

GENDER JUSTICE AND WOMEN EMPOWERMENT

Hon'ble Mr. Justice P. Sathasivam**

“You can tell the condition of a nation by looking at the status of its women.” - Jawaharlal Nehru

“Where women are honoured there resides the God.” - Manu, the great law-giver.

The legal profession has always been a profession of male dominance. The legal language marginalizes woman by saying that ‘he’ includes ‘she’. Of course this marginalization of a woman in legal language was a mere reflection of her marginalization in real life. In India, historically women’s disabilities have been well-known for social checks and retarding factors on the progress of the society. In Indian society women are subject to all kinds of inequalities *de jure* and *de facto*. This situation is both caused and aggravated by the existence of discrimination in the family, in the community and in the workplace. It is perpetuated by the survival of stereotypes and of traditional cultures, religious practices and beliefs detrimental to women.

Constitutional Position of Women in India

Article 14 of the Constitution of India, 1950 ensures to women the right to equality, and Article 15(1) specifically prohibits discrimination on the basis of sex. Article 16 of the Constitution provides for equality of opportunity to all, in matters relating to public employment or appointment to any office, and specifically forbids discrimination *inter alia* on the ground of sex. These articles are all justiciable, and form the basis of our legal-constitutional edifice. At the same time the Constitution of India under Article 15(3) provides for affirmative and

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positive action in favour of women by empowering the State to make special provisions for them.

The Directive Principles of State Policy of the Constitution also impose upon the State various obligations to secure equality and eliminate discrimination. These Directive Principles contained in Part IV of the Indian Constitution enjoin upon the State *inter alia* to direct its policy towards securing the rights to adequate means of livelihood for both men and women equality; equal pay for equal work for both men and women; ensuring that the health and strength of workers, men and women, are not abused, and the citizens are not forced by economic necessity to enter avocations unsuited to their age and strength. Further, a duty is imposed upon every citizen of India under Article 51A(e) to renounce practices derogatory to the dignity of women.

One of the most significant pronouncements on Article 15(3) by the Supreme Court of India is in *Government of Andhra Pradesh v. P.B. Vijay Kumar*.¹ The Supreme Court has ruled in the instant case that under Article 15(3) the State may fix a quota for appointment of women in Government services. Also, a Rule saying that all other things being equal, preference would be given to women to the extent of 30% of the posts was held valid with reference to Article 15(3). The Supreme Court has ruled that posts can be reserved for women under Article 15(3) as it is much wider in scope and covers all State activities. The Court emphasized that an important limb of the concept of gender equality is creating job opportunities for women.

‘Special Provision’ referred to in Article 15(3) of the Constitution is that which the State may make to improve women’s participation in all activities under the supervision and control of the State, and it can be in the form of either affirmative action or research. Talking about the provisions giving preference to women, the Court has said that this provision does not make any reservation for women. It operates at the initial stage of appointment and when men and women candidates are

¹ AIR 1995 SC 1648.

equally meritorious. Article 15 is designed to create an equalitarian society. The Court has observed: “Therefore, in dealing with employment under the State, it has to bear in mind both Articles 15 and 16 the former being a mere general provision and the latter being a more specific provision.”

Article 15(1) prohibits discrimination on the basis of sex. In *Air India v. Nargesh Meerza*² air hostesses were seeking parity with the male assistant flight pursers, the Court held that while the Rule terminating employment of an air hostess on first pregnancy was patently unconstitutional, air hostesses and assistant flight pursers could still be considered as different categories for the purpose of remuneration and other conditions of service as the word ‘only’ has been affirmed under Article 15. So discrimination can be made on considerations of recruitment and sex, and on not sex alone.

In *Air India Cabin Crew Association v. Yeshaswinee Merchant*³ the Court justified a special retirement age of fifty for air hostesses, using the ‘but for sex’ test. According to Court, the ‘but for sex’ test was development to mean that no less favourable treatment is to be given to women on gender based criterion which would favour the opposite sex, and women will not deliberately be selected for less favourable treatment because of their sex. Accordingly, the Court held that Articles 15 and 16 prohibit discriminatory treatment but not preferential of a woman, which is a positive measure in her favour. The Constitution does not prohibit the employer from considering sex in making employment decisions where this is done personal pursuant to a properly or legally chartered affirmative action plan.

Sexual Harassment of Women at Workplaces

One of the significant cases that started this revolution was regarding the prosecution of a top police executive, who was considered a main pillar of the success in putting down terrorism in Punjab, for misbehaving with a woman officer at the Indian Administrative Services

² (1981) 4 SCC 335.

³ (2003) 6 SCC 277.

Cadre.⁴ The Supreme Court in its landmark decision *Vishaka v. State of Rajasthan*⁵ recognized that sexual harassment at the workplace is a violation of constitutionally guaranteed fundamental rights.

The most significant aspect of the *Vishaka* judgment is that it structured and systematized the ingredients of the offence. Employers are given obligation to set up appropriate complaints committee, and initiate appropriate criminal and disciplinary action which also creating awareness about rights against 'sexual harassment at the workplace' in both private and public sector. It also sought the enforcement of fundamental rights of working women under Articles 14, 19 and 21. The Court held that each incident of sexual harassment of women at the workplace resulted in the violation of the fundamental rights to gender equality and the right to life and liberty, including the right to work with dignity. Accordingly, the meaning and content of fundamental right guaranteed in the Constitution of India were found to be of sufficient amplitude to encompass all the facets of gender equality, including sexual harassment or abuse.

In the absence of domestic law occupying the field, the Court formulated measures to prevent sexual harassment, relying on the content of international conventions and norms, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). India is a signatory to CEDAW, thereby making it mandatory for the State to fulfil its obligations to women under this Convention. Article 11 of CEDAW requires the State parties to take all appropriate measures to eliminate the discrimination against women in the field of employment in order to ensure the same rights, on a basis of equality of men and women. In brief, the *Vishaka* guidelines have the following effect:

- They amend service rules and standing orders to include the prohibition of sexual harassment. Accordingly the Industrial Employment (Standing Orders) Act, 1946 and Central Civil Service Conduct

⁴ *Rupan Deol Bajaj v. Kanwar Pal Singh Gill*, (1995) 6 SCC 194.

⁵ (1997) 6 SCC 241.

Rules, which govern the Government employment, were amended. The *Vishaka* judgment specifically provides that private employers ought to take steps towards the prohibitions contained in the standing orders;

- They create awareness of the rights of women employees;
- They allow disciplinary action to be taken, if an act of sexual harassment at the workplace amounts to misconduct;
- They allow the initiation of appropriate criminal action by making a complaint in case such conduct amounts to a specific offence;
- They set up a complaint committee which is headed by a woman, which is made up of at least 50% women and includes an NGO member;
- They permit workers to raise issues of sexual harassment at workers' meetings, and allow it to be affirmatively discussed at employer-employee meetings;
- They help an employee if a third party causes the sexual harassment.

The Court stipulated that the guidelines are binding and enforceable in law until suitable legislation is enacted to occupy the field.

Right to Privacy

In *Neera Mathur v. LIC*⁶ the Court recognized that privacy was an important aspect of personal liberty. Neera was appointed by the Life Insurance Corporation (LIC) without the knowledge that she was pregnant. After joining her post she applied for maternity leave. On coming back, she was served with a termination notice. When she complained against such termination, the LIC pleaded that she had not supplied them with the information which had been sought through a questionnaire. In Supreme Court the Judges were astonished to learn that the questionnaire sought information about the dates of the menstrual periods and the past pregnancies. The Supreme Court said that such probes amounted to

⁶ (1992) 1 SCC 286.

invasion of the privacy of a person, and therefore could not be made. The right to personal liberty guaranteed by Article 21 of the Constitution included the right to privacy, and here the women's right to privacy was recognized. Information about health could be sought where the information was relevant for the purpose. *E.g.*, information about menstrual cycles or past pregnancies might have been relevant for insurance cover by the LIC, but not for selecting a person for employment.

Paternity Test for Checking Chastity

Another case, the net effect of which was to strengthen women's right to dignity and liberty, was *Goutam Kundu v. State of West Bengal*.⁷ In this case the respondent S filed a criminal miscellaneous application in the High Court stating that the child from his wife, the appellant A, be subjected to a blood test to determine her paternity. The High Court dismissed the petition and S came in appeal to the Supreme Court. The Court laid down the following principles in this regard:

- That courts in India cannot order a blood test as a matter of course;
- Application for subjecting a child to blood test made in order to have a routine enquiry cannot be entertained;
- There must be a strong *prima facie* case for suspecting the fatherhood of a child which can be established only by proving non-access;
- The Court must carefully examine as to what would be the consequences of ordering a blood test whether it would have the effect of branding a child as a bastard, and the mother as an unchaste woman.

The Court observed that such a demand for subjecting a child to a blood test was contrary to the right to personal liberty guaranteed by Article 21 of the Constitution.

⁷ (1993) 3 SCC 418.

Uniform Civil Code for Gender Justice

Religion has, however, proved to be a formidable barrier to reform of the laws in respect of marriage, divorce, adoption, succession, maintenance and guardianship. The personal laws of the various communities cover these matters, and the State has shown reluctance to interfere with those laws. The Constitution enjoins upon the State to take steps to provide a Uniform Civil Code. Although the Hindu law was considerably reformed, no reforms have been made in the personal laws of the Muslims and the Christians. Personal laws of Muslims as well as Christians contain some provisions, which are unjust to women. In *Shah Bano's* case,⁸ the Supreme Court held that despite the provision in section 127 of the Code of Criminal Procedure, 1973 which said that if a woman received an amount under her personal law, she would not be entitled to any maintenance under section 125 of the Code after divorce, a Muslim woman would be entitled to maintenance if the amount received by her as dower was not sufficient for her sustenance. This was a liberal interpretation of the law and was informed by the consideration of gender justice. A fierce agitation was launched against that decision by Muslim fundamentalist. The Central Government yielded to the pressure of that agitation, and passed the Muslim Women's (Protection of Rights on Divorce) Act, 1986, which denied to Muslim women the right of maintenance under section 125 of the Code of Criminal Procedure, 1973. That was doubtless a retrograde step. That also showed how women's rights have a low priority even in the secular state like India. Autonomy of a religious establishment was thus made to prevailing women's rights.

Succession Right of Hindu Women

The Hindu Succession Act, 1956 is the direct outcome of the independent struggle, and also an attempt for the practical application of constitutional ethos. Hindu women had no right of inheritance to the property of her father. There were many enactments like the Hindu Women's Right to Property Act, 1937, the Hindu Law of

⁸ *Mohd. Ahmed Khan v. Shah Bano Begum & Ors.*, 1985 AIR 945, 1985 SCC (2) 556.

Inheritance (Amendment) Act, 1929; but none of them ensured right to inheritance to the impartible property in equal footing with the other male.

The Hindu Succession Act, 1956 had a tremendous impact in the Hindu society. Women started to feel respectable and not subordinate to the other male members of the family. Yet, unfortunately the 1956 Act cannot be said to be free from all bias, and evenly poised with the male.

Despite the Hindu Succession Act being passed in 1956, which gave women equal inheritance rights with men, the *Mitakshara* coparcenary systems was retained, and the Government refused to abolish the system of joint family.

The Hindu Succession (Amendment) Act, 2005 is a landmark. After 50 years, the Government finally addressed some persisting gender inequalities in the the Hindu Succession Act, 1956 which itself was path-breaking. The 2005 Act covers inequalities on several fronts: agricultural land, *Mitakshara* joint family property, parental dwelling house *etc.*

The Parliament enacted Amendment Act XXXIX of 2005 substituting new section for section 6. As per the amendment dated 05.09.2005, in a joint Hindu family governed by the *Mitakshara* law, the daughter of a coparcener shall –

- (a) By birth become a coparcener in her own right the same manner as the son;
- (b) Have the same rights in the coparcenary property as she would have had if she had been a son;
- (c) Be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu *Mitakshara* coparcener shall be deemed to include a reference to a daughter of a coparcener.

Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a joint Hindu family governed by the *Mitakshara* law, shall devolve by testamentary or

intestate succession under the Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and the daughter is allotted a share equal to that of a son.

However, the above provisions shall not apply to a partition which has been effected before 20th day of December, 2004.

The Hindu Succession (Amendment) Act, 2005 seeks to make two major amendments in the Hindu Succession Act, 1956. First, it is proposed to remove the gender discrimination in section 6 of the original Act. Second, it proposes to omit section 23 of the original Act, which disentitles a female heir to ask for partition in respect of a dwelling house, wholly occupied by a joint family, until the male heirs choose to divide their respective shares therein. Out of many significant benefits has been to make women coparcenary (right by birth) in *Mitakshara* joint family property. Earlier the female heir only had a deceased man's notional portion. With this amendment, both male and female will get equal rights.

Position of Muslim Women

Muslim community is broadly divided into two broad sects *viz.*, Shia and Sunni.

The paramount point which emerges from the personal laws is that in case of intestate succession a Muslim male is worth twice that of a female. In case of testamentary succession, a Muslim can bequeath only 1/3rd of the property. This inequality in property ownership causes simmering discontent among the women throughout the Muslim world. Muslim intellectuals are voicing their right of equality. Time has now come to remove all inequalities. Personal laws cannot be allowed to override the constitutional obligation. On the contrary, personal laws should mend to make it consistent with the constitutional ethos.

Position of Christian Women

Christians of different sects are governed by the Indian Succession Act, 1925. The native Christians and other Europeans Christians in India were governed by the English Law, and for them the first act promulgated was the Indian Succession Act, 1865 which codified both the testamentary as well as intestate succession. The rules laid down by the Act were substantially rules of English law with some modifications, additions and alterations.

Certain Provisions Enacted for the Benefits of Women

The Central and State Governments have included certain provisions in various Acts for the benefit of women. They are:

- **The Beedi & Cigar Workers (Condition of Employment) Act, 1966** - Provision of crèches for the benefit of women workers.
- **The Plantation Labour Act, 1951** - Women workers to be provided time off for feeding children.
- **The Contract Labour (Regulation & Abolition) Act, 1970** - Not to be required to work beyond 9 hours between 6 am and 7 pm with the exception of mid-wives and nurses in plantations.
- **The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979**- Separate toilets and washing facilities to be provided.
- **The Factories Act, 1948** - In factories, women not to be engaged for cleaning, lubricating or adjusting any part of prime or transmission machinery; maternity leave up to 12 weeks with wages to be provided.
- **The Maternity Benefit Act, 1961** - Maternity benefits to be provided on completion of 80 days working, not required to work during six weeks immediately following the day of delivery or miscarriage, no work of arduous nature; long hours of standing likely to interfere with pregnancy/ normal development of foetus; or which may cause miscarriage or is likely to affect health to be given for a period of one month immediately preceding the period of six weeks before delivery. On medical

certificate, advance maternity benefit to be allowed; Rs. 250/- as medical bonus to be given when no pre-natal confinement and post natal care is provided free of charge.

- **The Equal Remuneration Act, 1976** - Payment of equal remuneration to men and women workers for same or similar nature of work protected under the Act. No discrimination permissible in recruitment and service conditions except where employment of women is prohibited or restricted by or under any law.
- **The Employees Status Insurance (General) Regulation, 1950** - Claim for maternity benefit becomes due on the date the medical certificate is issued for miscarriage, sickness arriving out of pregnancy, confinement or premature birth of child.
- **The Beedi Workers Welfare Fund Act, 1976** - Appointment of a women member in Advisory Committee and Central Advisory Committee is mandatory under the Act.

Conclusion

There should be a better and fuller understanding of the problems peculiar to women to make solutions of those problems possible. As these problems centre round the basic problem of inequality, steps should be taken to promote equality of treatment and full integration of women in the total development effort of the country. The main stress should be on equal work and elimination of discrimination in employment. One of the basic policy objectives should be universal education of women, the lack of which tends to perpetuate the unequal *status quo*. The popular UNESCO slogan should come in handy: "Educate a man and you educate an individual; educate a woman and you educate a family."