
POLICY, PRACTICE, AND PERCEPTION: A STUDY ON ORGANIZATIONAL ADOPTION OF THE POSH ACT

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ABSTRACT

This article aims to highlight the issue of Sexual Harassment at Workplace and the legislation enacted in India to curb the same. The issue of Sexual Harassment at workplace has been dealt under the light of Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013, “POSH Act” which was enacted by the Ministry of Women and Child Development on December 9, 2013.

The “Vishaka guidelines” laid down by the Apex court in 1997 is considered to be the base or the founding stone for the said Act.

This work critically examines the Act, its scope and applicability, shortcomings and corrective suggestions with recent case Laws. Comparison of American laws with respect to Indian POSH Act and other International laws and policies in this aspect has also been done. The critical analysis highlights the major loopholes in this act which requires correction so that it can prove to be efficient and can subserve the objective of its enactment.

Keywords: POSH Act, Employment, Vishaka guidelines, gender inequality, Workplace, Sexual Offences.

HISTORICAL DEVELOPMENT OF THE ACT

Sexual harassment at workplace in India has always been in existence and construed to be an offence but it was an issue less talked about until the year 1997 which proved to be a milestone for enactment of a specific legislation in this regard. Aftermath the very famous case of **Vishaka v. State of Rajasthan**¹ where Bhanvari Devi, a social worker in Rajasthan was brutally gang raped upon prohibiting a child marriage. Her case was taken by a women organization named Vishaka which ultimately resulted in "Vishaka guidelines". 1997 was the year that proved to be a milestone in this matter as the Apex court after taking the cognizance of this grievous issue laid down certain guidelines known as "Vishaka guidelines" which acknowledged the need to lay certain rules in this matter to prevent human rights violation and violation of basic fundamental rights² of women at workplace. This judicial decision of the Supreme Court known as Vishaka guidelines were to be treated as law in this regard until any specific legislation was enacted by parliament.

It can further be said that the Vishaka guidelines paved the way for enactment of The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal)Act,2013. Earlier, in absence of any particular legislation, such cases were dealt under provisions of The Indian Penal Code, 1860 viz. section(s) 354³, 354A⁴, 354B⁵, 354C⁶, 354D⁷ and 509⁸.

Due to the introduction of Globalization, Liberalization & Privatization policies introduced in the year 1999, India witnessed a huge influx of women workers in its Industries and workplace. Women have marked their presence in almost all the working sectors be it science, fashion, entertainment, entrepreneurship, commerce & Trade and hence enactment of such an act was need of the hour to ensure a safe and healthy working environment for female employees.

FEATURES OF THE ACT OF 2013

a. Scope-

¹ AIR 1997 SC 3011

² Art. 14,15,19,21 of the Constitution of India

³ Section 354, IPC- assault or criminal force to woman with intent to outrage her modesty

⁴ Section 354A IPC- sexual harassment and punishment for sexual harassment

⁵ Section 354B IPC- assault or use of criminal force to woman with intent to disrobe

⁶ Section 354C IPC- voyeurism

⁷ Section 354D IPC- Stalking

⁸ Section 509 IPC- word, gesture or act intended to insult the modesty of a woman

Extends to ‘whole of India’⁹

b. Sexual Harassment includes¹⁰:-

- Physical contact and advances
- Demand for sexual favors
- Making sexist remarks
- Showing pornography or
- Any implicit or explicit promise of preferential treatment or biased treatment or creation of hostile environment not suitable for work in order to gain sexual favor would be construed under the definition of sexual harassment.
- Any implicit or explicit threat regarding her future employment.

c. Applicability of the Act-

The Act is applicable to both organized & unorganized sectors in the context of India. It includes under its purview government bodies, private, public sector Organizations, non-governmental organizations, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service.¹¹

d. Constitution of Internal Complaints Committee –

Every employer of a workplace shall, by an order in writing, constitute a Committee to be known as the “Internal Complaints Committee”

The Act provides for constituting an Internal Complaints Committee which shall consist of at least 50% women members, presiding officer being women employee at senior level of the same organization and a member for non- government organization.

⁹ Sexual Harassment at Workplace (Prevention, Prohibition and Redressal Act), s. 1

¹⁰ POSH Act, s. 2(n).

¹¹ POSH Act, s. 2(o).

1. Constitution and jurisdiction of¹² (local committee)

Every District officer is required to constitute local committees to receive complaints of sexual harassment in case Internal Complaints Committee hasn't been formed due to presence of less than 10 employees.

2. Complaint by an aggrieved women employee-

An aggrieved women employee may make a written complaint to the Internal Complaints Committee within three months of the incident. In case of absence of Internal Complaints Committee, the aggrieved women may file a written complaint to local committee¹³.

e. Redressal Mechanism-

At the request of the aggrieved party, the committee may initiate a conciliation process. However, the act does not provide for any monetary settlement during conciliation¹⁴.

- In case the aggrieved party denies the process of Conciliation, then the committee would need to conduct inquiry proceedings against the accused, in accordance with principles of natural justice.
- The inquiry process shall not take more than 90 days from the date of filing complaint with the committee. The committee then, must send the enquiry report and recommendations to the employer or district authority, as provided who must act on the recommendations within 60 days.

f. Punishment-

If the accused is proved guilty, the committee is authorized to order or give directions for paying compensation to the aggrieved as it may deem fit.

- On recommendation of the committee, employer or district authority may also take

¹² Subs. by Act 23 of 2016, s.3 and the second schedule, for Local Complaints Committee”(w.e.f. 6-5-2016)

¹³ POSH Act, s.9.

¹⁴ POSH Act, s.10.

following actions against the convict-

- Written apology
- Warning or censure
- Termination of employment
- Undertake counselling session
- Withholding of promotion or rise in pay
- The punishment under the act shall be in accordance with the terms and conditions of the employment, in case there's absence of service rules by the employer, then punishment would be in accordance to rules laid down under the act.

g. Appeals-

An aggrieved woman can approach the Court or tribunal in manner provide under the act. Appeal has to be done within 90 days.¹⁵

h. Duties of an employer-

Every employer shall¹⁶-

Establish an internal complaints committee, Provide a safe working environment at the workplace, Organize orientation program to introduce members of IC, display at any conspicuous place in the workplace regarding penal consequences or repercussions of sexual harassment, Organize workshops and seminars to create awareness regarding gender sensitization, assist in securing the presence of respondent, witnesses and aggrieved before the ICC or LCC, assist in making such information available towards ICC or LCC as relevant to the complaint, Provide assistance to aggrieved women if she wants to file complaint under any law such as IPC¹⁷.

¹⁵ POSH Act, s.18.

¹⁶ POSH Act, s. 19.

¹⁷ The Indian Penal Code, 1860 (Act 45 of 1860)

Treat sexual harassment at workplace as a misconduct and mention it explicitly in the rules and guidelines of the organization, monitor timely submission of reports by Internal Complaints Committee.

i. Penalty for non-compliance of provisions under the act-

- When an employer fails to constitute an Internal Complaints Committee under sub-section (1) of section 4, contravenes or abets any provision mentioned in the act,
- He shall be punishable with fine which may extend to fifty thousand rupees.

If an employer after being previously convicted of an offence under this act indulges himself in such an act again, they shall be liable to -

- double the punishment which might have been imposed on first conviction subject to maximum punishment provided for the offence.
- Cancellation of license or withdrawal, non-renewal of registration as the case may be by the government or local authority required for carrying on his business or activity.

It is to be noted that the court might take cognizance of any higher punishment for the same offence of which the accused is prosecuted if provided in any other act for the time being in force¹⁸.

CRITICAL ANALYSIS OF THE ACT

1. ACT IS GENDER BIASED-

This Act talks only about aggrieved women and is silent about male and transgender community. By wordings of the provisions of this act it seems that the act doesn't give any recognition to third gender. There have been cases where male as well as third gender suffer atrocities at workplace. This act doesn't talk about sexual harassment of men and transgender community.

¹⁸ POSH Act, s. 26.

Also, the act isn't clear about the term 'respondent' whether perpetrator can be a woman or a transgender.

2. THREE MONTHS LIMITATION IS INADEQUATE-

The said act is time barred for maximum of ninety days. However, sexual harassment is undoubtedly a traumatic experience on the part of aggrieved and require a strong mental strata and will-power to make oneself ready to file such a complaint and take a stand for herself. The time limitation of three months should further be extended in extraordinary circumstances to enable victims to stand for themselves.

The act also fails to cover the grievances of an aggrieved woman who at the time of harassment was an employee of the organization but later due to some reasons quit the job or got terminated, before she got a chance to lodge any complaint.

3. CHANCES OF MALICIOUS PROSECUTION-

Often there have been cases where a person gets falsely implicated due to enmity or other pertaining reasons. In such instances, cases aren't filed because there was some kind of harassment or misconduct but only because of malicious intent of the prosecution.

- a. In such a situation the whole object of this act is violated and rather than being a savior for an actually aggrieved women, it merely becomes a tool to falsely implicate innocent people just to fulfill ones own ulterior motive. There should be a provision regarding strict punishment for false complaints so that people refrain from misusing it just to fulfill their ulterior motives.

4. LACK OF AWARENESS-

The ultimate loophole of this Act is that people are unaware about its existence. The beneficiaries of this Act (aggrieved women) have no idea that such a legislation is in existence for providing remedies against sexual harassment at workplace. The act doesn't talk about its advocacy and awareness.

Home Ministry with the assistance of Law Ministry and Ministry of Information &

Broadcasting should launch awareness campaigns and seminars to make people aware of offences mentioned under the act.

AMENDMENTS IN THE POSH ACT, 2019

Sections 6,7 and 24 of the POSH Act, 2013 have been amended as follows:

1. 'Local Complaints Committee' shall be substituted with 'Local Committee'
2. 'Internal Complaints Committee' shall be substituted with 'Internal Committee'
3. The Amendment also vested some additional liabilities on the IC, that are enumerated as follows:
 - Sexual harassment at workplace should be based on a 'no tolerance policy'
 - IC must deal proactively in ensuring a safe, secure and welcoming environment for its employees and workers.
 - To adopt an 'open door policy' so that staff can approach authorities and voice their grievances as and when needed.
 - Workers, managers, supervisors and all the white as well as blue collared employees should be taught how to spot & respond to inappropriate behavior.

AMERICAN APPROACH

In America, the first set of guidelines regarding sexual harassment at workplace was laid by the **American Equal Employment Opportunity Commission (EEOC) in 1980**. The commission was of view that sexual harassment was contravention of **Title 7 of the Civil Rights Act of 1964**¹⁹. US courts have time to time referred to the EEOC guidelines in cases of sexual harassment & discrimination on grounds of sex and other factors.

The definition of sexual harassment as provided under EEOC guidelines is as follows-

“Harassment on the basis of sex is a violation of section 703 of title 7²⁰. Unwelcome sexual

¹⁹ Prohibition of Employment discrimination based on race, colour, religion, sex and national origin

²⁰ Civil Rights Act, 1964 US Equal employment opportunity commission

advances, request for sexual favors and other verbal or physical conduct of sexual nature constitute sexual harassment when

- 1) Submission of such conduct is made either explicitly or implicitly or a term and condition to one's employment.
- 2) Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual. or,
- 3) Such conduct is done with a purpose of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.”

In determining whether such an act constitutes sexual harassment, the commission will look at totality of circumstances as a whole. The determination of legality of alleged offence will be made on the basis of circumstantial facts and situations of each case.

OTHER INTERNATIONAL CONVENTIONS AND POLICIES

1. **Convention on the Elimination of all forms of Discrimination against women (CEDAW)** directs member states to take suitable and required measures to eliminate discrimination against women in fields including equality under Law, politics, education, workplace and other areas of public life.²¹
2. **International Covenant on Economic, Social and Cultural Rights** contains various provisions regarding protection of Interests of women, primarily her right to fair conditions of work and women not being subject to sexual harassment at workplace.
3. **ILO Committee of Experts on the application of Conventions and Recommendations**²² also prohibits any kind of sexual harassment projected against a woman at workplace.
4. **Beijing Platform for action**, recognizes sexual harassment as a form of violence, and discrimination and calls on multiple parties namely government, employers, Trade unions, and civil societies to ensure that government enacts adequate laws to curb the issue of sexual harassment and those laws are followed by the employers and develop an anti-

²¹ Article(s) 7-16

²² Employment and Occupation Convention (No.111) of 1958

harassment temperament towards women employees in their organization.²³

CONSTITUTIONAL SAFEGUARDS AGAINST SEXUAL HARASSMENT AT WORKPLACE

The constitution of India envisages certain Fundamental Rights under part 3(Articles 12-35) which guarantees every citizen with certain rights or privileges against the state, contravention of which is violation of those fundamental rights. Such a right is vested under Article 19(1)(g) which ensures every individual a right “to practice any profession, or to carry on any occupation, trade or business”.

Hence, every woman being a citizen of India has a right to participate in public employment and carry on occupation of her choice. But, offences such as sexual harassment at workplace curtails her right to work and compels her to keep away from such employment of her choice.

Sexual Harassment of women at workplace is also a violation of **Right to life and personal liberty**²⁴ that no person shall be deprived of his life or personal liberty. Article 21 being wide in scope, covers different facets of rights enshrined under its ambit. Right to livelihood being such integral facet of the Right to Life²⁵ is violated by offences such as Sexual Harassment.

An act amounting to sexual violence isn't only a violation of fundamental right of a woman but also against basic Human Rights as every individual is subject to moral dignity and such an act is a violation of their sense of dignity.

The concept of gender equality embodied in our Constitution would be ineffective at the very outset if a woman's right to Privacy is not regarded as her right to protection of life and liberty provided under Article 21 of the Constitution of India²⁶

JUDICIAL PRONOUNCEMENTS

• REAL LIKELIHOOD OF BIAS TEST BY DELHI HIGH COURT

In *Somaya Gupta v. Jawaharlal Nehru university and Ors.*²⁷ hon'ble Delhi high court held

²³ Para. 178, Beijing Platform for Action,1995

²⁴ Article 21 of the Constitution of India

²⁵ Narendra kumar v. State of Haryana, JT,(1994) 2 SCC 94

²⁶ Mohini Jain v. State of Karnataka, AIR 1992 SC 1858

²⁷ 2018 SCC Online Del 10819: (2018) 159 FLR 390

that mere apprehension of bias would not exclude a member from Internal complaints committee. The Delhi high court, referring to certain previous decisions of the apex court mentioned that it would be necessary to establish a 'real likelihood of bias' rather than mere apprehension. The High Court further observed that "if right minded persons would have a reason to believe that there's real likelihood of bias on the part of inquiring officer, he mustn't conduct the inquiry" this is based on the principle of natural justice that, justice shouldn't only be done, but also seem to be done.

In this particular case, the presiding officer of the Internal committee was herself a witness to the incident. Hence, she excluded herself from handling the complaint. On the part of other members of the IC, there wasn't even a remote suspicion of bias that any of them had personal interest in that matter that would interrupt with their obligations to conduct a fair enquiry under the POSH Act.

Hence, the court held that there was no need to re-constitute the IC.

•WORKPLACE UNDER THE POSH ACT

In the case of *Shubham Bhuvangiri Goswami v. Union of India*²⁸ the Calcutta high court held that the privy lounge, bar-cum-restaurant at a mall, where an incident of sexual harassment was alleged to have occurred

between two students of IIM Calcutta cannot be included under the ambit of 'workplace' under the POSH Act. Therefore, the court asked the counselling officer of IIM, Calcutta to mediate and settle the matter.

• CRIMINAL PROCEEDINGS APART FROM REMEDIES UNDER THE POSH ACT

In the case of *DB Singh v. State of J&K*, 2019 the High Court of Jammu and Kashmir held that the POSH Act doesn't bar the victim or complainant from seeking remedy under the Ranbir penal code, merely on the grounds that the matter has already been taken into cognizance by the IC under the POSH Act.

²⁸ 2019 SCC Online Cal 286

• NEED OF AN EXTERNAL MEMBER TO FORM AN IC

In case of **Neelam Bhardwaj v. State of Punjab & ors.**²⁹, a writ petition before Punjab & Haryana High Court, the primary contention being, complaints Committee not being constituted as per provisions of section 4 of the aforesaid Act of 2013. The High court of Punjab & Haryana ordered the employer to re-constitute the IC on the ground of absence of an external member as mandated under the POSH Act that the IC must have an external member who's a person associated with a non-governmental organization or an institution dedicated to cause of women or issues such as sexual harassment.

CONCLUSION

Sexual Harassment at workplace is a violation of a woman's fundamental rights of Equality and liberty provided by the Constitution under Article(s) 14, 15, 19, 21. It creates an insecure and hostile work environment contributing to create an adverse effect on the work life of a woman thereby affecting her contribution to national growth and hindering women empowerment.

With the aim to curb such an offence that is least talked about, the legislature enacted the said act which is the **Sexual Harassment at workplace (Prevention, Prohibition and Redressal) Act, 2013**. Although there are certain loopholes in this act which have been mentioned so far in this work & requires modification but in totality this Act has proven to be a boon for women out there who are determined to stand against injustice done to them and are constantly changing roles in every arena of life as fiercely as one could and coming up with flying colors.

²⁹ 2018 LLR 1286

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