national level aimed at achieving the full realization' of the rights recognised in CEDAW (Art 24); and India's official commitment at the Fourth World Conference on **Women** in Beijing to, *inter alia*, 'formulate and operationalize a national policy on **women** which would continuously guide and inform action at every level and in every sector; to set up a Commission for **Women's** Rights to act as a public defender of **women's** human rights; [and] to institutionalise a national level mechanism to monitor the implementation of the Platform for Action.'

In disposing of the writ petition with directions, it was held that:

1. The fundamental right to carry on any occupation, trade or profession depends on the availability of a 'safe' working environment. The right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, belongs to the legislature and the executive. When, however, instances of sexual harassment resulting in violations of Arts 14, 19 and 21 are brought under Art 32, effective redress requires that some guidelines for the protection of these rights should be laid down to fill the legislative vacuum.
2. In view of the fact that the violation of such fundamental rights is a recurring phenomenon, a writ of *mandamus* needs to be accompanied by directions for prevention if it is to be successful.
3. Any international **convention** not inconsistent with the fundamental rights guaranteed in the Constitution and in harmony with its spirit must be used to construe the meaning and content of the constitutional guarantee and to promote its object; this is now an accepted rule of judicial construction (*Minister of Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353; [1996] 1 CHRLD 67 (Aus HC) applied and *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 (Ind SC) followed) and is also implicit from Arts 51(c) and 253 read with Entry 14 of the Union List in the Seventh Schedule of the Constitution. Article 73 of the Constitution also provides that the executive power of the Union is available until Parliament enacts legislation to expressly provide measures needed to curb the evil in question.
4. It follows that Arts 11 and 24 of CEDAW, General Recommendations Nos 22, 23 and 24 of the CEDAW Committee, relating to sexual harassment in the workplace, and India's commitment at the Fourth World Conference on **Women** may be relied upon to construe the nature and ambit of the gender equality guarantee and, since the guarantee includes protection from sexual harassment and the right to work with dignity, to formulate preventive guidelines.
5. Both the power of the court under Art 32 and the executive power of the Union have to meet the challenge of protecting working **women** from sexual harassment and making their fundamental rights meaningful. Governance of society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme.
6. In the absence of legislation, the obligation of the court under Art 32 must be viewed along with the role of the judiciary envisaged in the 1995 Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region, principle 10 of which requires the judiciary: (a) to ensure that all persons are able to live securely under the rule of law; (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and (c) to administer the law impartially among persons and between persons and the State. These principles were accepted by the Chief Justices of Asia and the Pacific as representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary.
7. The following guidelines and norms are, therefore, to be observed at all workplaces or other institutions

for the preservation and enforcement of the right to gender equality of working **women**:

- a. The employer or other responsible persons in the workplace or other institution is under a duty to prevent or deter the commission of acts of sexual harassment and to provide procedures for the resolution, settlement or prosecution of such acts by taking all steps required;
- b. The definition of sexual harassment includes unwelcome sexually determined behaviour (whether directly or by implication) such as:
 - i. physical contact and advances;
 - ii. a demand or request for sexual favours;
 - iii. sexually-coloured remarks;
 - iv. showing pornography;
 - v. any other unwelcome physical, verbal or non-verbal conduct of a sexual nature;
- a. All employers or persons in charge of any workplace, whether in the 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:
 - i. express prohibition of sexual harassment at the workplace should be notified, published and circulated in appropriate ways;
 - ii. 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;
 - iii. as regards private employers, steps should be taken to include these prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act 1946;
 - iv. 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 workplaces and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment;
- a. 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 victimised 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;
- e. 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;
- f. 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. Such a complaint mechanism should ensure timely treatment of complaints;
- g. The above complaint mechanism 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 members should be **women**. Further, to prevent the possibility of any undue pressure or influence from senior levels, the Complaints Committee should involve a third party, either an NGO or another body which 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 these guidelines, including reports of the Complaints Committee, to the Government Department;
- h. Employees should be allowed to raise issues of sexual harassment at workers' meetings and in other appropriate fora and it should be affirmatively discussed in employer-employee meetings;

- i. 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;
 - a. 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.
9. The Central/State Government should consider adopting suitable measures, including legislation, to ensure that these guidelines are also observed by employers in the private sector.

Lawyers For the Petitioners: Ms Meenakshi Arora and Ms Naina Kapur
For the Respondents: The Solicitor General
Amicus Curiae: Shri Fali S Nariman

Citations (1997) 6 SCC 241, AIR 1997 SC 3011, (1998) BHRC 261, [1997] 3 LR

Notes The court stated that the guidelines are to be treated as law declared by it in accordance with Art 141 of the Constitution until the enactment of appropriate legislation and that the guidelines do not prejudice any rights available under the Protection of Human Rights Act 1993.