
SEXUAL HARASSMENT OF WOMEN AT WORKPLACE WITH LEGISLATIVE AND JUDICIAL RESPONSE

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1. INTRODUCTION

“Long bygone are the days when men used to be the sole bread-winners of a family. Globalization has brought a radical change in the status of women worldwide. However, with the larger influx of women in the mainstream workforce of India, sexual harassment at workplace has assumed greater dimensions. Workplace sexual harassment is a form of gender discrimination which violates a woman’s fundamental right to equality and right to life, guaranteed under Articles 14, 15 and 21 of the Constitution of India. Workplace sexual harassment not only creates an insecure and hostile working environment for women but also impedes their ability to deliver in today’s competing world. Apart from interfering with their performance at work, it also adversely affects their social and economic growth¹ and puts them through physical and emotional suffering.”

“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” (“POSH Act”) “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 (“Criminal Law Amendment Act”) which has criminalized offences such as sexual harassment, stalking and voyeurism.

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

“The POSH Act has been enacted with the objective of preventing and protecting women against workplace sexual harassment and to ensure effective redressal. Statement of Objects and Reasons, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 of complaints of sexual harassment. While the statute aims at providing every woman (irrespective of her age or employment status) a safe, secure and dignified working environment, free from all forms of harassment, proper implementation of the provisions of the statute remains a challenge.”

“Although the law preventing sexual harassment at workplace has been in force since 2013, there remains lack of clarity on various aspects pertaining to the statute, including what constitutes sexual harassment, obligations of an employer, remedies/safeguards available to the victim, procedure of investigation, etc. Many 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 or ridiculed; which underpins the need for greater awareness and greater enforcement.”

“Sexual harassment against women is not a new age crime. It existed in the society since time immemorial. The sexual harassment of women at workplace act 2013 was passed in India in pursuance of Vishaka guidelines given by the supreme court in the case of *Vishaka and Others vs State of Rajasthan*² in 1997. In this particular case, the Supreme Court acknowledged the gravity of the issue of sexual harassment of working women and laid down guidelines making it mandatory for employers to prevent commission of such acts. Also, India had already signed and ratified the convention on elimination of all forms of discrimination against women (CEDAW), but had not enacted any domestic law in furtherance of the same. Thus, decide call also to assimilate the international obligation. the provisions of the act extend to all private and public places, as well as schools and colleges.”

“It also covers the transportation taken and places visited by the employee during the course of employment. The workplace is not confined to traditional office setups and instead, it goes further to include organisations, departments, offices, branches, units or sports complexes, etcetera. The

² Vishaka & Ors. v State of Rajasthan & Ors. (1997) 6 SCC 241

armed forces tribunal has recently given outer judgement that includes army men within the ambit of the Act.”

“Any tool would be useless if the person operating it is unaware of the way it is to be used. Therefore, the objective of this booklet is to serve as a ready reckoner to all the stakeholders and re-educate them on the law relating to workplace sexual harassment.”

OBJECTIVE OF RESEARCH

- With more and more women joining the workforce, both in organized and unorganized sectors, ensuring an enabling working environment for women through legislation is felt imperative by the Government. The proposed legislation contains provisions to protect every woman from any act of sexual harassment irrespective of whether such woman is employed or not. Are the provisions actively being followed?
- What are the instances where the SC has upheld and followed the provisions of POSH?
- To evolve a permanent mechanism for the prevention and redressal of sexual harassment cases and other acts of gender-based violence at the workplace.

HYPOTHESIS

“There is no commonly accepted framework for studying social-sexual behaviour at work. Probably the most common lay view of non-harassing sexual behaviour is that sexual interest prompts it: men and women make overtures at work because they are attracted to each other. On the other hand, people are likely to view sexual harassment as an exercise of power rather than of sexual interest. The more women climb up the corporate ladder, the more sexual advances they may have to face.”

RESEARCH METHODOLOGY

This is a Qualitative Research project and the relevant material for this project has been collected from the primary as well as secondary sources. Qualitative Research is a research is based on the principles or the propositions made earlier as well as first hand data collected from sources. It is

based on the sources like books of the library, and through various websites and data collected personally. This project is totally based on the quantitative research and is also based on the books, articles, journals.

RESEARCH QUESTIONS

- Is a single legislative statute enough to counter the crime of harassment at work?
- Are the provisions being followed by the organisations?
- What are the precedents that have been provided by the Courts in India?

2. EVOLUTION OF THE LAW ON WORKPLACE SEXUAL HARASSMENT

“The elimination of gender-based discrimination has been one of the fundamentals of the Constitutional edifice of India. The principle of gender equality is enshrined in the Constitution, in its Preamble, fundamental rights, fundamental duties and Directive Principles. However, workplace sexual harassment in India, was for the very first time recognized by the Supreme Court of India in its landmark judgment of *Vishaka vs. State of Rajasthan*³, wherein the Supreme Court framed certain guidelines and issued directions to the Union of India to enact an appropriate law for combating workplace sexual harassment. Nothing less of an irony, the POSH Act and the POSH Rules was enacted 16 years after the *Vishaka* Judgement.”

“In the absence of a specific law in India, the Supreme Court, in the *Vishaka* Judgment, laid down certain guidelines making it mandatory for every employer to provide a mechanism to redress grievances pertaining to workplace sexual harassment” (“*Vishaka* Guidelines”) “which were being followed by employers until the enactment of the POSH Act.”

The Vishaka Judgement

“In 1992, Bhanwari Devi, a dalit woman employed with the rural development programme of the Government of Rajasthan, was brutally gang raped on account of her efforts to curb the then

³ 1997 6 SCC 241: AIR 1997 SC 3011

prevalent practice of child marriage.⁴ This incident revealed the hazards that working women were exposed to on a day-to-day basis and highlighted the urgency for safeguards to be implemented in this regard. Championing the cause of working women in the country, women's rights activists and lawyers filed a public interest litigation in the Supreme Court under the banner of Vishaka."

"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 constitute a health and safety problem, it amounts to sexual harassment in the workplace. It is discriminatory, for instance, when the woman

⁴ Indira Jaising, *Law Relating to Sexual Harassment at the Workplace* (2014)

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 – Some Other Judgments

A. Apparel Export Promotion Council v. A.K Chopra⁵

“The Vishaka judgment initiated a nationwide discourse on workplace sexual harassment and threw out wide open an issue that was swept under the carpet for the longest time. The first case before the Supreme Court after Vishaka in this respect was the case of Apparel Export Promotion Council v. A.K Chopra.⁶ 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 Supreme Court explained that “sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication (1999) 1 SCC 759 particularly when submission to or rejection of such conduct by the female employee was capable of being used for affecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile work environment for her.””

B. Medha Kotwal Lele & Ors. V. Union of India & Ors.

“A letter written by Dr. Medha Kotwal of Aalochana (an NGO) highlighted a number of individual cases of sexual harassment stating that the Vishaka Guidelines were not being effectively implemented. Converting the letter into a writ petition, the Supreme Court took

⁵ AIR 1999 SC 625

⁶ (1999) 1 SCC 759

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. In its judgment, the Supreme Court observed” that “the implementation of the Vishaka Guidelines has to be not only in form but also in substance and spirit so as to make available safe and secure environment for women at workplace in every aspect and thereby enabling working women to work with dignity, decency and due respect.’ Not being satisfied with the implementation of the Vishaka Guidelines, 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 Vishaka Guidelines, it would be open to the aggrieved persons to approach the respective High Courts.”

UNDERSTANDING SEXUAL HARASSMENT

“Sexual harassment is one of the manifestations of the male dominance and the status of women who are being viewed as objects of pleasure. This is more deeply felt in societies which are patriarchal in nature. Indian society being an inherently patriarchal society. Indian Society not only being patriarchal is further marred by the presence of structural inequalities like caste system.⁷ Although very commonly used term, the exact meaning what constitutes sexual harassment remains unclear.”

“Sexual Harassment at workplace is an unwanted sexually oriented behaviour resulting from unequal power relations at workplace and it has serious consequences on employment of women.”⁸ Sexual harassment is used in a myriad sense ranging from the commonest form of eve teasing to horrendous acts like rape.⁹

“Eve Teasing may be understood as verbal or physical acts or gestures by men towards women in

⁷ AnaghaSarpotdar, “Sexual Harassment of Women at Workplace in India: Journey from a Workplace Problem to a Human Rights Issue” *Journal of business Management and Social Sciences Research* (2014):17

⁸ AnaghaSarpotdar, “Sexual Harassment of Women at Workplace in India: Journey from a Workplace Problem to a Human Rights Issue” *Journal of business Management and Social Sciences Research* (2014):17

⁹ Gitanjali Ganguly, “Indian Feminism Issues of Sexuality and representation”, in *Popular Culture in a Globalised India*, ed.K.Moti Gokulsing et.al.(Routledge: 2009) 53

a public place.¹⁰ In India eve teasing which is considered to be a colonial legacy is still continuing and perhaps constitutes the most common form of sexual harassment to which all women irrespective of their ages may be subject to. Surprisingly some acts of eve teasing would rarely be considered as a form of sexual harassment.¹¹ As Pratiksha Baxi points out “Eve teasing in post-colonial India as a cognitive category that refers largely to sexual harassment of women in public spaces, thereby constituting women as eves, temptress who provoke men into states of sexual titillation.”¹² This reflects the tolerance of the society for such derogatory acts.

“However, in *Dy. Inspector General of Police vs S. Samuthiram*¹³ court held that eve teasing constitutes violation of fundamental rights under Articles 14, 15 and 21 of the Constitution of India. Furthermore the offense of rape which is the extreme form that sexual harassment is normally understood as nonconsensual sexual intercourse. In the Indian Context section 375 Indian Penal Code (as amended by Criminal Law Amendment Act 2013) defines the offense of rape. According to this section rape is the penetration of Vagina, Mouth, Urethra and anus of a woman by the penis or any other object against her will and consent.¹⁴ The definition of rape also includes any manipulation of the body of the female for the purpose of penetration.”

In between these two extremes of eve teasing and rape there are many acts which can come under the umbrella term of outraging the modesty of women using force.¹⁵

3. KEY PROVISIONS OF THE POSH ACT

I. APPLICABILITY AND SCOPE

- Applicable Jurisdiction: The POSH Act extends to the ‘whole of India’.¹⁶

¹⁰ Varun Kapoor and Kanika Dhingra, “Sexual Harassment Against Women in India”, available at <http://www.ssrn.com/link/OIDA-Intl-JournalSustainable-Dev.html>.

¹¹ Pratiksha Baxi, “Sexual Harassment”, Seminar, available at <http://www.indiaseminar.com/2001/505/505%20pratiksha%20baxi.htm>

¹² Gitanjali Ganguly, “Indian Feminism Issues of Sexuality and representation”, in *Popular Culture in a Globalised India*, ed.K.Moti Gokulsing et.al.(Routledge: 2009) 53

¹³ AIR 2013 SC 14

¹⁴ Section 375 Indian Penal Code

¹⁵ Preamble to the Constitution of India

¹⁶ Section 1 of the POSH Act

- 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.¹⁷ Given that the definition does not necessitate the woman to be an employee, even a customer/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.¹⁸ “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 is not a gender-neutral legislation and protects only women. “Therefore, the safeguards under the POSH Act are not applicable to ‘men’ victims although employers may choose to extend the protection through their policy.”
- Covered bodies: “The POSH Act applies to both the organized and unorganized sectors¹⁹ in India. It inter alia, applies to government bodies, private and public sector organizations, nongovernmental 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.²⁰”

II. WHAT AMOUNTS TO SEXUAL HARASSMENT?

“The POSH Act defines ‘sexual harassment’ in line with the Supreme Court’s definition of ‘sexual harassment’ in the Vishaka Judgment. As per the POSH Act, ‘sexual harassment’ includes unwelcome sexually tinted behaviour, whether directly or by implication, such as”

- i. physical contact and advances,

¹⁷ Section 2(a) of the Prevention of Workplace Sexual Harassment Act

¹⁸ Section 3 of the Prevention of Workplace Sexual Harassment Act

¹⁹ Having less than 10 workers

²⁰ Section 2(o) of the Prevention of Workplace Sexual Harassment Act

- ii. demand or request for sexual favours,
- iii. making sexually coloured remarks,
- iv. showing pornography, or
- v. any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.²¹

“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;
- interference with work or creating an intimidating or offensive or hostile work environment; or
- humiliating treatment likely to affect the lady employee’s health or safety.^{22”}

“As discussed above, the definition of ‘sexual harassment’ under the POSH Act is wide enough to cover both direct or implied sexual conduct which may involve physical, verbal or even written conduct. The key distinguishing feature is that the conduct is unwanted and unwelcome by the recipient. It includes quid pro quo sexual harassment, a form of sexual blackmail. In a typical situation of quid pro quo harassment, the respondent being a person in power, pressurizes the woman employee (usually a subordinate) for sexual favours in exchange for advancement in the workplace or threat of adverse employment action. The definition also includes reference to creating an ‘intimidate, offensive or hostile working environment’. An example would be a work environment where an individual is subject to

²¹ Section 2(n) of the Prevention of Workplace Sexual Harassment Act

²² Section 3(2) of the Prevention of Workplace Sexual Harassment Act

unwelcome comments about her body type resulting in the woman employee feeling embarrassed and unable to work properly.”

“While some forms of sexual harassment such as sexual assault are inherently offensive and egregious, and may need to occur only once for it to be treated as ‘sexual harassment’, some other forms may not be easily distinguishable. Since there is no fine line test in determining what would amount to a ‘hostile working environment’, the burden will lie on the internal committee to decide whether the harassment suffered by a victim is sufficiently severe to have created a hostile working environment or not. Further, determining what constitutes ‘sexual harassment’ depends upon the specific facts and the context in which the conduct has occurred.”

“In 2010, the High Court of Delhi²³ endorsed the view that sexual harassment is a subjective experience and for that reason held” “A complete understanding of the complainant’s view requires... an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women... Men tend to view some forms of sexual harassment as “harmless social interactions to which only overly-sensitive women would object. The characteristically male view depicts sexual harassment as comparatively harmless amusement.... Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.”

III. 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.”²⁴

²³ Dr. Punita K. Sodhi v. Union of India & Ors. W.P. (C) 367/2009 & CMS 828, 11426/2009

²⁴ Section 2(f) of the Prevention of Workplace Sexual Harassment Act

IV. WORKPLACE

“While 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, 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.²⁵”

“In the case of *Saurabh Kumar Mallick v. Comptroller & Auditor General of India*,²⁶ the respondent who was facing departmental inquiry for allegedly indulging in sexual harassment of his senior woman officer contended that he could not be accused of sexual harassment at workplace as the alleged misconduct took place not at the workplace but at an official mess where the woman officer was residing. It was also argued that the complainant was even senior to the respondent and therefore no ‘favour’ could be extracted by the respondent from the complainant and thus the alleged act would not constitute ‘sexual harassment’. The Delhi Court while considering this matter held this as ‘clearly misconceived’.” The Delhi Court observed that *‘the aim and objective of formulating the Vishaka Guidelines was obvious in order to ensure that sexual harassment of working women is prevented and any person guilty of such an act is dealt with sternly. Keeping in view the objective behind the judgment, a narrow and pedantic approach cannot be taken in defining the term ‘workplace’ by confining the meaning to the commonly understood expression “office”. It is imperative to take into consideration the recent trend which has emerged with the advent of computer and internet technology and advancement of information technology. A person can interact or do business conference with another person while sitting in some other country by way of video-conferencing. It has also become a trend that the office is being run by CEOs from their residence. In a case like this, if such an officer indulges in an act of sexual harassment with an employee, say, his private secretary, it would not be open for him to say that he had not committed the act at ‘workplace’ but at his ‘residence’ and get away with the same. Noting the above, the High Court observed*

²⁵ Section 2(o) of the Prevention of Workplace Sexual Harassment Act

²⁶ Decided on May 9, 2008

that the following factors would have bearing on determining whether the act has occurred in the 'workplace':

- *Proximity from the place of work;*
- *Control of the management over such a place/residence where the working woman is residing; and*
- *Such a residence has to be an extension or contiguous part of the working place.*

In conclusion, the Delhi High Court held that the official mess where the employee was alleged to have been sexually harassed definitely falls under 'workplace'.

V. COMPLAINTS COMMITTEE

"An important feature of the POSH Act is that it envisages the setting up of a grievance redressal forum."

A. Internal Committee²⁷

"The POSH Act requires an employer to set up an 'internal committee' ("IC") at each office or branch, of an organization employing 10 or more employees, to hear and redress grievances pertaining to sexual harassment.²⁸ Failure to constitute the IC has led to imposition of a fine under the POSH Act.²⁹"

B. Registration of the IC

"The Department of Women and Child Development of Telangana and Maharashtra have issued a circular (on 01.07.2019 for Telangana) and an office order (on 23.03.2017 for Mumbai) mandating registration of the IC in Telangana & Mumbai.

²⁷ As per Repealing and Amending Act, 2016, the nomenclature of Internal Complaints Committee was changed to Internal Committee.

²⁸ Section 4 of the Prevention of Workplace Sexual Harassment Act

²⁹ Global Health Private Limited & Mr. Arvinder Bagga v. Local Complaints Committee, District Indore and Others (W.P. No.22314 and 22317 of 2017)

While employers in Mumbai were required to register their ICs with the office of the District Women and Child Development Officer in the prescribed format, employers in the state of Telangana were required to register their ICs on the Sexual Harassment Electronic Box.”

C. Local Committee³⁰

“At the district level, the government is required to set up a ‘local committee’ (“LC”) to investigate and redress complaints of sexual harassment from the unorganized sector or from establishments where the IC has not been constituted on account of the establishment having less than 10 employees or if the complaint is against the employer.³¹ The LC 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.”

D. Powers of the IC/LC

“The POSH Act stipulates that the IC and LC shall, while inquiring into a complaint of workplace sexual harassment, have the same powers as vested in a civil court under the Code of Civil Procedure, 1908 when trying a suit in respect of:”

- i. summoning and enforcing the attendance of any person and examining him on oath;
- ii. requiring the discovery and production of documents; and
- iii. any other matter which may be prescribed.³²

VI. COMPLAINT MECHANISM

“An aggrieved woman who intends to file a complaint is required to submit six copies of the written complaint, along with supporting documents and names and addresses of the witnesses to the IC or LC, within 3 months from the date of the incident and in case of a series of incidents, within a period of 3 months from the date of the last incident. Prompt

³⁰ As per Repealing and Amending Act, 2016, the nomenclature of Local Complaints Committee was changed to Local Committee.

³¹ Section 5 of the Prevention of Workplace Sexual Harassment Act

³² Section 11(3) of the Prevention of Workplace Sexual Harassment Act

reporting of an act of sexual harassment is probably as important as swift action to be taken by the authorities on receiving a complaint. Infact the more prompt the complaint is, the more authentic can it be treated. In instances where sufficient cause is demonstrated by the complainant for the delay in filing the complaint, the IC/LC may extend the timeline for filing the complaint, for reasons to be recorded in-writing. 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.³³ Given that the POSH Act and the POSH Rules do not prescribe any format in which the complaint needs to be filed, the following tips may be kept in mind:””

- The complaint should be addressed to the IC members and not the employer/HR representative.
- The complaint should be concise, i.e., it should be written in simple language which can be understood easily. Complaints that are well written and presented properly have greater credibility.
- Details of exact incident, date and time, witness etc. to be included.
- Circumstances preceding and following the incident to be recorded.
- Whether the complainant asked the respondent to desist from the unwelcome acts.
- Append as many documents as possible in whatever format i.e., relevant e-mails, screenshots of SMS's/WhatsApp messages, call details, photographs, recordings etc.
- Details of the respondent including name, designation, reporting structure between complainant and respondent if any (whether subordinate, colleague or superior).
- Do not state any fact that is false or incorrect.

³³ Section 6 of the Prevention of Workplace Sexual Harassment Act

- The relief that is sought from the employer.”

VII. CONCILIATION

“Before initiating action on a complaint, the IC on the request of the aggrieved woman, can make efforts to settle the matter between the parties through conciliation by bringing about an amicable settlement. Conciliation is basically an informal method of resolving complaints before the complaint escalates into a fully blown formal inquiry. Thus, after a complaint of sexual harassment has been lodged, the aggrieved woman may request the IC to resolve the matter by conciliating between the parties before commencement of the inquiry proceedings, although monetary settlement should not be made as a basis of conciliation.³⁴”

“Once the settlement has been arrived at, the IC or the LC (as the case maybe) shall record the settlement arrived at and thereafter provide copies of the settlement to the aggrieved woman as well as the respondent. Once a settlement has been arrived at, the IC shall not proceed with an inquiry under the POSH Act.”

VIII. REDRESSAL PROCESS/INQUIRY

- “Written complaints (6 copies) along with supporting documents and names and addresses of witnesses have to be filed within 3 months of the date of the incident. Timeline extendable by another 3 months.
- Upon receipt of the complaint, 1 copy of the complaint is to be sent to the respondent within 7 days.
- Upon receipt of the copy of complaint, the respondent is required to reply to the complaint along with a list of supporting documents, and names and addresses of witnesses within 10 working days.
- The Inquiry has to be completed within a total of 90 days from the receipt of the

³⁴ Section 10 of the Prevention of Workplace Sexual Harassment Act

complaint.

- The Inquiry report has to be issued within 10 days from the date of completion of inquiry.
- The employer is required to act on the recommendations of the IC/LC within 60 days of receipt of the Inquiry report.
- Appeal against the decision of the committee is allowed within 90 days from the date of recommendations.”

IX. INTERIM RELIEFS

“At the request of the complainant, the IC or the LC (as the case maybe) may recommend to the employer to provide interim measures such as:

- a. transfer of the aggrieved woman or the respondent to any other workplace;
- b. granting leave to the aggrieved woman up to a period of 3 months in addition to her regular statutory/ contractual leave entitlement;
- c. restrain the respondent from reporting on the work performance of the aggrieved woman or writing her confidential report, which duties may be transferred to other employees.”

X. PUNISHMENT AND COMPENSATION

“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:

- a. punishment prescribed under the service rules of the organization;
- b. 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

- c. deduction of compensation payable to the aggrieved woman from the wages of the respondent.³⁵

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

- a. the mental trauma, pain, suffering and emotional distress caused to the aggrieved employee;
- b. the loss in career opportunity due to the incident of sexual harassment;
- c. medical expenses incurred by the victim for physical/ psychiatric treatment;
- d. the income and status of the alleged perpetrator; and
- e. feasibility of such payment in lump sum or in instalments.³⁶

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

XI. 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

³⁵ Section 13 of the Prevention of Workplace Sexual Harassment Act

³⁶ Section 15 of the Prevention of Workplace Sexual Harassment Act

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.³⁷”

XII. CONFIDENTIALITY

“Recognising the sensitivity attached to matters pertaining to sexual harassment, the POSH Act attaches significant importance to ensuring that the complaint and connected information are kept confidential. 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.³⁸ 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 form of sexual harassment at the workplace.³⁹”

³⁷ Section 14 of the Prevention of Workplace Sexual Harassment Act

³⁸ Section 16 of the Prevention of Workplace Sexual Harassment Act

³⁹ Shivangi Prasad and Attreyi Mukherjee, Handbook on the law of Sexual Harassment at Workplace 179 (2015)

“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 5,000.⁴⁰”

XIII. CONSEQUENCES OF NON-COMPLIANCE

“If an employer fails to constitute an IC or does not comply with the requirements prescribed under the POSH Act, a monetary penalty of up to INR 50,000 (approx. US\$ 700) may be imposed. 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. It is however unclear as to which business licenses are being referred to in this case.⁴¹ It is also pertinent to note that all offences under POSH Act are non-cognizable.⁴²”

4. OTHER LAWS PERTAINING TO WORKPLACE SEXUAL HARASSMENT

INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT, 1946

“The Industrial Employment (Standing Orders) Act,” 1946⁴³ (“Standing Orders Act”) is a central enactment “which, inter alia, requires an employer to define and publish uniform conditions of employment in the form of standing orders. As per the statute, the standing orders should contain terms of employment including, hours of work, wage rates, shift working, attendance and late coming, provision for leaves and holidays and termination or suspension/dismissal of employees.”

“At the first instance, the Standing Orders Act is applicable to ‘industrial establishments employing a minimum of 100 workmen. The Standing Orders Act prescribes Model Standing Orders, serving as guidelines for employers and in the event that an employer has not framed and certified its own

⁴⁰ Section 17 of the Prevention of Workplace Sexual Harassment Act and Rule 12 of the Prevention of Sexual Harassment Rules

⁴¹ Section 26 of the Prevention of Workplace Sexual Harassment Act

⁴² Section 27 of the Prevention of Workplace Sexual Harassment Act

⁴³ This law is proposed to be replaced by the Code on Industrial Relations, 2020.

standing orders, the provisions of the Model Standing Orders shall be applicable.”

INDIAN PENAL CODE, 1860

“Conduct that may be construed as sexual harassment not only violates the Prevention of Workplace Sexual Harassment Act, but also could constitute an offence under the IPC.”

5. CASE STUDY

“The Bombay High Court (“Court”) ruled that it would not interfere with an order of punishment passed by the Internal Complaints Committee (“ICC”) in relation to a sexual harassment complaint, unless the order is shockingly disproportionate.”

“The Court passed this judgment in the case of Vidya Akhave (“Petitioner”) v. Union of India and Ors⁴⁴ in relation to the new Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 of India (“Sexual Harassment Act”).”

“The Court observed that the employer must sufficiently comply with the duties cast upon it under the Sexual Harassment Act. The Court also stated that (a) an employer must provide for an effective mechanism for prevention of sexual harassment of women at workplace; (b) male employees must be sensitized towards the concerns of female employees and (c) the ICC must deal with complaints of sexual harassment in an expedited manner.”

FACTS

“The employee (petitioner) was employed with an Indian government owned development bank. She had filed a complaint of sexual harassment against the General Manager, who was her immediate superior officer (Supervisor). However, no action was taken by the employer. Thereafter, the employee filed another complaint seeking establishment of an ICC as was necessary to be set up, as per the law laid down by the Supreme Court in the case of Vishakha v. State of Rajasthan.⁴⁵ As for the incidents that took place before February/March 2012, the

⁴⁴ Writ Petition 796 of 2015

⁴⁵ AIR 1996 SC 1

limitation period of three months prescribed under the Sexual Harassment Act had expired and thus, were not taken into account by the ICC. However, the Human Resource department could take separate action based on those instances, which would be beyond the scope of the Sexual Harassment Act. Based on the ICC's report, the Disciplinary Authority passed an order, by which the Supervisor was"

- (a) demoted to a lower rank by two ranks;
- (b) transferred to another city and
- (c) received a pay cut as per his lower rank (Order).

CONTENTIONS

"The employee however challenged the validity of the Order before the Court under Article 226 of the Constitution of India. The employee contended that a higher punishment should be imposed on the Supervisor. Also, the employee challenged the validity of the observations of the ICC as it had not adequately taken on record all evidences. Also, the Supervisor had not been declared guilty under the Sexual Harassment Act and a mere condemnatory statement was made by the Disciplinary Authority against the Supervisor. As for expiration of the period of limitation, the employee argued that because the Supervisor was her immediate superior, she was under reasonable apprehension to file a complaint as it would endanger her career. The Supervisor argued that the penalty imposed was harsh enough as a result of which the Supervisor had suffered psychologically and financially. It was contended that the Supervisor had to stay apart from his family, as he had to shift to another city. It was further contended that it was not open to the Court to re-appreciate the evidence once the Disciplinary Committee had considered it and ruled over it. Lastly, it was contended that the Court cannot look into the proportionality of the Order passed by a Disciplinary Committee."

JUDGMENT

"The Court referred to its decision in *Om Kumar v Union of India*⁴⁶ and reaffirmed the principles

⁴⁶ (2001) 2 SCC 386

of judicial restraint to be exercised by courts under Article 226 of the Constitution. The Court held that unless the Order is shockingly disproportionate to the act of the delinquent employee, it will be circumspect in interfering with the Order. Reiterating the decision of Om Kumar, the Court held that interference is warranted only when there is non-compliance of the principles of administrative law, Wednesbury Principles and doctrine of proportionality by the Disciplinary Authority.”

“As for compliance with the Wednesbury Principles, interference was held to be not permissible unless any of the following conditions were satisfied: (a) the Order was contrary to law, (b) relevant factors were not considered, (c) irrelevant factors were considered and (d) no reasonable person would have taken such a decision.”

“Under the principle of proportionality, the Court stated that it would have to be seen whether the legislature and administrative authority maintained a proper balance between the adverse effects which the legislation or order may have on the rights, liberties or interests of persons, keeping in mind the purpose which they were intended to serve. The Court also observed that the inquiry by the Disciplinary Authority was conducted dispassionately and all evidences were appropriately considered and ruled upon in a fair and proper manner. Therefore, the Court was not entitled to give a second opinion merely because it had the discretion to do so.”

“However, the Court felt that there was a need to have an effective mechanism in place at workplaces for addressing issues of sexual harassment of women. The Court also observed that male employees must be made aware of concerns of female employees by undertaking an exercise of gender sensitization as more and more women were becoming part of the national workforce and contributing to the national economy. The Court also remarked as to how many companies, corporations and government undertakings have not complied with the Sexual Harassment Act and do not have an adequate mechanism to deal with issues of sexual harassment.”

ANALYSIS

“This judgment reaffirms the importance and powers of the ICC that is required to be formed under the Sexual Harassment Act. Given the sensitivities surrounding sexual harassment allegations, it is important that the ICC is trained to deal with such cases in a fair, proper and dispassionate

manner and based on the principles of natural justice. It is also necessary for the ICC to ensure that it completes the investigation and issues its order within the time frame set under the law.”

“The judgment also clarifies the already enshrined principles of judicial restraint by the courts. The interference of the courts should be limited to ensuring that there are no procedural irregularities or violations of principles of natural justice. Once the ICC has adequately and appropriately addressed a complaint of sexual harassment, it is not open to the courts to look into the merits of the matter.”

6. CONCLUSION

“The indifferent societal and Judicial attitude towards women in India not only prevented the enactment of anti-sexual harassment laws but also led to the persistence of episodes of violence against the women and their victimization. The Supreme Court of India in *Vishaka v State of Rajasthan*⁴⁷ held that Sexual Harassment of Women is against the Constitutional principles of equality, dignity and non-discrimination. The Supreme Court also emphasized the need for legislation in this regard, but pending such enactment framed some guidelines which would have the force of law. There was enough lobbying by the feminist groups to enact such a law, but this matter did not get the attention it deserved by the concerned authorities.”

“Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is a panacea for the sexual harassment suffered by the women for ages. The wide and the broad manner in which the act has defined workplace other crucial elements appear to be promising enough to keep up with the purpose of its enactment.”

“However, the Act should have made a reference to those incidents of sexual harassments which are religiously and racially (caste) motivated. There should be enough awareness and sensitization at about this matter at all levels in the organization. The weak enforcement of the Act can also be attributed to its numerous flaws.”

⁴⁷ AIR 1997 SC 3011

“However, it is opined that one should not be hasty to arrive at a conclusion about the ineffectiveness of the Act. The Act will have to displace the viscous attitude of tolerance and indifference towards such acts, which is difficult to overcome in this short span. One should not expect the act to do wonders unless it is reciprocated, not only by the organizations to which this Act applies but the society as well.”

BIBLIOGRAPHY/REFERENCE

- Anagha Sarpotdar, “Sexual Harassment of Women at Workplace in India: Journey from a Workplace Problem to a Human Rights Issue” *Journal of business Management and Social Sciences Research* (2014):17
- Constitution of India
- Gitanjali Ganguly, “Indian Feminism Issues of Sexuality and representation”, in *Popular Culture in a Globalised India*, ed.K.Moti Gokulsing et.al.(Routledge: 2009) 53
- Indian Penal Code
- Pratiksha Baxi, “Sexual Harassment”, Seminar, available at <http://www.india-seminar.com/2001/505/505%20pratiksha%20baxi.htm>
- Prevention of Workplace Sexual Harassment Act
- Shivangi Prasad and Attreyi Mukherjee, *Handbook on the law of Sexual Harassment at Workplace* 179 (2015)
- Varun Kapoor and Kanika Dhingra, “Sexual Harassment Against Women in India”, available at <http://www.ssrn.com/link/OIDA-Intl-JournalSustainable-Dev.html>.