

Judicial Activism on Equal Pay and Gender justice

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ABSTRACT

Some believe that there is bound to be difference in the status of both men and women because of their difference in biological construction. However, the weaker section considers it a non-relevant factor in not treating them unlike. Hindu religion is considered to be one of the oldest civilizations. Hindu Shartras have always placed the status of women on high platform. They are innumerable customs wherein women have respected and worshiped in different forms, despites this religious sanction and customary acceptance of the high status of women, the ground reality is totally different. Hence an attempt is made to study the concept of equal pay for equal work as a matter of discrimination between male and female workers in the area of remuneration for work of equal value.

Key Words: 1. Civilizations 2. Status of women 3. Equal pay 4. Discrimination
5. Remuneration 6. Equal value

Introduction

Equality is an important aspect of justice. Universal Declaration of Human Rights declares that “Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is of freedom, justice and peace in the world” Our constitution also translates the concept of equality in its fullness as Justice Social, Economic, Political, Dignity of the individual and equality of status and opportunity.

Unequal status of women is an offensive attempt to human dignity and violative human right and today it has emerged as fundamental issue in human development the world over. The protest against unequal law and for equal opportunities by the western women in the late 19th century resulted in a series of International conventions.

Today, women are employed in all most all types of jobs such as technical, professional and non-professional in both private and public sectors. In addition to these, almost all the females, particularly from the lower strata, are getting engaged in agricultural operations for daily wages and also for domestic work in the houses of their landlords.

Thus, equal pay for men and women today has become a vital issue of great concern to society in general and to employees in particular. Therefore, any disparity in wage payment leads to unrest and discontent.¹ The principle of equal pay for equal work for men and women acquires greater significance in to-days global world, where the women of to-day are making their mark in every field of human activity. Therefore, discrimination of any kind in the matter of wage structure would be an impediment to the general growth of industrial relations. It is true that the lack of parity of payment to both men and women in similar circumstances definitely would degenerate working morale of both the sexes. Thus equality at equals is of greater importance.

“We are at the beginning of the new Millennium. We claim to have crossed thousands of years of human civilization. Still we appear to be in the first lap of the run for attaining complete civilization. There appears to be a need to recognize the rights, privileges and claims of women, equal to their counterpart”.²

The position of women is unique in every society, whether developed, developing or under-developed. Women constitute half the population of the world and face exploitation at every phase of life. A report of the United Nations Organization points out that women constitute half the world's population, perform nearly two thirds of work hours, received one tenth of the world's income and own less than one hundredth percent of world's property.³ The doctrine of equal pay for equal work is not a recent development. It's origin can be traced from annals of History. We have various sources of literature in which we can find the status of women in the society at various stages of historical evolutions. The status of women is always a matter of misery and exploitations. History is the visual mirror in which the dumping status of women was always seen.

In the present world, the women have been developed in a variety of skills of works in which more efforts and responsibilities are required on the part of women. Earlier, division of labour was based on sex and women were found in household tasks like cooking, cleaning, stitching of cloths, agricultural work and looking after the children. Therefore, the early women workers were not directly competitive with males. With the introduction of factory system of production, the situation was changed as the female workers used to get employment in factories. The educated women are entering into employments like Banks, Schools, Post and Telegraphs and in offices as clerks, typists and stenographers. Now the situation has come in India that women are in every walk of life like politicians, administrators as collectors, engineers, doctors, teachers, police officers, constables, clerks, nurses, and executives etc., The women are involved in ever activity which assist the men to earn their lively hood. It is a recognized fact that men and women are equal partners in every human activity.

¹ Mrs. Maduri Singh: Enforcement of Equal Remuneration Act, 1976 and status of Women Workers, Myth and Reality 1992, LAB. I.C Vol.III.

² B.D. Agarwal: Curing Gender Bias, AIR 2000 (June), p.85.

³ M.D. Sankar & S.K. Sarkar: Status of Women & International Politics - Some Observations AIR 2000 (Feb) p.30.

Therefore, the need has come that the present day world is stressing that the women should be treated equally with men not only in giving employment but also in paying the wages equally on par with men if they are situated in equal placement or employment. It is proved today that the yesterday's women who are confined to kitchen, agriculture or for procuring and bringing up children are able to occupy the high special position. Hence, they deserve equality of treatment both in the employment and payment of wages which would ensure the decent livelihood and greater efficiency.

INTERNATIONAL CONCERN OF EQUAL PAY

The main thrust has been for social security since the origin of man-kind. All human beings want minimum requirement of food, shelter and clothing. There have been historical revolutions in China, Russia and other countries to have economic security and emancipation from exploiter's yoke. In human society, there cannot be mathematical equality nor is it physically and humanly possible. There has been an endeavor to reduce it to the minimum gap.⁴ At international level efforts are made to fill the gap.

The universal declaration of human rights asserts the principle of non-discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedom set forth therein, without discrimination of any kind, including any distinction as to sex. The general assembly of the United Nations adopted and proclaimed it on 10th December 1948 as "a common standard of achievement of all people and all nations".

The preamble to the draft Declaration on the elimination of discrimination against women 1966, states that the people of United Nations have in the charter, reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of the men and women. Further Article 10 of the Draft Declaration on the elimination of Discrimination against women affirms that "all appropriate steps shall be taken to ensure to women, married or unmarried equal rights with men in the field of economic and social life, and in particular.

- a) The opportunity, without discrimination on grounds of marital status or on any other grounds to receive vocational training: to work for a free choice of profession and employment, subject to the exception necessitated by the dangerous or arduous nature of the work and to professional and vocational advancement.
- b) The right to equal remuneration with men and to equality of treatment with respect to work of equal value etc.
- c) article 7 of the International Covenant on Economic and Cultural Rights, of 1966, inter alia, provides: The states parties to the present covenant recognize the right

⁴ R.K. Mahajan: Doctrine of Equal Pay for Equal Work: Judicial Activism. SCJ 1991, Vol. I, p.65.

of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular: Remuneration which provides all workers, as a minimum with fair wages and equal remuneration for work of equal value without distinction of any kind, particularly women being guaranteed condition of work not inferior to those enjoyed by men with equal pay for equal work and equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no consideration other than those of seniority and competence”⁵. **I.L.O.**

Concern on Equal Remuneration:

A significant milestone in acceptance and promotion of the principle of “equal pay for equal work” was earlier reached with the establishment of the International Labour Organisation. In this regard, the norms that are formulated by I.L.O. are of prime worthy. Much before the United Nations proclaimed the Universal Declaration of human rights in 1948, the International Labour Organisation had enshrined many principles in its constitution. The preamble to the constitution of the International Labour Organisation declares “recognition of the principle of freedom of association” and of “equal remuneration for work of equal value” to be the means of improving conditions of labour and of establishing peace.

While the preamble to the I.L.O. Constitution of 1919 stressed the urgency of, inter alia, recognition of the principle of “equal remuneration for work of equal value”, the preamble to its Constitution as amended in 1948, reaffirmed the urgency in improvement of the conditions of labour as regard the principle of equal pay for equal work.

The Philadelphia declaration which was made in May 1944, was an another milestone in the area of equal remuneration. It has set down the basic aims and objectives of International Labour Organisation and principles of social policy that were to inspire all the number states. The declaration had affirmed among the principles basic to social tantrum that “all human beings irrespective of race, creed or sex, have the right to pursue both their material well being and spiritual development in conditions of freedom and dignity of economic security and equal opportunity.

CONSTITUTIONAL COMMITMENTS ON STATUS OF WOMEN

There is no doubt that the Constitution of India contemplates a social revolution, brought about through the use of law as an instrument of directed social charge. The attainment of equality of status for women was one of the specific objectives which is implicit in the preamble, fundamental rights and the directive principles of state policy.

The people of India have given unto themselves the constitution of India towards securing Justice- Social, Economic and political. Economic Justice reigns supreme among the other social and political justices. Unless one is economically free, he cannot enjoy the social and political justice. The Indian Society was full of

⁵ Article .7 of international covenant on Economic, Social and Cultural Rights, 1966

contradictions. The lower sections of the society in India have suffered discrimination and unequal treatment in various forms since time immemorial. The victims suffered heavily on the social and economic front.⁶ Bearing this in mind, the framers of the Constitution mandated that the state should direct its policy towards securing inter alia, equal pay for equal work for men and women. By this, the founding fathers of the Indian Constitution wanted to wipe out every tear from every eye.

Thus, the Constitution of India in its attempt to build an egalitarian and secular ideology engrafted into its principles of equality, liberty and Justice as proclaimed in the declaration of human rights. The preamble of the Constitution is quite clear that it seeks to secure all its citizens including women, Justice – Social, economic and political and liberty of thought, expression, belief, faith and worship, equality of status and opportunity and promote fraternity assuring dignity of the individual for all its citizens including women. The fundamental rights and the directive principles of state policy form a distinctive philosophy enshrined in the heart of the Constitution.⁷

The distinctive ideals laid down in the preamble have been given wider amplifications and elaborations in the Constitution. The directive principles of state policy also directed the state to promote the welfare of the people by securing and protecting as effectively as it may a social order in which Justice social, economic and political shall inform all the institutions of national life.⁸ Further Article 39(d) requires it to strive for securing equal pay for equal work of both men and women. Therefore it is necessary to legislate in the interest of women welfare, assuring them the equity that has been granted to woman by the Constitution. Thus women's individuality and equality are stressed and proclaimed as a Constitutional guarantee

LEGISLATIVE FRAME WORK OF EQUAL REMUNERATION

Article 39[d] of the Constitution of India envisages that the State shall direct its policy among other things, towards securing that there is equal pay for equal work for both men and women. In order to implement the constitutional directive, the Equal Remuneration Act was passed in 1976, which seeks to provide for payment of equal remuneration to male and female workers and prevents discrimination on the ground of sex against women in matters of employment. The President of India promulgated the Equal Remuneration Ordinance 1975 on the 26th September 1975, so that the provisions of Article 39 of the Constitution may be implemented in the year which is being celebrated as the International women's year. The ordinance provides for payment of equal remuneration to men and women workers for the same work or work of similar nature and for the prevention of discrimination on ground of sex.

⁶ Mrs. X. Vishnupriya: Equal Pay for equal Work in India; Myth and Reality by Vol. I, S.C.J. 1991, p.83

⁷ S.C. Srivastava: Equal Remuneration for men and Women, Vol. 32, JILL, 1990, p.83

⁸ Article.38 of the Indian Constitution.

Equal Remuneration Act, 1976 is a piece of labour welfare legislation which primarily bars discrimination between men and women workers when they are placed in similar work and under similar working conditions.

The object of the Act is clearly enumerated in the preamble to the Act, as follows. “ An Act to provide for the payment of equal remuneration to men and women workers and for the prevention of discrimination on the ground of sex, against women in the matter of employment and for matters connected there with or incidental there to. The preamble of the Act thus not only prohibits discrimination of equal payment between men and women, but also emphasis to prohibit the discrimination between men and men and between women and women in the matters of payment of Remuneration and in any condition of service subsequent to recruitment such as promotion, training or transfer.

The whole scheme of the Equal Remuneration Act 1976 is designed as such that it provides to secure and attain gender Justice and equality at work place. This Enactment contains all together 18 sections of significant importance. The important provisions of the Enactment are as follows.

Same work or work of a similar nature:⁹ Means work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions by a man or woman and the differences if any, between the skill, effort and responsibility required of a man and those required of a woman are not of practical importance in relation to the terms and condition of employment.

In deciding whether the work is the same or of a similar nature, a broad approach should be taken. In doing so the duties actually and generally performed by men and women and not those theoretically possible should be looked at.¹⁰

A settlement arrived at between the management and the employees cannot be a valid ground for effecting discrimination in payment of Remuneration made between male and female employees performing the same work or work of similar nature.¹¹

Section -4 incorporates the basic principle of parity of payment for equal work. It provides, inter alia: No employer shall pay to any worker employed by him in an establishment or employment, remuneration, whether payable in cash or kind at rates less favorable than those at which remuneration by him to the workers of the opposite sex in such establishment or employment for performing the same work or work of a similar nature.

Section 5 of the Act is of fundamental importance. It not only prohibits discrimination in matter of recruitment, but also eliminates the same degree of discrimination in any condition of service subsequent to recruitment such as

⁹ Section 2(h) of the E.R. Act 1976.

¹⁰ Mackinaon Mackunzie and Co., V. Andrey D. Costa. (1987) (2)S.C 469

¹¹ Machinoan Mackunzie and Co., V. Andrey D. Costa. (1987) 2SCC 469

promotion, training or transfer. Thus section 5 of the E.R.Act 1976 provides an area where the discrimination of any kind should not be made. This provision of the Act stressed the need of elimination the discrimination between the men and women workers in the matter of recruitment. The recruitment must be one which relates the employment or establishment in which the same work or work of similar nature is to be performed.

Section 6 provides for the establishment of advisory committees. The appropriate Government shall constitute one or more advisory committees to advise it with regard to the extent to which women may be employed in such establishments or employments as the central Government may, by notification specify in this behalf. The very object and aim of establishment of advisory committees is for the purpose of providing increasing employment opportunities for women. Every such advisory committee shall consist of not less than ten persons, to be nominated by the appropriate Government, of which one-half shall be women.¹² The advisory committee in tending its advise shall have regard to the number of women employed in the concerned establishment or employment, the nature of the work, hours of work, suitability of women for employment, as the case may be, the need for providing increasing employment opportunities for women, including part-time employment, and such other relevant factors as the committee may think fit.¹³ In doing so, the advisory committee shall regulate its own procedure.¹⁴

JUDICIAL ACTIVISM ON EQUAL REMUNERATION

The doctrine of equal pay is no more an abstract one but it is a reality towards social justice enshrined in the constitution. Judiciary has played an active role in enforcing and strengthening the constitutional goal of equal pay for equal work. The judiciary has infused the spirit of justice while interpreting Article -14 of the constitution of India to hold the doctrine is steadfast so that the exploitation can be avoided to accept the low wages under helpless condition. Judicial activism has gone to such an extent that even in unconscionable contracts by the employers have been held to be illegal

During the last few years, many cases have been filed in the Supreme Court, High Courts and Administrative Tribunals on the issue of the equal pay for equal work. The doctrine of equal pay for equal work is very much widened to include all kinds of aspects of equality. Equal treatment in equal circumstances has become the vital concern of the judiciary. The judiciary while interpreting the doctrine has gone beyond the statutory definitions and infused the spirit of principles of natural justice. The Supreme Court held while interpreting this doctrine, that in deciding whether the work is the same or of a similar nature, a broad approach is needed. In doing so, the duties

¹² Sub-Clause 2 of Section 6.

¹³ Sub-Clause 3 of Section 6.

¹⁴ Sub-Clause 4 of Section 6.

actually and generally performed by men and women and not those theoretically possible, should be looked at.¹⁵

Air India Vs Nergesh Meerza¹⁶ is a case of discrimination against women in the matter of employment and service rules, where the Supreme Court dealt with two offending rules governing the foreign service. Here two Government Corporations continued their discriminatory trend. The two government corporations were the AIR India and the Indian Air lines and the discrimination was against the service rules of Government air hostesses and flight purses. The latter were doing more or less the same work, but this categorizing of the work as being different permitted the employers to give different scales or age of retirement and subject them to other different service conditions.

In the instant case, the court observed and said: “by making pregnancy a bar to continuance of service of an Air Hostess, the corporation seems to have made an individualized approach to a woman’s physical capacity to continue her employment even after pregnancy which undoubtedly is a most unreasonable approach”.

In another famous case Randhir Singh Vs. Union of India¹⁷ the court held that even though the principle of equal pay for equal work is not expressly declared by our constitution to be a fundamental right, but it certainly is constitutional goal. Article 39(d) of the constitution proclaims equal pay for equal work for both men and women as a Directive principle of the State policy. Equal pay for equal work means equal pay for equal work for everyone and as between the sexes. Directive principles, as has been pointed out in some of the Judgements of this court have to be read into the fundamental rights as a matter of interpretation.

Equal Remuneration –Not Applicable to Professional Services

The concept of equal pay for equal work has been given a new interpretation by Supreme Court. The court held that the Doctrine of equal pay cannot be made applicable everywhere and to all kind of services. Supreme Court in an important case namely Girijambal Vs. Govt. of Andhra Pradesh¹⁸ gave a new interpretation to the concept of equal pay for equal work. The Court said that the principle of equal pay for equal work cannot be invoked or applied invariably in every kind of service and certainly it cannot be invoked in the area of professional services when they are to be compensated.

Equal pay for equal work – A Fundamental right

Originally the doctrine of equal pay for equal work is a directive in the Directive Principles of State policy as is enshrined in part 4 of our Constitution. This doctrine is

¹⁵ Mackinnon Mackenzie and Co. Vs. Andrey D Costa, 1987 2 SCC. 46

¹⁶ 1979 4 SCC 260.

¹⁷ AIR 1982 SC 879

¹⁸ AIR 1981 SC 1537

not placed among the fundamental rights guaranteed in the third part of the Constitution. Hence there arises the problem whether equal pay is a fundamental right or not. Therefore the issue is discussed by Supreme Court in Federation of A.I.C & C.E stenographers Vs. Union of India.¹⁹ The doctrine of equal pay for equal work was elevated to the position of fundamental right in the above case. The very question involved in the above case was whether differentiation in the pay scales between stenographers of customs and central excise department and of the central secretariat was justified or not. It was held that when such differentiation is based on dissimilarity of responsibility, it is justified.

The interpretation of the aforesaid decisions show the concern of the judiciary in assuming equal pay for equal work to both male and female workers and also it reveals the beneficial interoperations keeping in view the constitutional directives for equal pay for equal work.

Conclusion

Law in statutes is not enough, but there should be law in action. Here it is true that mere legislation protection cannot succeed in achieving the goal of equality between the two sexes, unless active social groups are formed for the purpose. The social groups should identify and point out the weak provisions of the present law in its application and trace out persons who are still beyond the reach of legal protection. The social groups should feel that it is their legitimate duty to encourage the aggrieved women to raise their voice against the discrimination on the ground of sex.

In India since majority of the workers have been working in unorganized and private sector undertakings, the law relating to equal remuneration must be strictly interpreted and enforced against the private employers who always tend to play tactics on trivial grounds and penal action should be severe against the erring employers.

Women, because of the dire necessity agree to work at lesser wages than the wages paid to their male counterparts and the existing provisions for penalty in case of violation of the Act do not have deterrent effect. Therefore, a provision of stringent penalty must be introduced.

Therefore, it is the duty of the Government to frame policies and rules for effective implementation of the Act. Various voluntary social organizations should take lead and play an active role in securing equal pay for equal work to all men and women workers without discrimination of any kind. Above all, the women should be educated about their rights to secure Justice at the work place and it is the duty of the concerned agencies to protect the voice of the voiceless.

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