

## **“Vishakha Guidelines: A Revolutionary Judgement Struggling between the Voids of Law”**

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### **Preamble of the Constitution of India assures “equality of status & opportunity” for all the citizens of India.**

It was August 1997, when a group of women filed a PIL against the state of Rajasthan and the Union of India to enforce the fundamental Rights of working women under Article 14, 19 and 21 of the constitution of India. All of this started in 1992, when an Indian social worker named Bhanwari Devi was brutally gangraped by some higher caste men angered by her efforts to prevent a child marriage that was a nine months old daughter of their family. The police's irresponsible attitude towards this incident and the release of the culprits in the absence of evidence by the court; these reasons, along with the women activists, attracted the attention of the entire country. And thus, the beginning of the India's Working Women Movement started. We can say that in this movement, the case of Bhanwari Devi laid a foundation stone but this case itself got lost in the middle of a complex and bilateral justice system.

It was Vishakha and a group of four women organisation who sought the PIL and after them this landmark judgement was named as Vishakha & ORS. V State of Rajasthan & ORS. This essay will focus on these following aspects-

1. The impact this case brought upon the system.
2. The aftermath of the Impact over the mechanism of law.
3. In our judicial system, when the right time will come when late justice will actually mean the justice denied: A concern.

Justifying the first reference with the objective page of the judgement<sup>1</sup> which reads,

*The immediate cause of filing this writ petition is an incident of alleged brutal gangrape of a social worker in the village of Rajasthan undoubtedly but that incident is the subject matter of a separate criminal action and no further mention of it, by us, is necessary. The court shaped the petition with certain objectives as looked by the petitioners.*

### **OBJECTIVES OF THE VISHAKHA'S CASE-**

1. To safeguard the Fundamental rights of working women i.e. Article 14, Article 15 and Article 21 of the constitution. It includes Article 19(1)(g) “Right to practice any profession, to carry out any occupation, trade or business.

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<sup>1</sup> Vishakha & Ors v/s State of Rajasthan & Ors, On 13 Aug 1997.

2. Concerning the hazards to which a working woman maybe exposed or the depravity to which sexual harassment can degenerate. Thus, Urgency to safeguard the women by an alternative mechanism in the absence of legislative measures.

### **THE IMPACT OF THE WRIT-**

The court observed that before 1997, women who experience sexual harassment assault at the workplace would have to go through a long criminal procedure of law. Complain under Section 354 of IPC which means “criminal assault of women to outrage the modesty of the women and remedy sought under Section 509 elaborating the punishment “for the use of words, gestures or act intended to insult the modesty of a women” were the only solution. Due to a disquieting judicial system woman often hesitate to come forth with the complaint. Some of them fear to lose their job whether some leave their job to avoid the situation whether some of them keep struggling with the torment. This is a direct violation of pledge to gender equality. The true meaning of the term “Gender Equality” means ‘equal rights and equal opportunities’ to all the men and women. To live a life with dignity is the basic human right and has received a global acceptance. The court further referred<sup>2</sup> that *the International Conventions and norms are logically concomitant to the Fundamental rights guaranteed under the Constitution of India, which embody the basic concept of gender equality in all spheres of human activity.*

Thus, there is need for an alternative mechanism until a legislative measure is not in existence by exercising the power under Article 32 and Article 141 it would be treated as Law

judgement, the SC decided to laid down the guidelines for employers to deal with complaints of sexual harassment / assault at the workplace namely “Vishakha Guidelines”. The following flowchart would easily demonstrate the key points of the guidelines-

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<sup>2</sup> In Nilabati Behera v. State of Orissa, (1993) 2 SCC 746: (1993 AIR SCW 2366)



## VISHAKHA GUIDELINES



Definition of Sexual Harassment	Preventive Measures	Penal Code
For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (Whether directly or by implication) as: a) Physical contact and advances; b) a demand or request for sexual favours; c) sexually coloured remarks; d) showing pornography; e) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.	a) Applicability on both public and private sector b) Disciplinary Action c) Complaint mechanism/ Complaint Committees formation with 50% female members d) To spread awareness	a) To ensure the safety of women, if a count to any specific offence under IPC, the employer shall initiate the appropriate action against the wrong doer.

### AFTERMATH OF THE ACT

However, these guidelines created a concave, limitizing the sexual harrasment by a binding law but the legislative void said to be continued. In a case of **Apparel Export Promotion Council v/s A. K. Chopra {(1999) 1 SCC 759}**<sup>3</sup>, the Honorable Supreme Court need to reiterated the law laid down in the Vishakha Guidelines. Dr. Medha Kotwal of ALOCHANA, an NGO highlighted the number of indivisual cases of sexual harassment stating,

*“that the Vishkha Guidelines were not being effectively Implemented and it justified the need of a binding legislation in the form of an Act as soon as possible.”*

<sup>3</sup> Apparel Export Promotion Council v/s A. K. Chopra {(1999) 1 SCC 759 }

Pendency of cases is one of the harmful assests in the hands of law. As it is said JUSTICE TOO LONG DELAYED IS JUSTICE DENIED<sup>4</sup> , Martin Luther King Jr, ascribed it as a infringement of the rights of the law itself as the quote is continuously struggling to be fitted into the Indian Judicial System.

Sexual harassment at the workplace is now a global phenomenon. India ranks 5<sup>th</sup> from the bottom out of 153 countries concerning the Global Gender Gap Report concerning the economic participation on women in the economy<sup>5</sup>. According to survey carried for transforming India, a Delhi based NGO it was found that the perpetrator was a superior authority.<sup>6</sup> Female labour force participation in India has been continuously degrading from 34% in 2006 to 24.8% in 2020. It demands to draw the concern over the true nature of gender equality. India is a religious country. It draws its roots from the very old established societal system i.e. the patriarchy system. This is a major reason behind this low repo rate of female workforce in the country.

Indian judiciary system is bearing a backlock of cases upon its back that instead of its being so flexible continuously bending downwards. It took 16 years to form an Act out of these guidelines, which is no doubt a very long time.

The concern which started from Vishakha Case ended in 2013 in the name of the Act **Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 or POSH Act 2013**. Let us have a view what impact this act hold.

### **POSH ACT 2013**

- The objective of the act reads that,

*The Act will ensure that women are protected against sexual harrasment at all the work places, be it Public or Private. This will contribute to realisation of their rights to Gender Equality, Life & Liberty and equality in working conditions everywhere. The sense of security at the workplace will improve women's participation in work, resulting in their economic empowerment and inclusive growth.*<sup>7</sup>

- Who are Aggrieved<sup>8</sup> Women under the Act?

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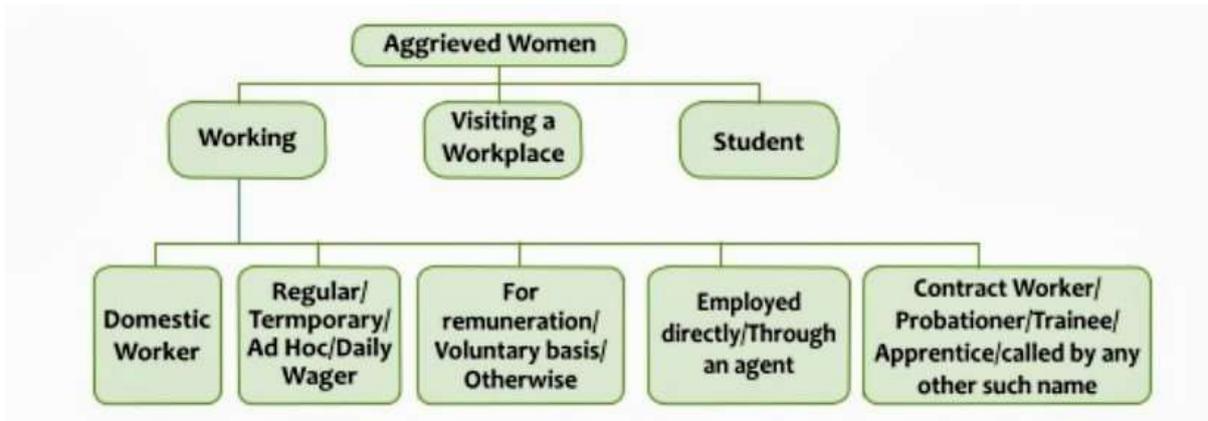
<sup>4</sup> Sourdin, Tania; Burstyner, Naomi (2014). "Justice Delayed is Justice Denied", Victoria U. L. & Just. JVictoria University, Melbourne. 4:46. Retrieved April 23, 2020- via HeinOnline,

<sup>5</sup> <https://www.indiatoday.in/india/story/women-s-participation-in-indian-workforce-plummets-from-37-to-18-in-13-years-report-1653772-2020-03-09>

<sup>6</sup> Aarti Dhar, National: 88% women subjected to sexual harassment at workplace in IT sector: survey The Hindu Dated November 15, 2010 available at <http://www.thehindu.com/todays-paper/tp-national/88-womensubjected-to-sexual-harassment-at-workplace-in-IT-sector-survey/article15687569.ece>

<sup>7</sup> Press Information Bureau, Government of India (4 November 2010). Protection of Women against Sexual Harassment at Workplace Bill,2010.

<sup>8</sup> <https://wcd.nic.in/act/handbook-sexual-harassment-women-workplace>



- Work Place defined under the Act.



This legislation contains provisions to protect every woman from any act of sexual harassment whether she is employed or not<sup>9</sup>. Naina Kapoor {An learned advocate who framed and acted as lead instructing counsel in the public interest litigation (PIL) case of Vishakha in 1997} has said in an interview that the Sexual Harassment at the Workplace (Prevention, Prohibition, Redressal) Act 2013 has considerably diluted the progressive spirit of Vishakha judgment and the mechanism constituted under the Act and Regulation 2013 is not in compliance with the Vishakha judgment.

Thus, this can be sum up as the act did fell short of Vishakha judgment on numerous critical fronts and due to these following clauses in the Act; the Government has come in for sharp criticism by the Justice Verma Committee Report;

- Section 11 of the Act says before initiating the inquiry the aggrieved women can request for settlement between her and the respondent through conciliation. The act also prescribes the monetary consideration would not be subjected to the settlement.

<sup>9</sup> Statement of Objects and Reasons (SOR) appended to The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013(No. 14 of 2013).

However, considering the unequal position of the women, this provision may be abused.

- The act further provides that information related to enquiry cannot be subjected under Right to Information (RTI).
- The provisions which might be aggregated, that it is mandatory for the employers by this Act to constitute the internal committees to look into the cases of sexual harassment in the workplace but it also envisions a situation in which the offender may be an employer, as in Tehelka Case<sup>10</sup>, making the investigation partial and malfunctional.<sup>11</sup>
- It is provided to pay the compensation for any mental or physical harm or in the loss of employment but the complainant is too complex and bureaucratic that could dissuade her from coming forward with the complaints. There is no any safeguarded measure are provided to deal with these particulars.
- When we make a compare with the developed countries such as US, we can see that they follow a case law structure when dealing with such kind of sexual harassment as there is vicarious liability casted upon the employers. While in India for not setting up the internal committee, the maximum penalty is 50,000 Rs without depending on the size of the company but in US, the aggrieved women can sue the company for turning a blind eye and a compensation up to \$3000,000 can be taken by them depending upon the size of the company.
- Apart from that, the Act includes a clause seeking to penalize false and malicious complaints by the so aggrieved women (Sec 14). In case when the allegations are not being proved, it can cost the women with the termination from the job. Thus, it prevents the small employees to lodge a complaint against an accused.
- Again, these provisions are seemed quite biased when we talk about gender equality in whole. It only seeks safeguards for women employees but the question arises what about those unfiled uncomfortable complaints of the men employees?

This concept was again highlighted, when a law intern lodged a complaint of sexual harassment against a former Judge<sup>12</sup>. On the short notice, the Court appointed a panel for probing the alleged sexual harassment of a law intern which submitted its report to the Chief Justice of India accusing the former judge in the case. In another case of same nature, on petition filed by a young woman accusing a retired Supreme Court judge of sexually harassing her while he was not in office, Chief Justice of India gave decision against her saying that he had retired when harassment took place and so, Supreme Court had no administrative control over former judge. Thus, a plea was submitted to include the pillar of judiciary under the regime of this act.

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<sup>10</sup> <https://www.thehindu.com/opinion/lead/issues-of-sexual-assault-the-tehelka-case/article5386951.ece>

<sup>11</sup> Kian Ganz, 'What happens when women complain of sexual harassment?' Live mint last modified June 30, 2015.

<sup>12</sup> Supreme Court to hear sexual harassment case against former judge!' reported by Vaidanathan edited by Deepshikha Ghosh, January 13, 2014

Recently a number of judgements have also been pronounced providing relief in the matter of sexual harassment of working women. The Bombay High Court<sup>13</sup> concerned that the safety mechanism should be evolved for the women to that ease that they feel free to complaint to the suitable higher authority. In another case of **S. Rajni VS State of Tamil Nadu**<sup>14</sup> on 17th August 2017, it was decided to constitute the complaint committees under mandatory procedure contemplated under the act strictly. Similarly, in the case of **M. Daisyrani VS the Institute of Road Transport**<sup>15</sup> it was held that it is the duty of the employer to create or provide a peaceful environment for women to work.

Sexual harassment of working women is a manifestation of moral infirmity of Indian societal system. What is the usefulness of having laws on paper if it cannot be utilized by the society? The main objective of the legal fraternity has been social welfare from years, but this legislative void caused due the lack of execution would not be subtle if the fundamental concern is being ignored. Consequently, the right to economic empowerment would directly be violated without curving the imperil of sexual harassment of women at workplace. We have a male dominating society with 24.8% female work force, here what is implicit in implementing gender specific laws and policies, is the lack of decision-making positions of women in the main.

Now, the time demands a supportive environment by raising awareness among women. Whether it be society or the workplace, when it comes to their rights, they should be equipped with the most dangerous weapon in their hands i.e. the knowledge of their rights.

### **Conclusion**

Law is everchanging in nature. It copes up with the needs of the society. In the Era, we are living in, we get to see some unconventional ways to commit a crime, for which our Law needs to be prepared. When we talk about #METOO movement, we get to know that out of 10, 2 men are being subjected to sexual harassment. The journey which started from Vishakha, is now 23 years old. To understand the true meaning of Gender Equality is yet to be described. In the era of Women Empowerment, it is also necessary to protect our men to establish a woman empowered society. The journey from the guidelines to act need an enforceable mechanism in its strict senses. From the above study, contemplating the issue, it is reasonable to conclude that despite of the initiatives taken by the government, a constant raise in the numbers is being recorded. The reluctance showed by most of the organisations and as the studies have propounded, there is a need to redress the institutional mechanism rather than beating around the bush in paperwork. Reasons ranging from hebetude to the lack of understanding the far reaching prospective of law, women are in a constant apprehension of being a casualty. Thus, law still needs to be more legible and stricter in its true senses.

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<sup>13</sup> Vidya Akhave v. Union of India, Department of Women & Children Bombay High Court Writ Petition Number 796 of 2015. Decided on Oct. 4, 2016.

<sup>14</sup> Madras High court Writ Petition Number 1812 Of 2015. Decided on August 17, 2017.

<sup>15</sup> Madras High court Writ Petition Number 25803 of 2015 and W.M.P. No. 1,2 & 3 of 2015. Decided on August 29, 2017