

POSH

Prevention Of Sexual Harrasment

Live

A quarterly insight to the POSH Law!

By Vaishali Bhagwat, Adv

www.vaishalibhagwat.com

POSH LIVE brings to you updates and information relating to matters of sexual harassment irrespective of the gender and age. This is an effort to create awareness about laws relating to sexual harassment and any form of discrimination.

Right to say No - Demystifying Marital Rape (In view of split verdict by Delhi High Court)

According to the recent survey conducted by National Family Health Survey 5 (2019 – 2021); 18% of women in India are not able to say 'NO' to their husbands if they do not want to engage in sexual intercourse with them.

Let us have a look at definition of rape and exceptions to it, specifically looking at meaning of marital rape.

The Indian Penal Code of 1860 communicates that in a marriage there is an implied consent for sexual intercourse, which cannot be said otherwise.

Sec.375 of Indian Penal Code, A man is said to commit "rape" who has sexual intercourse with a woman under circumstances as mentioned below -

- (a) Against her will;
- (b) Without her consent;
- (c) With consent obtained under fear of death or hurt;
- (d) Consent is given under a misconception of fact that the man is her husband;
- (e) Consent is given because of unsoundness of mind, intoxication or under influence of any stupefying or unwholesome substance;
- (f) With a woman under eighteen years of age, with or without her consent
- (g) With a woman who is unable to communicate her consent.

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GOOD TO KNOW!

Nirbhaya Helpline

After 2012 Delhi gang rape case a women's safety helpline has been started in India under the name of 'Nirbhaya Helpline'. Every state/city has the different helpline number.

There is a single helpline number '112' on which immediate assistance can be sought. This helpline is an integration of Police (100), fire (101) and women (1090) helpline numbers and this project has been funded by Central Government's Nirbhaya Fund. Till 2019, 20 States and Union Territories have joined this pan-India network of single emergency helpline number managed by the Emergency Response Support System (ERSS).

In January 2022, **Mumbai Police** established the Nirbhaya Squad comprising of trained Women Police Officers. If any woman is in trouble, simply dialling **number 103** will get you in touch with Nirbhaya Squad who will come to the rescue immediately. The teams of Nirbhaya Squad carry out special patrolling in vulnerable spots and awareness drives and tracks the activities of sexual offenders among other tasks.

The women can also file an online complaint against the cybercrimes on www.cybercrime.gov.in or they can simply call on National Women Helpline Number 181. It is a 24 hour confidential service for women and child survivors and victims of any form of violence including domestic & intimate partner. All calls are free and confidential. Women can also ask for help by calling on Number 1091.

These circumstances have exceptions such as –

- i. If a woman who does not physically resist for penetration, by this reason it shall not be regarded as the Sexual Activity.
- ii. A medical procedure or intervention shall not shape an offence of rape.
- iii. Sexual intercourse or sexual act by a man with his wife, the wife not being under 15 year of age is not rape.

The third exception, is widely known as 'Marital Rape'. It is based on the assumption that a woman upon marriage gives a forever consent for sexual activity to her husband.

Honourable Judge, Leila Seth, in her book 'Talking of Justice' has stated that the marital rape concept should be looked at from the historical perspective and the principle of patriarchy. It would be indispensable to quote the excerpt from her book which is as follows, "The offence of rape was originally based on the idea of theft of a man's property. According to the old-fashioned notion on which the law was based, a woman belonged first to her father and, after marriage, to her husband. So, if anyone had sexual intercourse with her before marriage, the father's honour was affected and, after marriage, the husband's. According to the English common law of coverture, a woman was deemed to have consented at the time of marriage to having intercourse with her husband at his whim. In 1736, Sir Matthew Hale declared that a husband could not be guilty of rape on 'his lawful wife, for by their mutual matrimonial consent and contract' she had agreed to this and this consent 'she cannot retract'."

The recent Judgement delivered on 11th May, 2022 was a split verdict while hearing the case **W.P.(C) 284/2015 & CM Nos.54525-26/2018 in Delhi High Court**. It recognized that marital rape is in violation of fundamental rights enshrined under article 14 (equality before law), article 15 (prohibition of discrimination on grounds of religion, race, caste, sex or place of birth), article 19 (1) (a) (freedom of speech and expression) and article 21 (right to life and liberty) of Indian Constitution and on the other side supports the disguised consent of a woman upon marriage.

However, it also stated that, "every incident of non-consensual sex of a man with a woman is not rape". It also further said that "an allegation of rape should find no place in a relationship of marriage" and that the sex between husband and wife "remains a conjugal obligation".

While preserving the conjugal right of the husband in question, the fundamental right to sexual autonomy and bodily integrity is denied to the said wife.

The judgement also talks about intelligible differentia, comparing the act of rape by a stranger and the husband. It further states that this exception serves the laudatory purpose of preserving the marital institution on which the bedrock of the society rests. We however would like to remind our readers that the marital institution cannot be safeguarded by just decriminalising the marital rape exception as mentioned in the judgement. It is the time we consider the fact that there are several women who are subject to marital rape not once but innumerable times, the fact that apart from conjugal rights, husband and wives need to share love and respect towards each other which are requisites of marital institution and would diminish from their lives on occurrence of marital rape. The datum of differentiating the act of rape on basis of who the offender is immaterial and it does not lessen the intensity of grief and pain one has to go through.

The judgement stated, "modern – day marriage is a relationship of equals" which is indeed in contemplation of the fact that very foundation of marital institution is on the verge to evolve with the changing society.

On an argument that women can seek remedies under sections like 498A of IPC and Protection of Domestic Violence Act, 2005, the honourable judge mentioned that, "hedge around the main issue, which is, to call out the offence of rape for what it is". We firmly believe that our judiciary is capable enough to deal with any false cases reported. Depriving victims of legal remedy out of false case concern can be discouraging. In the split verdict, efforts of preserving the exception of marital rape seem to be futile and leave an impression of unjust provision being carried forward for generations without considering the changes in the society. It is the pointless struggle by judiciary to hold on to such provision and overlooking the very objective of why laws are required in the society.

Keeping the marital rape exception is like taking away the right to say 'no' to the husband. It should be considered as a crime against an individual (instead of considering it as threat to marital institution) and be treated likewise. The criminalization of this exception would be a step in the eliminating outdated beliefs and thoughts and preserving the right to equality and personal liberty in its letter and spirit. It would be a step towards building a nation in which we would want to belong to.

The Delhi High Court two Judge bench, in this Judgement have granted the certificate to appeal to Supreme Court in this matter considering that this involves substantial questions of law.

Sex workers and their fundamental rights

Read with recent Judgement by Supreme Court!

The perception with which the sex workers are looked at is different than how other women are perceived. Sex workers in India are exploited and are subject to violence many a times. The moral stigma attached to their work, poses them as criminals. People in positions of authority routinely demand sexual favours for speedy redressal of grievance. Police abuse sex workers, illegally detain them. The society excludes sex workers in normal course of life. Because the society is unable to distinguish between trafficking and sex work; both the acts are being looked through the same lens.

With the recent judgement from Supreme Court of India, hopefully this scenario will change for good.

While deciding on the case of Budhadev Karmaskar Vs. The State of West Bengal & Ors. Criminal Appeal No(s).135/2010; the honourable Supreme court has issued significant guidelines recognizing the fundamental rights of sex workers. The order stated that sex workers have the right to be treated with dignity & are entitled to equal status and equal protection under law.

Fundamental Right covered in Article 21 of Indian Constitution guarantees the right to life and personal liberty to all persons. It guarantees the right of persons to life with human dignity. It also includes all the aspects of life which go to make a person's life meaningful, complete and worth living. The sex worker's right to say no has been upheld by the court. By protecting this right, it was directed to police to register criminal/sexual offence complaints coming from sex workers. Not just the complaints need to be registered but also be taken seriously and actions should be taken in accordance with law. The Fundamental right to demand equal protection in front of law which forms a part of Article 14 enshrined in our Constitution.

In addition, an important aspect that the judgement covered was of refraining police to take action against sex workers who are adult and are participating with consent. Article 19 (1) (g) of Indian Constitution, confers right to practise any profession or carry on any occupation, trade or business. In view of this fundamental right, the adult sex workers, if they have chosen it as their profession, it is not to be considered illegal. Running brothel is illegal as per the recent judgement by Supreme Court.

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The judgement stated that, "The Central Government and the State Governments must involve the sex workers and/or their representatives in all decision-making processes, including planning, designing and implementing any policy or programme for the sex workers or formulating any change/reform in the laws relating to sex work. This can be done, either by including them in the decision-making authorities/panel and/or by taking their views on any decision affecting them." It also further stated that, "The Central Government and the State Governments, through National Legal Services Authority, State Legal Services Authority and District Legal Services Authority, should carry out workshops for educating the sex workers about their rights vis-a-vis the legality of sex work, rights and obligations of the police and what is permitted/prohibited under the law. Sex workers can also be informed as to how they can get access to the judicial system to enforce their rights and prevent unnecessary harassment at the hands of traffickers or police."

With this landmark judgement, sex workers have the hope to get legal help, remedy and a voice to raise against any wrong. The social stigma attached to their profession will not vanish overnight and for that the society will have to reincarnate with open minds. However, recognition of fundamental rights can form the first step towards betterment of condition of sex workers in India.

NEWS CORNER – Calling man bald at work is sexual harassment, rules UK tribunal

The three member tribunal had to determine whether a reference to someone's lack of hair was simply an insult or it amounted to harassment. "Baldness is much more prevalent in men than women. We find it to be inherently related to sex", reads the judgement. It further states that, "The tribunal therefore determines that by referring to the claimant as a 'bald cunt', the respondent's conduct was unwanted, it was a violation of the claimant's dignity, it created an intimidating, etc., environment for him, it was done for that purpose, and it related to the claimant's sex," the judgment reads.

Orissa High Court orders Family Pension to Transwoman

The Orissa High Court has recently ordered grant of family pension to a transwoman, who was allegedly discriminated on the basis of her gender while allowing pensionary benefits after death of her parents.

The Court held that, "This Court is of the considered view that the petitioner as a transgender has every right to choose her gender and accordingly, she has submitted her application for grant of family pension under Section 56(1) of Odisha Civil Services (Pension) Rules 1992. Further such right has been recognized and legalized by judgement of Honourable Apex Court in NALSA Case (supra) and as such, the law laid down by the Honourable Supreme Court is

ABOUT THE AUTHORS

Adv Vaishali Bhagwat



Advocate Vaishali Bhagwat, is amongst the first technology lawyers in the country with prior qualification and working experience in the field of Computer Science, Cyber Defense and Information Assurance.

Her work also focuses on women and children's rights and has worked extensively on cases relating to violence against women and children including sexual violence. Vaishali is an external member on various ICC committees and has conducted several complex inquiries relating to sexual harassment at workplace. POSH awareness and capacity building workshops conducted by her are rich in content as she discusses various cases and draws on her experience dealing with inquiries and POSH related court litigation including criminal cases.

Vaishali has advised several organizations across varied sectors on POSH compliance, safety in virtual workplaces, cyber safety and is also regularly invited as an expert speaker/ panelist on this subject by various organizations providing POSH services

www.vaishalibhagwat.com



Mrudula Arjunwadkar

BSc., LLB, MPM

HR & POSH Consultant

Helping organizations in end to end POSH Compliance, External member to ICC, POSH trainings



Adv. Revati Kharde

BA, LLB, LLM

Intern at Adv. Vaishali Bhagwat

Graduate in Cyber Laws from Northumbria University, Newcastle