

As if battling value judgements was not enough, activists, feminists and concerned citizens are deeply disturbed by recent court verdicts and orders on the interpretation of "consent" in rape cases. Some court rulings read more like a bigoted personal viewpoint without any reference to previous cases or precedence. One wonders how insensitive and out of tune the judicial system is with current social reality.



GOURI AGTEY ATHALE

sexual attack must be interpreted from the perspective of the victim.

In light of that recommendation, look at the Punjab and Haryana High Court ruling: they not only ignored that recommendation but also several sections of the Indian Penal Code (IPC) regarding the primary question of law when statements are made about the victim's personal lifestyle choices (having a beer, smoking, staying out late with boys, drug taking, etc.), blackmail, which was inherent in the threat held over the victim's head that unless she complied they would send out nude pictures of her....

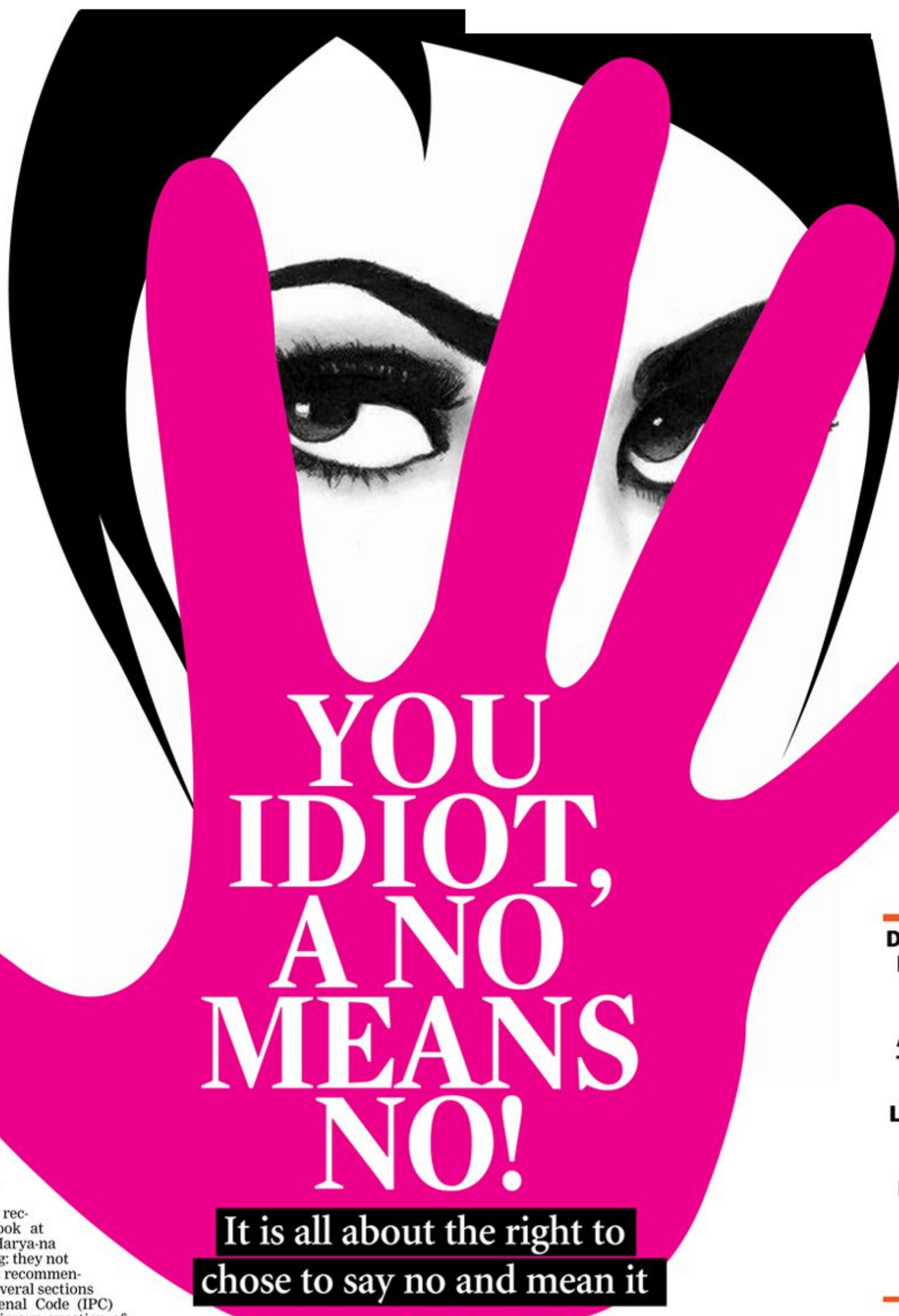
The two-member bench of the High Court did note that there was attempted blackmail and it needed to be investigated. So much for the reason the victim submitted to the trauma of repeated rape and humiliation, all noted in her statements in court. Instead, the concern seems to have been that the accused should not be deprived of their education and be given an "opportunity to redeem themselves and be a part of society as normal beings" rather than with upholding relevant sections of the IPC (gangrape, criminal intimidation) or with the section of the Information Technology Act on the publishing of obscene information in electronic form.

Has any thought been spared for what it took for the victim in this case to register the case? What she must have dreaded when the accused threatened to send out nude pictures has now come to pass with this double trauma, of her personal choices being broadcast everywhere. The very issues that forced her to submit to the blackmailing by her assailants have now gone public. Sure, those pictures weren't sent but barring that everything else has.

The Justice Verma Committee report has some pointed remarks on how and why what happens does in fact happen. The report notes: "The failure of good governance is the obvious root cause of the current unsafe environment eroding the rule of law and not for want of needed legislation. If there was a felt need for more laws, there are many recommendations of expert bodies and judicial decisions that remain unimplemented."

The order of the High Court makes no reference to any previous case or precedent. Most of the order reads like a personal viewpoint, which appears to be out of sync with the current social environment. This is not to make a case for rampant smoking, drinking, drug taking or casual sex. No, it is about the right to choose to say no and mean it. A no by a girl is not a yes. It is a No!

(The author is a Pune-based columnist and a senior freelance journalist)



YOU IDIOT, A NO MEANS NO!

It is all about the right to chose to say no and mean it

REMEMBER THIS

NO IS NOT SURE IS SILENCE IS ONLY A YES IS YES!

DOES THE SEX WORKER HAVE THE RIGHT TO SAY 'NO' TO A SEXUAL PARTNER AFTER CONSENTING TO HAVE SEX? WILL IT BE CONSIDERED LEGALLY VALID EVEN IF HER 'NO' IS RESOUNDING AND EMPHATIC ENOUGH TO ESTABLISH ABSENCE OF CONSENT?

FEEBLE OR STRONG, NO HAS JUST ONE MEANING

The recent Farooqui case has skewered the ground for women particularly sex workers ever hoping to get justice in rape cases with its shoddy interpretation of the law.



MEENA SARASWATHI SESHU & AARTHI PAI

Can an adult sex worker, who has consented to providing a sexual service for an agreed sum of money, be raped? Can a sex worker who is in sex work of her own volition be raped? Does she have a chance to say "no" to a client... the police... or the anti-social elements, who believe in force as a way of life?

If the defining criterion of rape is "lack of consent", then yes, there is a real possibility that sex workers may face this kind of violence in their work space. What then can the sex worker do? Go to the police, who have always viewed sex workers as criminals, and thus persons who have relinquished the right to say "no"? The lived experience of sex workers from Veshya Anyay Mukti Parishad (VAMP) in Sangli district of Maharashtra shows that most women are reluctant to report rape, unless the violence involves grave physical injury. The physical injury is assessed in the police station by the constable on duty, who then takes the crucial decision to either send her to the civil hospital for a medical examination or simply reject her complaint.

Unfortunately, rape without obvious physical injury is not taken as a reason for registering a complaint. The police ask uncomfortable questions and demand that she prove that the man "forced" sex on her

without her consent. Her argument that she was violated sexually without her consent during the sexual act is neither taken seriously nor even recorded by the police. Her argument that the pre-agreed terms of the sexual act were violated is also not given any credence by the police. Such cases never reach the courts, as the police have already interpreted the law and given their verdict.

A value judgement has also been made: the sex worker, who is supposed to be the eternal victim of male lust, forfeits her right to be victimised by rape. The consent she has already given to provide sexual service makes her case questionable in the eyes of law enforcers. Is it possible to prove rape in such cases? Is it possible that a court will listen to a sex worker fight for her right to establish consent or its lack, especially when the consent is linked to money exchanged in advance for a sexual act?

The central question is: Does the sex worker have the right to say "no" to a sexual partner after consenting to have sex? Will it be considered legally valid even if her "no" is resounding and emphatic enough to establish absence of consent? If recent court judgements are any indication, then the answer to these questions is an emphatic "no".

The September 13, 2017, bail order of the Punjab & Haryana High Court cites the victim's "experimentation in sexual encounters", "promiscuous attitude and voyeuristic mind" as part of its legal reasoning for granting bail to the three men convicted in the

Jindal Law School gangrape case. Sex workers could easily be accused of "promiscuous attitude and voyeuristic mind".

The recent judgement in the Mahmood Farooqui case states, "Instances of woman behaviour are not unknown that a feeble 'no' may mean a 'yes'. If the parties are strangers, the same theory may not be applied. If the parties are in some kind of prohibited relationship, then also it would be difficult to lay down a general principle that an emphatic 'no' would only communicate the intention of the other party. If one of the parties to the act

is a conservative person and is not exposed to the various ways and systems of the world, mere reluctance would also amount to negation of any consent. But the same would not be the situation when parties are known to each other [...] and if, in the past, there have been physical contacts. In such cases, it would be really difficult to decipher whether little or no resistance and a feeble 'no', was actually a denial of consent."

Every notion in this paragraph pushes women in sex work out of the ambit of the interpretation of consent. They are not technically "strangers" to their clients once they agree to provide the sexual service. Morally, they are in a "prohibited relationship" and so cannot plead that they are "conservative persons not exposed to the ways of the world". Further, the judicial reasoning in the Farooqui case, where the man is the initiator of sexual interaction, simply does not apply in the case of sex workers

who solicit for clients. Would this mean that their consent must never be considered?

The past histories of sex workers are not to be discussed in any case of rape. But will society, police and the courts follow these guidelines in cases relating to sex workers, whose past sexual behaviour will be scrutinised? We already know that if there is no evidence of "grievous hurt", the police do not even record a first information report (FIR), or apply the Indian Penal Code sections relating to rape or gangrape.

If the Farooqui judgement is any indication, they will not stand a chance of due process of law. Two kisses exchanged on earlier occasions made both Mahmood Farooqui and the court believe that the consent of the prosecutrix could be assumed and that her repeated "no" was not emphatic enough. This dangerous assumption is the root cause of impunity for rapists and denial of recourse to women who are raped.

The Farooqui judgement takes us down another slippery slope regarding the conduct of a woman subjected to rape. It argues that a woman needs to communicate her fear to the rapist. Does that mean that if there is absence of fear or if the perpetrator does not take on board her fear, that ergo, she has not been raped? From the perspective of many women in sex work, who have learnt to survive rape ordeals by being submissive, this order is a death knell to their hopes of ever finding justice

(Aarthi Pai is a lawyer and is currently director of Centre for Advocacy on Stigma and Marginalisation (CASAM), while Meena Saraswathi Seshu is general secretary of SANGRAM, a grassroots health and human rights NGO that works with sex workers)