

SEXUAL HARASSMENT: A LEGAL APPROACH TO ITS PROHIBITION AND REDRESSAL

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ABSTRACT

With improved access to education and employment, millions of Indian women are entering the country's workforce today. Many working women face sexual harassment at workplace on daily basis. It is crucial therefore that as a country, we strive to eliminate work-place sexual harassment since women have the right to work in safe and secure environment. Protection of women is necessary for gender equality and development of nation as a whole. - Maneka Gandhi

Sexual harassment is a social evil which causes great exploitation and discrimination since it has a great negative impact on one's Right to Life and Livelihood. Rather than viewing the sexual harassment as a problem to change, people think about its persistence as "just the way things are". But after the brutal gang rape of a social worker, Bhanwari Devi, from Rajasthan a petition was filed in the apex court in 1997 for the very first time to enforce fundamental rights of working women. Following the 2012 gang rape of a woman in Delhi again turned the spotlight on women's rights in India.

Besides the Vishaka guidelines emerged from the case of *Vishaka & Ors. v. State of Rajasthan*, Sexual Harassment of Women at workplace (Prevention, Prohibition and Redressal) Act, 2013 (also referred as POSH Act) has also been enacted. The paper critically analyses the existing law in India on Sexual Harassment. For the law to be effective and successfully functional, commitment and support of each citizen is very much required.

Key Words: *Harassment, Exploitation, Discrimination, Dignity and Vishakha.*

I. INTRODUCTION

Sexual harassment at workplace is a gender discrimination which is against a one's fundamental right to equality and right to life, guaranteed under Articles 14, 15 and 21 of the Constitution of India. Such harassment creates insecurity and fearful working environment and it also impedes the ability to deliver in modern world full of competition. Besides from interfering with the

performance at work, it also negatively affects the social and economic growth and causes emotional and physical suffering.¹

India's first legislation specifically addressing the issue of workplace sexual harassment; the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was enacted by the Ministry of Women and Child Development, India in 2013. The Government also subsequently notified the rules under the POSH Act titled the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 ("POSH Rules"). The year 2013 also witnessed the promulgation of the Criminal Law (Amendment) Act, 2013 which has criminalized offences such as sexual harassment and stalking.

The POSH Act has been enacted with the objective of preventing and protecting women against workplace sexual harassment and to ensure effective redressal of complaints of sexual harassment. The provision aims to provide every woman a safe, secure and dignified working environment, irrespective of her age or employment status. The law to prevent sexual harassment at workplace has been in force since 2013, but there are loopholes in it as well regarding clarity on various aspects of the statute, like what constitutes sexual harassment, obligations of an employer, remedies available to the victim, procedure of investigation, etc. A lot of people are also not fully aware of the criminal consequences of sexual harassment. Lewd jokes, inappropriate comments etc. are dismissed as normal, with women being hesitant to initiate actions due to apprehension of being disbelieved which underpins the need for greater awareness and greater enforcement. Every tool would be useless if the user doesn't know to use it.

II. WHAT IS SEXUAL HARASSMENT?

As a result of growing importance of this issue Section 354A was added to the IPC through the way of Criminal Law (Amendment) Act, 2013 which enlists the acts which constitutes the offence of sexual harassment. They are:

- physical contact and advances involving unwelcome and explicit sexual overtures; or
- a demand or request for sexual favours; or
- showing pornography against the will of a woman; or
- making sexually coloured remarks.

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¹ Statement of Objects and Reasons, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

Earlier, there were no related laws in the Indian Penal Code that could be evoked. There were three sections in Indian Penal Code viz. S. 94, 354 and 509 to deal with such crimes. However, these related laws are framed as an offence that either amount to obscenity in public or acts that are seen to violate the modesty of women. While Section 294 IPC is a law applicable to both men and women, the latter two are specifically oriented towards women.

III. DEVELOPMENT OF LAW ON SEXUAL HARASSMENT IN INDIA

The Visakha Judgement

Bhanwari Devi, a dalit woman who was a social worker in Rajasthan was brutally gang-raped while stopping a child marriage.² This incident revealed the hazardous condition of women and the demand for legislation was raised. A PIL was filed in the Supreme Court under the banner of Vishaka by the lawyers and women's rights activists. The Supreme Court for the first time, acknowledged the glaring legislative inadequacy and acknowledged workplace sexual harassment as a human rights violation. In framing the Vishaka Guidelines, the Supreme Court placed reliance on the Convention on Elimination of All Forms of Discrimination against Women, adopted by the General Assembly of the United Nations, in 1979, which India has both signed and ratified. As per the Vishaka Judgment, the Vishaka Guidelines issued under Article 32 of the Constitution, until such time a legislative framework on the subject has been drawn-up and enacted, would have the effect of law and would have to be mandatorily followed by organizations, both in the private and government sector. As per the Vishaka judgment, *'Sexual Harassment' includes such unwelcome sexually determined behavior (whether directly or by implication) as:*

- a) *Physical contact and advances*
- b) *A demand or request for sexual favours*
- c) *Sexually coloured remarks*
- d) *Showing pornography*
- e) *Any other unwelcome physical, verbal or nonverbal conduct of sexual nature.*

Where any of these acts are committed in circumstances under which the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work (whether she is drawing salary or honorarium or voluntary service, whether in government, public or private enterprise), such conduct can be humiliating and may

² Indira Jaising, Law Relating to Sexual Harassment at the Workplace (2014)

constitute a health and safety problem, it amounts to sexual harassment in the workplace. It is discriminatory, for instance, when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work (including recruiting and promotion), or when it creates a hostile working environment. Adverse consequences might result if the victim does not consent to the conduct in question or raises any objection thereto.'

Post Vishaka Developments

The first case before the Supreme Court after Vishaka in this respect was the case of *Apparel Export Promotion Council v. A.K Chopra*³. In this case, the Supreme Court reiterated the law laid down in the Vishaka Judgment and upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexually harassing a subordinate female employee at the workplace. In this judgment, the Supreme Court enlarged the definition of sexual harassment by ruling that physical contact was not essential for it to amount to an act of sexual harassment.

The apex court in its judgement in *Medha Kotwal Lele & Ors. v. Union of India & Ors*⁴ took cognizance and undertook monitoring of implementation of the Vishaka Guidelines across the country by directing State Governments to file affidavits emphasizing on the steps taken by them to implement the Vishaka Guidelines. Not being satisfied, it directed States to put in place sufficient mechanisms to ensure effective implementation of the Vishaka Guidelines. Finally, the Supreme Court asserted that in case of a non-compliance or non-adherence of the Guidelines, it would be open to the aggrieved persons to approach the respective High Courts. The apex court also directed that the complaints committee as envisaged in the Vishaka judgement will be deemed to be an inquiry authority for the purposes of Central Civil Rules, 1964 and the report of the complaints committee will be deemed to be an inquiry report under those rules.

Amendment in IPC Post Nirbhaya Case in 2013

- **Section 354A:** Sexual harassment
- **Section 354B:** Forcing a woman to undress

³ AIR 1999 SC 625

⁴ (2013) 1 SCC 297

- **Section 354C:** Watching or capturing images of a woman without her consent (voyeurism).
- **Section 354D:** Following a woman and contacting her or trying to contact her despite her saying she does not want contact. Monitoring a woman using the internet or any other form of electronic communication (stalking).⁵

IV. PROVISIONS OF THE POSH ACT

Jurisdiction and Scope

Jurisdiction Area: The POSH Act extends to the ‘whole of India’.⁶

Aggrieved Woman: As per the POSH Act, an ‘aggrieved woman’ in relation to a workplace, is a woman of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment.⁷ Given that the definition does not necessitate the woman to be an employee, even a customer or client who may be sexually harassed at a workplace can claim protection under the POSH Act.

The POSH Act further stipulates that a woman shall not be subjected to sexual harassment at her workplace.⁸ Accordingly, it may be noted that in order for a woman to claim protection under the POSH Act, the incident of sexual harassment should have taken place at the ‘workplace’. The POSH Act protects only women and is not a gender-neutral legislation and protects only women. Therefore, the safeguards under the POSH Act are not applicable to ‘men victims.’

Covered bodies: The POSH Act applies to both the organized and unorganized sectors⁹ in India. It inter alia, applies to government bodies, private and public sector organizations, non-governmental organizations, organizations carrying out commercial, vocational, educational, entertainment, industrial, financial activities, hospitals and nursing homes, educational institutes, sports institutions and stadiums used for training individuals and also applies to a dwelling place or a house.

⁵ <http://www.lawyerscollective.org/wp-content/uploads/2014/04/Dos-and-Donts.pdf>

⁶ Section 1 of the POSH Act

⁷ Section 2(a) of the Prevention of Workplace Sexual Harassment Act

⁸ Section 3 of the Prevention of Workplace Sexual Harassment Act

⁹ Having less than 10 workers

What amounts to Sexual Harassment?

The following circumstances, among other circumstances, if they occur or are present in relation to or connected with any act or behaviour of sexual harassment may amount to sexual harassment:

- implied or explicit promise of preferential treatment in employment;
- implied or explicit threat of detrimental treatment in employment;
- implied or explicit threat about present or future employment status;
- humiliating treatment likely to affect the lady employee's health or safety.
- interference with work or creating an intimidating or offensive or hostile work environment;
- humiliating treatment likely to affect the lady employee's health or safety¹⁰

Employee

The definition of an 'employee' under the POSH Act is fairly wide to cover regular, temporary, ad hoc employees, individuals engaged on a daily wage basis, either directly or through an agent, contract labourers, co-workers, probationers, trainees, and apprentices, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied.¹¹

Workplace

The Vishaka Guidelines were confined to the traditional office set-up, recognizing the fact that sexual harassment may not necessarily be limited to the primary place of employment, but the POSH Act has introduced the concept of an 'extended workplace'. As per the POSH Act, 'workplace' includes any place visited by the employee arising out of or during the course of employment, including transportation provided by the employer for the purpose of commuting to and from the place of employment.¹²

¹⁰ Section 3(2) of the Prevention of Workplace Sexual Harassment Act

¹¹ Section 2(f) of the Prevention of Workplace Sexual Harassment Act

¹² Section 2(o) of the Prevention of Workplace Sexual Harassment Act

Committees for complaints

An important feature of the POSH Act is that it envisages the setting up of a grievance redressal forum. The POSH Act requires an employer to set up an 'internal complaints committee' (ICC) at each office or branch, of an organization employing 10 or more employees, to hear and redress grievances pertaining to sexual harassment. The ICC will be a 4-member committee under the Chairpersonship of a senior woman employee and will include 2 members from amongst the employees preferably committed to the cause of women or has experience in social work/legal knowledge and includes a third party member (NGO etc.) as well.

At the district level, the Government is required to set up a 'local complaints committee' (LCC) to investigate and redress complaints of sexual harassment from the unorganized sector or from establishments where the ICC has not been constituted on account of the establishment having less than 10 employees or if the complaint is against the employer. The LCC has special relevance in cases of sexual harassment of domestic workers or where the complaint is against the employer himself or a third party who is not an employee. A District Officer notified under the Act will constitute LCC. LCC will be a five member committee comprising of a chairperson to be nominated from amongst eminent women in the field of social work or committed to the cause of women, one member from amongst women working in block/taluka/tehsil/municipality in the district, two members of whom at least one shall be a woman to be nominated from NGOs committed to the cause of women or a person familiar with the issues related to sexual harassment provided that at least one of the nominees should preferably have a background in law or legal knowledge. The concerned officer dealing with the social welfare or women and child development shall be an ex officio member.

Complaint Mechanism

A complaint of sexual harassment can be filed within a time limit of 3 months. This may be extended to another 3 months if the woman can prove that grave circumstances prevented her from doing the same. The Act has a provision for conciliation. The ICC/LCC can take steps to settle the matter between the aggrieved woman and the respondent, however this option will be used only at the request of the woman. The Act also provides that monetary settlement shall not be made a basis of conciliation. Further, if any of the conditions of the settlement is not complied with by the respondent, the complainant can go back to the Committee who will proceed to make an inquiry. The Committee is required to complete the inquiry within a time period of 90 days. On

completion of the inquiry, the report will be sent to the employer or the District Officer, as the case may be, they are mandated to take action on the report within 60 days. In case the complaint has been found proved, then the Committee can recommend action in accordance with the provision of service rules applicable to the respondent or as per the rules which will be prescribed, where such service rules do not exist. In case the allegation against the respondent has not been proved then the Committee can write to the employer/district officer that no action needs to be taken in the matter. The law also makes provisions for friends, relatives, co-workers, psychologist & psychiatrists, etc. to file the complaint in situations where the aggrieved woman is unable to make the complaint on account of physical incapacity, mental incapacity or death.¹³

Punishments

The POSH Act prescribes the following punishments that may be imposed by an employer on an employee for indulging in an act of sexual harassment:

- i. punishment prescribed under the service rules of the organization;
- ii. if the organization does not have service rules, disciplinary action including written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counselling session, or carrying out community service; and
- iii. deduction of compensation payable to the aggrieved woman from the wages of the respondent.¹⁴

The POSH Act also envisages payment of compensation to the aggrieved woman. The compensation payable shall be determined based on:

- i. the mental trauma, pain, suffering and emotional distress caused to the aggrieved employee;
- ii. the loss in career opportunity due to the incident of sexual harassment;
- iii. medical expenses incurred by the victim for physical/ psychiatric treatment;
- iv. the income and status of the alleged perpetrator; and
- v. feasibility of such payment in lump sum or in instalments.¹⁵

¹³ Section 6 of the Prevention of Workplace Sexual Harassment Act

¹⁴ Section 13 of the Prevention of Workplace Sexual Harassment Act

¹⁵ Section 15 of the Prevention of Workplace Sexual Harassment Act

In the event that the respondent fails to pay the aforesaid sum, ICC may forward the order for recovery of the sum as an arrear of land revenue to the concerned District Officer.

Frivolous complaints

In order to ensure that the protections envisaged under the POSH Act are not misused, provisions for action against “false or malicious” complainants have been included in the statute. As per the POSH Act, if the IC/LC concludes that the allegation made by the complainant is false or malicious or the complaint has been made knowing it to be untrue or forged or misleading information has been provided during the inquiry, disciplinary action in accordance with the service rules of the organisation can be taken against such complainant. Where the organisation does not have service rules, the statute provides that disciplinary action such as written apology, warning, reprimand, censure, withholding of promotion, withholding of pay rise or increments, terminating the respondent from service, undergoing a counselling session, or carrying out community service may be taken. The POSH Act further clarifies that the mere inability to substantiate a complaint or provide adequate proof need not mean that the complaint is false or malicious.¹⁶

Non- disclosure of Identity of Victims

The Act prohibits disclosure of the identity and addresses of the aggrieved woman, respondent and witnesses. The POSH Act specifically stipulates that information pertaining to workplace sexual harassment shall not be subject to the provisions of the Right to Information Act, 2005. The POSH Act further prohibits dissemination of the contents of the complaint, the identity and addresses of the complainant, respondent, witnesses, any information relating to conciliation and inquiry proceedings, recommendations of the IC/LC and the action taken to the public, press and media in any manner. That said, the POSH Act allows dissemination of information pertaining to the justice that has been secured to any victim of sexual harassment, without disclosing the name, address, identity or any other particulars which could result in the identification of the complainant or the witnesses.¹⁷ Disclosure of the justice secured could not only deter other individuals from engaging in acts of sexual harassment, but also instil in the minds of employees and public that the employer is serious about providing a safe work environment and harbours zero tolerance for any

¹⁶ Section 14 of the Prevention of Workplace Sexual Harassment Act

¹⁷ Section 16 of the Prevention of Workplace Sexual Harassment Act

form of sexual harassment at the workplace. Breach of the obligation to maintain confidentiality by a person entrusted with the duty to handle or deal with the complaint or conduct the inquiry, or make recommendations or take actions under the statute, is punishable in accordance with the provisions of the service rules applicable to the said person or where no such service rules exist, a fine of INR 5,000.

Employer's Duties and Obligations

In addition to ensuring compliance with the other provisions stipulated, the Sexual Harassment Act casts certain obligations upon the employer to, inter alia,

- i. provide a safe working environment
- ii. display conspicuously at the workplace, the penal consequences of indulging in acts that may constitute sexual harassment and the composition of the Internal Complaints Committee.
- iii. organise workshops and awareness programmes at regular intervals for sensitizing employees on the issues and implications of workplace sexual harassment and organizing orientation programmes for members of the Internal Complaints Committee.
- iv. treat sexual harassment as a misconduct under the service rules and initiate action for misconduct. The employer is also required to monitor the timely submission of reports by the ICC.

If an employer fails to constitute an Internal Complaints Committee or does not comply with any provisions contained therein, the Sexual Harassment Act prescribes a monetary penalty of up to INR 50,000 (approx. US\$1,000). A repetition of the same offence could result in the punishment being doubled and / or de-registration of the entity or revocation of any statutory business licenses.

Examples of Conduct Amounting to Sexual Harassment

Whether an act or conduct would amount to 'sexual harassment' is dependent on the specifics of the act and the circumstances. The following is an indicative list of conduct that could be considered as sexual harassment:

- i. Unwanted sexual advances or propositions;

- ii. Pestering for dates or receiving unwelcome sexual suggestions or invitations;
- iii. Offering employment benefits in exchange for sexual favours;
- iv. Leering;
- v. Making sexual gestures;
- vi. Displaying sexually suggestive objects or pictures, cartoons, calendars or posters;
- vii. Making or using derogatory comments, comments about a person's body or dress, slurs, epithets or sexually suggestive jokes;
- viii. Written communications of a sexual nature distributed in hard copy or via a computer network, suggestive or obscene letters, notes or invitations;
- ix. Physical conduct such as unwanted touching, assault, impeding or blocking movements;
- x. Being forcibly kissed or hugged;
- xi. Having someone expose their private parts to you or repeatedly staring at a woman's body parts that makes her uncomfortable;
- xii. Making or threatening retaliation after a negative response to sexual advances or for reporting or threatening to report sexual harassment;
- xiii. Eve-teasing;
- xiv. Sexually tinted remarks, whistling, staring, sexually slanted and obscene jokes, jokes causing or likely to cause awkwardness or embarrassment;
- xv. Subtle innuendoes or open taunting regarding perfection, imperfection or characteristics of physical appearance of a person's body or shape;
- xvi. Gender based insults and/or sexist remarks;
- xvii. Displaying pornographic or other sexually offensive or derogatory material;
- xviii. Forcible invitations for dates;
- xix. Forcible physical touch or physical assault or molestation;
- xx. Suggesting or implying that failure to accept a request for a date or sexual favours would adversely affect the individual in respect to performance evaluation or promotion.
- xxi. Explicitly or implicitly suggesting sexual favours in return for hiring, compensation, promotion, retention decision, relocation, or allocation of job/responsibility/work;
- xxii. Any act or conduct by a person in authority and belonging to one sex which denies or would deny equal opportunity in pursuit of career development or otherwise making the environment at the work place hostile or intimidating to a person belonging to the other sex, only on the ground of such individual providing or refusing sexual favours;
- xxiii. Physical confinement against one's will and any other act likely to violate one's privacy.

IV. CONCLUSION

India is a developing nation and number of working women is increasing day by day. To protect the women's human rights, the recognition of the right to protection against sexual harassment is must needed legislation. It is necessary because without it the dream of providing independence, the right to work with dignity and equality of opportunity to women cannot be true. Sexual harassment at the workplace is a social challenge that needs to be addressed. It is important to enhance the awareness of employers and employees on the existence of forms of sexual harassment at the workplace, preventive measures, and legal framework on preventing and addressing sexual harassment. Dissemination and awareness raising activities should be regularly conducted and evaluated in order to improve best practice on how to address sexual harassment in the workplace, and also to forewarn and inform of forms of sexual harassment to enable potential victims to avoid them. Enhancing training courses on sexual harassment and providing documentation or a handbook on the prevention of sexual harassment at the workplace can help in combating it. Adding to the rape incident, sexual harassment never shouted for a candle march, mournful banners and lamenting heart and dead expectations but it shouted for and is still c raving, screaming badly for awareness, alertness, vigilance and several prolific provisions and moreover it will be fruitful when we as a responsible human and the society works for the enhancement of gender sensitive education and to bridge the gap between men and women.

“While a murder destroys the physical frame of the victim, sexual harassment degrades and defiles the soul of a helpless woman.”¹⁸

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¹⁸ <http://www.slideshare.net/krishcyb/sexual-harassment-of-working-women-in-india>

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