

Chapter 9

Sexual Harassment in the Workplace

Case 9.1 Vishaka v Rajasthan & Others

(Vishaka & Others v State of Rajasthan & Others)¹

Aspects relevant to VAWG: Sexual harassment in the workplace, absence of legislation prohibiting sexual harassment in the workplace, discrimination, gang rape, gender equality, obligation of the state to protect women from sexual harassment in the workplace, the role of the court in addressing sexual harassment in the workplace

Summary of facts

This case does not emanate from the East Africa jurisdiction and is only used to demonstrate international good practice decisions.

The petitioners in this case were various social activists and non-governmental organisations (NGOs). They were concerned with finding suitable ways for the realisation of the true concept of 'gender equality' and the prevention of sexual harassment of women in the workplace through the judicial process and in the absence of legislation prohibiting sexual harassment in the workplace. Although the Government of India has an obligation to provide legal protection from sexual harassment in the workplace, there was no legislation in India prohibiting sexual harassment in the workplace.

Following the brutal gang rape of a publicly employed social worker (Bhanwari Devi) in a village in Rajasthan in India, she, together with five women's organisations including Vishaka, filed a group suit under Article 32 of the Constitution of India against the government and others.

Issues and resolution

In the petition, she sought the court's enforcement of the fundamental rights provisions relating to working women, namely: the right to equality (Art. 14), the right to practice 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), and India's international obligations under CEDAW Article 11, which requires the government to take all appropriate measures to eliminate discrimination against women in the field of employment, and CEDAW Article 24, which requires the government to adopt all necessary measures at the national level aimed at achieving the full realisation of all the rights recognised in CEDAW.

The petition also questioned 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 institutionalize a national level mechanism to monitor the implementation of the Platform for Action.

In determining the petition, the court relied on the constitution and India's international obligations and held that the fundamental right to carry on any occupation, trade or profession depends on the availability of a safe working environment, free of sexual harassment, and the right to life means a life with dignity.

The court held that the responsibility of ensuring such safety and dignity through the enactment of legislation and creating mechanisms for its enforcement rested with the government. It further held that the workplace should be free of sexual harassment and, in the absence of legislation prohibiting sexual harassment in the workplace, the government of India was in breach of its international obligations to take legislative and other measures to protect women from violence and to prevent such violence from taking place.

The court recognised the right to gender equality and held that such right includes legislating against sexual harassment in the workplace. Noting the absence of legislation on sexual harassment in the workplace, the court applied judicial creativity within the confines of the Constitution of India, and used this case to produce the first enforceable civil law guidelines on gender equality and non-discrimination in the workplace, and the right of working women to be free from sexual violence and harassment in both public and private employment.² The court directed that those guidelines were to be treated as a declaration of law in accordance with Article 141 of the constitution. The court further stated that the guidelines were to be treated as a declaration of law under Article 141 of the constitution, and were to be observed in order to enforce the right to gender equality and to prevent discrimination against women and sexual harassment in the workplace.

This prompted the government, in 2007, to introduce the long awaited Bill on Sexual Harassment in the Workplace. This case inspired other reformers in the region and, in 2009, the Supreme Court of Bangladesh – referring to the Vishaka case – recognised that, 'the harrowing tales of repression and sexual abuse of women in their workplaces' were due to failure on the part of the government to enact a sexual harassment law.

Points to note/contribution to jurisprudence

1. The Court gave a wide interpretation to the right to practice any profession or to carry on any occupation and clearly brought out the reality of the indivisibility of several rights. The right was said to include the right to a safe environment free from sexual harassment. The judgement brought out the fact that sexual harassment results in violation of several rights: the fundamental right of a woman to equality with men and protection from discrimination on the basis of sex and her right to life and to live with dignity, the right to liberty, and right to practice any profession or to carry on any occupation, trade or business.
2. Cognisant of the need for effective redress and protection of women's rights, in dealing with the legal vacuum created by the failure of Parliament in its legislative obligation, the Court made law when it crafted guidelines which would be applicable until Parliament would duly carry out its mandate.
3. In order to promote and protect constitutional guarantees courts can have recourse to the content of international conventions and norms in construing fundamental rights guaranteed by the Constitution. The Court read international law into the legislative vacuum.
4. Following the Vishaka Guidelines for prevention of sexual harassment developed by the Supreme Court, Parliament enacted the Sexual harassment of Women at Workplace (Prevention, Prohibition and Redress) Act 2013. This is evidence that courts can take the lead in pushing Parliament to fulfil its mandate.

Notes

- 1 Source: INTERIGHTS, the International Centre for the Legal Protection of Human Rights.
- 2 The guidelines and norms were to be observed at all workplaces or other institutions for the preservation and enforcement of the right to gender equality of working women and to protect them from sexual harassment.