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SEXUAL HARASSMENT AGAINST WOMEN AT WORKPLACE IN INDIA: LAW AND CHALLENGE

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ABSTRACT

Approximately half of the population of our country and the potential workforce is the female gender. Sexual harassment is a serious problem for women workers. There is extensive anecdotal evidence indicating its pervasiveness, but it remains hidden by the veil of silence surrounding the difficulty. Sexual harassment includes a variety of actions from mild transgressions to sexual assault or assault. Sometimes women raise their voices against such injustice but more often than not it's buried with time. Sexual harassment and assault may be prevented by secondary school, college, and workplace through education programs. It is the duty of the State to take strong measure by making law and give power to authorities for the protection of women from such kind of immoral offences which violates their dignity, equality and affect them mentally and physically. The need for preventing such injustice and appropriately dealing with such cases, The Sexual harassment Act, 2013 was brought into effect. The Indian Constitution declares that gender equality is a fundamental right. When it is infringed, the natural basis of human rights, inherent in human beings is violated. Though Article 14, 15(1) and (3), 16, 19(1) (a) (2), 21, 23, 39(a), 39(d), 39(e), 42 and 51-A (e) guarantee the women's right on this issue. The most important among them in Indian Penal Code, 1860 that prescribes punishment for the offence of assault or use of force on women or words, gestures, or acts intended to insult the modesty of a woman.

The paper is an effort to elucidate lucidly the periphery of the act and the way organizations should influence in protecting and preserving the dignity of a women.

Keywords: Workplace, Equality, Human Rights, Sexual Harassment, Sexual Harassment, Sexual Harassment.

INTRODUCTION

Over the past few decades, the world has witnessed an extraordinary increase in values and class of living across the world. India has also witnessed a huge boost in its economic area. However, growth is not development. This is a continuing topic of debate. It is not necessary that growth and development are always interrelated. It is the economic growth which ideally brings social transformation as well as social development, but this does not always happen.

As we know that development is providing opportunities to each individual to their livelihood and also develop a full tendency to one each of the individuals, to realize their dreams freely and achieve whatever individual feels with confidence without any barriers. Every individual enjoys equal opportunities, dignity, and respect in a developed society. In such a society social, cultural, economic religious, or gender bias is nonexistent.

As in a modern era crime against women is a global phenomenon. Women are still victims of horrendous crime across the world. In recent days' women are even discriminated against on the basis of gender, equality, race, caste which is a major issue that plays a key role in crime against women. There are different types of crimes against women in the society such as domestic violence, sexual abuse, sexual assault, cruelty, rape, dowry death, and even when women are sexually abused or harassed at the workplace is the incident happening more in a recent day. Women are not treated equally when they do work in a company, or at the workplace in the case of salary or any other matter related to it and have been sexually harassed.

Violence against women is a violation of human rights. This is the biggest hindrance to achieve gender equality. The elimination of gender-based discrimination has been one of the fundamentals of the constitutional edifice of India. It can be a major hindrance for any society to achieve equality, development, and peace. Sexual harassment is a crime that leads to physical and psychological harm to women.

In India, there are many challenges to attain development but one of the prominent ones is the evil cultural tradition that has been instrumental in violence against women.

The WHO report on "Violence against women "in the year 2017 is "**women who are less educated and have witnessed their mothers being abused, develop an attitude of accepting violence as male privilege and women's subordinate status.**

EVOLUTION OF THE LAW ON WORKPLACE SEXUAL HARASSMENT

The elimination of gender-based discrimination has been one of the fundamentals of the constitutional structure of India. This principle of gender equality is also enshrined in the Constitution, in its Preamble, fundamental rights, fundamental duties and also Directive Principles of State Policy. Sexual Harassment at the workplace for the very first time

recognized by the Supreme Court of India in its landmark judgment of **Vishaka Judgment**¹, from these case Supreme Court issued certain plans and instructions to the Union of India to perform a suitable law for fighting workplace sexual harassment.

In the lack of specific law in India, the Supreme Court, in the **Vishaka judgment**, laid down certain rulemaking it compulsory for every company to provide a means to rectify grievances pertaining to workplace sexual harassment which were being followed by employers until the enactment of the POSH Act.

1. **THE VISHAKA JUDGMENT**

In 1991, 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 prevalent practice of child marriage. ²This incident revealed the hazards that working women were exposed to on a 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 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 rule, 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 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 as:

- Physical contact and advances
- A demand or request for sexual favors;
- Sexually colored remarks;
- Showing pornography;

¹ 1997 6 SCC 241: AIR 1997 SC 3011

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

- Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

2. POST VISHAKA –SOME OTHER JUDGMENTS

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

The Vishaka judgement 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 came before the Supreme Court after Vishaka in this respect was the case of Apparel Export Promotion Council v A.K Chopra . In this case, the supreme court reiterated the law laid down in the Vishaka judgement 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, requests for sexual favors and other verbal or physical.

B. Medha Kotwal Lele & Ors. V. Union of India & Ors³.

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 written petition, the Supreme Court took cognizance and undertook monitoring of the 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 the 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.

³ (1997) 6 SCC 241

What amounts to Sexual Harassment?

After the Vishaka judgment the POSH Act defines ‘sexual harassment’ in line up with the Supreme Court’s definition of ‘sexual harassment’. According to the POSH Act, ‘sexual harassment’ includes uninvited sexually painted behavior, whether directly or by inference, such as:

1. Physical speak to and advance
2. Demand or request for sexual favors
3. Making sexually colored remarks
4. Showing pornography
5. Any other uninvited physical, verbal or non-verbal conduct of a sexual nature.⁴

Here are some conditions that if they occur or are present in relation to or connected with any or behavior of sexual harassment may amount to sexual harassment.

- Implied or explicit guarantee of favored treatment in employment
- Implied or explicit hazard of negative treatment in employment
- Implied or explicit hazard about the present or future employment class
- Interference with work or creating an intimidating or offensive or hostile work environment
- Humiliating treatment is likely to affect the lady employee’s health or safety.

The definition of ‘sexual harassment’ under the POSH Act is broad enough to cover both direct or implied sexual perform which may involve physical, verbal, or even written conduct. The key distinctive characteristic is that the conduct in unnecessary and unwelcome by the recipient. It includes quid pro quo sexual harassment, a form of sexual blackmail (this for that). In representative circumstances of quid pro quo harassment, the respondent is a person in power, pressurize the woman employee for sexual favors in replacement for a spread in the workplace or hazard of adverse employment action. The definition also includes reference to creating a ‘threaten nasty or unfriendly working environment’.

⁴ Section 2 (n) Of the Prevention workplace sexual harassment Act

An example would be a job environment where a human being is subject to uninvited comments about her body style resultant in the woman worker feeling uncomfortable and incapable to work properly.

Whereas some forms of sexual harassment such as sexual assault are intrinsically 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 noticeable. While there is no fine test indecisive what would quantity to a ‘hostile working environment’, the trouble will lie on the domestic committee to make a decision whether the harassment suffered by a victim is satisfactorily strict to have created a hostile working environment or not. Auxiliary shaping what constitutes ‘sexual harassment’ depends upon the definite facts and the framework in which the accomplish has occurred.

In 2010, the High Court of Delhi endorsed the view that sexual harassment is a subjective experience and for that reason held ⁵“ 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.”

KEY PROVISION OF THE POSH ACT

APPLICABLE JURISDICTION;

The POSH Act extends to the ‘whole of India’.

While for the POSH Act, an ‘aggrieved woman’ in next of kin 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. Known that the definition does not impose the woman to be an

⁵ Dr. Punitha K Sodhi v. Union of India & ors. W.P. © 367/2009

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. 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 gender-neutral legislation and protects only women. Therefore, the safeguards under the POSH Act are not applicable to ‘men victims.

EMPLOYEE

The definition of an ‘employee’ under the POSH Act is fairly wide to cover regular, temporary, adios employees, individuals engaged on a daily wage basis, either directly or through an agent, contract laborer’s, 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.⁶

WORKPLACE

While the Vaisakha 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, including transportation provided by the employer for the purpose of commuting to and from the place of employment.⁷

In the case of Saurabh Kumar Mallick v. Comptroller & Auditor General of India,⁸ 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 complaint was even senior to the respondent and therefore no ‘favor’ could be extracted by the respondent from the complaint and thus the alleged act would not constitute ‘sexual

⁶ Section 2 (f) of the Prevention of Workplace Sexual Harassment Act

⁷ Section 2 (O) of Prevention of WORKPLACE Sexual Harassment Act

⁸ Decided on May 9, 2008

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 Vaisakha Guidelines were 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. A person can interact or do a business conference with another person while sitting in some other place. It has 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 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. Nothing the above, the High Court observed 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 falls under the ‘workplace’.

THE ANITA SURESH’S CASE: MISUSE OF WOMEN LAWS

The fear of women filing false complaints to misuse the laws framed around them is one of the prime concerns to the existence of the law against sexual harassment. Through an analysis of a 2019 HC judgment in the case of Anita Suresh v Union of India & Ors⁹, it is evident how courts often do not differentiate between a “malicious intent” to file the complaint and one where enough evidence was not permissible to the court by the complainant.

The High Court of Delhi in the above-mentioned case, delivered a judgment related to sexual harassment at the workplace. The news reported on the judgment that the court had imposed a fine of Rs 50,000 on the complainant (a woman) for filing a “false” complaint of sexual harassment at her workplace. There were huge loads of comments from the readers which

⁹. W.P. (C) 5114/2015

surfaced everywhere possible. The tone of these comments ranged from blanket declarations that false complaints are routinely lodged against employees mostly seniors, to recommendations of rigorous imprisonment to the false complainants against sexual harassment. However, that was not the first time that such measures were recommended, and it would not be the last. The fear of women misusing these laws has repeatedly highlighted in discussions about sexual harassment at the workplace and would continue to be one of the principal obstructions to the existence of the law against sexual harassment.

THE BRIEF FACTS OF THE CASE WERE FOLLOWS:

The petitioner, Anita Suresh, filed a complaint of sexual harassment against her employer, the Employees' State Insurance Corporation (ESIC), alleging that another employee of the corporation had indicated comments of sexual advances towards her and made sexually inappropriate remarks. This was prior to the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, thus, the ESIC constituted an Internal Complaints Committee (ICC) in accordance with the guidelines set out in Vishaka & Ors v State of Rajasthan & Ors¹⁰. The ICC heard the complaint, but due to a lack of evidence, the behavior of the respondent was not established. The committee recommended relocating both the parties and did not impose any further penalty or instruction on either the parties or the ESIC. The petitioner again challenged the ICC's recommendation on grounds that there was sufficient evidence to prove her complaint and that the penalty awarded was insufficient.

REVIEW BY THE DELHI HIGH COURT

The High Court of Delhi, while hearing the petition, reviewed the ICC's proceedings and ruled that the petitioner had filed a false complaint. Its basis for the ruling was that the petitioner could not remember who may have been witness to the sexual advances when she was questioned by the ICC. The court also said that none of the people examined at the time reported witnessing any such conduct by the respondent. It also said that the petitioner had not mentioned the exact comments made by the respondent to the ICC. On these grounds, the court ruled that the complaint appeared to be false and seemed to have been filed with "some ulterior motive." The petitioner's past service record was examined and noted that she had been subject to disciplinary action on work-related issues on two occasions. It is unclear as to why her service record was relevant to the case discussed, but the court dedicated significant attention to it.

The court concluded by stating that her writ petition was without merit and stood dismissed. A monetary penalty was imposed on the petitioner and the respondent was granted the opportunity to initiate action against her for filing a "false complaint."

WHAT DOES THE POSH ACT SAY?

¹⁰. (1997) 6 SCC 241

There is a specific provision inserted under the POSH Act to deal with false complaints. Section 14 of the Act specifically states that if the ICC, during the course of the investigation, finds that any complaint has been falsely or maliciously filed, or that any evidence brought before the ICC is false, it can recommend a penalty to be imposed on such a person. This section was inserted amidst much concern that women are “prone” to misuse rights-based legislations. When the POSH Act was evaluated by the Parliamentary Standing Committee in 2011, they observed that this section should not deter women from filing complaints. As a result, two key provisos had been inserted into the section. First, that the inability to prove a complaint does not render it false. Second, that malicious intent has to be specifically established before disciplinary action is recommended against the complainant.

The principle behind these provisos is that no person should be penalized for bringing forward a complaint only because they are unable to prove it. As is common knowledge, most instances of sexual harassment irrespective of at the workplace or not happen in places or situations where evidence is difficult to come by. In a workplace, sexual remarks and physical advances can be made behind closed doors, where there are no witnesses, no recordings, no video footage, and indeed nothing but the word of the victim against the word of the perpetrator. It is the role of the ICC to find evidence and establish whether the harassment occurred or not. However, despite the ICC’s best efforts, it is likely that there will be cases where the ICC will be unable to reach a conclusion due to a lack of evidence. In such cases, the complaint will not be termed “false” or “malicious,” and the respondent will not be held guilty of sexual harassment. For a complaint to be considered false or malicious, the ICC needs to specifically show that the complainant intentionally and maliciously filed a complaint that she knew to be untrue. In this manner, the law does seek to establish a balance between the possibility of misuse and the preservation of an individual’s right to file complaints.

LEGAL FRAMEWORK DISREGARDED BY THE HIGH COURT

The judgment, however, is in clear and gross violation of these principles. First, the court disregarded the first proviso to Section 14 and ruled that because the petitioner was unable to produce evidence to support her claim, she must have filed a false complaint. The effect of this ruling is twofold. First, it is a clear derogation from the principle set out in the POSH Act, and second, it has the potential to deter more women (or men) from coming forward with their complaints owing to the fear that a lack of evidence will eventually label them as the wrongdoer.

Furthermore, while the court made a blanket statement that the complaint was filed with an “ulterior motive,” it provided no concrete evidence for this ruling in the judgment. The court did reproduce the petitioner’s disciplinary record at her workplace, but in no way did it identify a tangible or convincing link between her record and the alleged “malicious intent” behind her sexual harassment complaint.

Also in the process of trying to settle the case, the court overlooked the realities of sexual harassment at the workplace. It is rarely something that will have direct witnesses or evidence, and that is what precisely makes it an insidious hindrance in women’s participation in the waged workforce. The judge, in this case, seems to have gone along with the trope that women

are prone to lie and misuse the law, and for good measure, cited past misconduct to discredit the petitioner.

QUESTIONS OF EQUITY

“What can men do to protect themselves against the possibility of a false complaint?” This is a common question that comes up during legally mandated anti-sexual harassment training. It leads one to wonder why people feel the need to assume that complainants or plaintiffs are liars or abusers of a measure only when it is intended to uplift a disadvantaged group. For instance, despite wide knowledge regarding the occurrence and possibility of insurance fraud, there is no discourse condemning the existence of insurance policies.

During discussions with employees in corporate offices, one can see a discernable wave of anger and frustration at the fact that women are given the “freedom” to talk about their experiences, not just on social media, but also through the constitution of a decentralized ICC, which look into complaints of sexual harassment at the workplace. Common points of discussion include the loss of reputation that a man faces because of a “false” complaint, the potential of women “misusing” any rights given to them, and most jarringly, the opinion that sexual harassment is either exaggerated or non-existent. From Section 498A of the Indian Penal Code (which criminalizes cruelty towards a woman by her husband or in-laws) to the POSH Act, rights-based laws that seek to safeguard women are met with intense anger, criticism, and even contempt by certain groups.

However, these laws exist because violence and discrimination against women are systemic and pervasive in India and across the world. The objective of these laws is not to place women at a higher position of power than men. Rather it is to provide them with opportunities and rights to enable them to have equal standing. By failing to adhere to the principles of equity and subscribing to stereotypes about women’s behavior, the courts will do a disservice not only to the women of this country, but also the laws that seek to empower them.

CONCLUSION

Preventing and effectively addressing harassment of girls in colleges and universities may be a significant challenge, but we are optimistic that academic institutions can meet that challenge—if they demonstrate the will to do so. This is because the research shows what is going to work to stop harassment and why it’ll work. A systemwide change to the culture and climate in our nation’s colleges and universities can stop the pattern of harassing behavior from impacting the subsequent generation of girls entering science, engineering, and medicine.

Changing the present culture and climate requires addressing all sorts of harassment, not just the foremost egregious cases; moving beyond legal compliance; supporting targets once they come forward; improving transparency and accountability; diffusing the faculty structure between faculty and trainees; and revising organizational systems and structures to value

diversity, inclusion, and respect. Leaders at every level within academia are going to be needed to initiate these changes and to determine and maintain the culture and norms. However, to achieve making these changes, all members of our nation’s college campuses—students, faculty, staff, and administrators—will get to assume responsibility for promoting a civil and respectful environment. It is everyone’s responsibility to stop sexual harassment.

In this spirit of optimism, we provide the subsequent compilation of the report’s findings, conclusions, and proposals.