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LAW REFORMS IN SEXSUAL HARASHMENT OF WOMEN AT WORKPLACE

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Abstract

An uncontested upsurge vis-a-vis sexual harassment at workplace in India has enthralled unexampled mindfulness to the menace like never before. Long outmoded are the days when women used to be confined in the four walls of the houses and only men used to be the breadwinner of the family. Globalization has brought about a paradigm shift in the status of women worldwide by recognizing the role of women in the mainstream workforce.

However, with the proliferation of women entering workforce, the menace of sexual harassment at workplace has assumed radical dimensions. While a murder destroys the physical frame of the victim, sexual harassment degrades and defiles the soul of a helpless woman. Thus, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (POSH Act) was enacted with the objective of protecting women in India from sexual harassment anent their workplaces.

Keywords: Sexual Harassment, Workplace, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, Women, POSH Act, Workforce, Victim

A) INTRODUCTION:

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 ("Constitution"). 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, etc.

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

B)SCOPE:

- The PoSH Act has been implemented to prevent and protect women from sexual harassment at the workplace and thereby ensure a safe working environment for women.
- The PoSH Act, as mandatory compliance, requires every company having more than ten employees to constitute an Internal Complaints Committee (ICC) in the prescribed manner to receive and address the complaints of any sort of sexual harassment from women in a time-bound and extremely confidential manner.

C) PURPOSE:

The POSH Act aspects is of equality of women in the workplace, gender-specific violence, and unwelcome sexually colored behaviour and adopted them to come out with a strong legislature.

D) 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, (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.¹⁰ 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. As you would note from 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 (which if translated in English, would mean 'this for that'). 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 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.

EINTERNATIONAL PERSPECTIVE

[General Assembly Resolution 48/104](#) on the Declaration on the Elimination of Violence Against Women defines violence against women to include sexual harassment, which is prohibited at work, in educational institutions, and elsewhere (Art. 2(b)), and encourages development of penal, civil or other administrative sanctions, as well as preventative approaches to eliminate violence against women (Art. 4(d-f)). The [Convention on the Elimination of all Forms of Discrimination against Women](#) (CEDAW) directs States Parties to take appropriate measures to eliminate discrimination against women in all fields, specifically including equality under law, in governance and politics, the workplace, education, healthcare, and in other areas of public and social life. (Arts. 7-16). Moreover, the [Beijing Platform for Action](#), para. 178, recognizes sexual harassment as a form of violence against women and as a form of discrimination, and calls on multiple actors including government, employers, unions, and civil society to ensure that governments enact and enforce laws on sexual harassment and that employers develop anti-harassment policies and prevention strategies

International Labour Organisation

The ILO Committee of Experts on the Application of Conventions and Recommendations has confirmed that sexual harassment is a form of sex discrimination covered by the [Discrimination \(Employment and Occupation\) Convention \(No. 111\)](#) of 1958. The ILO’s [Indigenous and Tribal Peoples Convention \(No. 169\)](#) also specifically prohibits sexual harassment in the workplace.

FSEXUAL HARASSMENT EVALUATION IN INDIA

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 (“Supreme Court”) in its landmark judgment of Vishaka v. State of Rajasthan² (“Vishaka Judgment”), 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.

Vishaka vs State of Rajasthan (1997)

- Vishaka Judgment is a historical case that deals with the offence of Sexual Harassment of women at her workplace. This [supreme court judgment](#) defined the ambit of Sexual Harassment as including an uninvited or unwelcome sexual favour or sexual gestures from one gender towards the other gender.
- working women in India, lawyers and women’s rights activists filed public interest litigation (PIL) in the Supreme Court under the banner of Vishaka. The Supreme Court, considering such grave concern, acknowledged the serious legislative shortcoming and acknowledged workplace sexual harassment as a human rights violation under the Constitution of India.
- “**Vishaka Guidelines**” were stipulated by the Supreme Court of India, in Vishaka and others v State of Rajasthan case in 1997, regarding sexual harassment at the workplace. The court stated that these guidelines were to be implemented until legislation is passed to deal with the issue.
- After the Supreme Court judgment in the case of Vishaka & vs State of Rajasthan (1997), the Ministry of Women and Child Development, after several years, passed the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (PoSH Act).

Provisions of the POSH Act

- The Act defines sexual harassment at the workplace and creates a mechanism for redressal of complaints and safeguards against false or malicious charges.
- Every employer is required to constitute an Internal Complaints Committee (ICC) at each office or branch with 10 or more employees.
- The Complaints Committees have the powers of civil courts and are required to provide for conciliation before initiating an inquiry if requested by the complainant.
- Penalties have been prescribed for employers for non-compliance with the provisions of the Act.
- The State Government will notify the District Officer in every district, who will constitute a Local Complaints Committee (LCC) to enable women in the unorganized sector or small establishments to work in an environment free of sexual harassment

Constituting an ICC sends a powerful message that the company is completely committed to working towards women's safety. Nonetheless, it is important to note that constituting an ICC is a mandatory requirement under the PoSH Act and not abiding by the same can attract heavy fines including cancellation of license to conduct business operations.

Employer's Duties and Obligations

To requiring an employer to set up an IC and ensure redressal of grievances of workplace harassment in a time bound manner, the POSH Act casts certain other obligations upon an employer which includes:

- a. Promoting a gender sensitive workplace and removing the underlying factors that contribute towards creating a hostile working environment against women;
- b. provide a safe working environment;
- c. formulate and widely disseminate an internal policy or charter or resolution or declaration for prohibition, prevention and redressal of sexual harassment at the workplace;
- d. display conspicuously at the workplace, the penal consequences of indulging in acts that may constitute sexual harassment and the composition of the IC;
- e. declare the names and contact details of all members of the IC;
- f. organize workshops and awareness programmes at regular intervals for sensitizing employees on

the issues and implications of workplace sexual harassment and organizing orientation programmes for members of the IC;

- g. provide necessary facilities to the IC for dealing with the complaint and conducting an inquiry;
- h. cause to initiate action, under the Indian Penal Code, 1860 (“IPC”) or any other law in force, against the perpetrator, or if the aggrieved woman so desires, where the perpetrator is not an employee, in the workplace at which the incident of sexual harassment took place;
- i. provide assistance to the aggrieved woman if she so chooses to file a complaint in relation to the offence under the IPC or any other law for the time being in force;
- j. treat sexual harassment as a misconduct under the service rules and initiate action for misconduct;
- k. prepare an annual report with details on the number of cases filed and their disposal and submit the same to the District Officer;
- l. monitor the timely submission of reports by the IC.

G) MECHANISM ADMINSTRATED ON SEXUAL HARASSMENT AT WORKPLACE

1. J.S Verma Committee on sexual harassment at workplace, 2012

The Justice JS Verma committee was set up after the [Nirbhaya incident](#) of December 2012 and submitted its recommendations on strengthening the laws to curb crimes against women.

Recommendations of the panel were:

- The Committee had recommended setting up of an employment tribunal instead of an internal complaints committee (ICC) in the Sexual Harassment at the Workplace Act.
- The committee proposed that the tribunal should not function as a civil court but may choose its procedure to deal with each complaint to ensure faster disposal of cases.
- Internal complaints could be more counterproductive as dealing with such complaints in-house could discourage women from filing complaints.
- Domestic workers should be included within the purview of the Act.

- The Committee has termed the Sexual Harassment Act unsatisfactory and not reflecting the spirit of the Vishakha guidelines framed by the Supreme Court in 1997 to curb sexual harassment at the workplace.
- The Committee said any unwelcome behaviour should be seen from the subjective perception of the complainant, thus broadening the scope of the definition of sexual harassment.
- The panel said an employer should be held liable if
 1. he or she facilitated sexual harassment
 2. permitted an environment where sexual misconduct becomes widespread and systematic
 3. Where the employer fails to disclose the company's policy on sexual harassment and ways in which workers can file a complaint
 4. When the employer fails to forward a complaint to the tribunal
 5. The company would also be liable to pay compensation to the complainant
- The panel opposed penalizing women for false complaints as it can potentially nullify the objective of the law.
- The panel also said that the time limit of three months to file a complaint should be done away with and a complainant should not be transferred without her consent.

Sexual Harassment Committee - Time for a Change

➤ Om Kumar v Union of India

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.

Internal Complaints Committee (ICC) - Women

Constitution of ICC-SHW for considering complaints of sexual harassment of women employees at DST

In compliance with the instructions of National Commission for women and guidelines issued in implementation of the directives of Hon'ble Supreme Court Judgement dated 13th August, 1997 in the case of Visakha and others vs. State of Rajasthan and Others on the subject of sexual harassment of women in the workplace, this Department had duly constituted a Complaint Committee for considering complaints of sexual harassment of women working in the Department of Science and Technology. The composition of the Complaints Committee was revised subsequent to transfer etc. of the existing Chairperson/Member. This Committee in the Department has now been re-constituted on 12th July, 2017 for considering complaints of sexual harassment of women employees.

2. Changes in Conduct of Inquiry

In *Sibu v. Air India Limited*, ((2016) 2 KLJ 434) was held that the inquiry as per the POSH Act is not a preliminary inquiry but instead a fullfledged enquiry, which needs to be done in the same manner as is done to prove misconduct in disciplinary proceedings. The court mandated the IC to follow principles of natural justice and give fair opportunity to the respondent to defend himself. The Delhi High Court pointed out in *Gaurav Jain v. Hindustan Latex Family Planning Promotion Trust and Ors.* (2015 SCC OnLine Del 11026) that strict rules of evidence are not required to be followed in inquiry proceedings and that the IC can adopt its own procedure in conformity with the principles of natural justice and especially in a case of sexual harassment. In another matter before Rajasthan High Court (*Shital Prasad Sharma v. State of Rajasthan and Ors.* (2018 SCC OnLine Raj 1676), it was observed that the POSH Act and the rules enable a three-member team to conduct the inquiry so long as the Presiding Officer is present. Therefore, the inquiry report does not stand vitiated unless it is shown that there were less than 3 members who conducted the inquiry

- It is pertinent to note that the courts are recognizing and upholding the powers to the IC as provided by law. Accordingly, employers and their ICs need to ensure that the proceedings are conducted in a fair manner and in compliance with the law and the principles of natural justice.

- Sexual harassment allegations in the workplace not only run the risk of loss of employer's reputation but also lead to legal troubles. Needless to mention, sexual harassment at workplace continues to remain one of the most sensitive issues that needs to be dealt with immense care and sensitively. As opined by the Bombay High Court, employers need to genuinely be concerned with the safety of women at workplace rather than staging a farce of compliance under the POSH Act.
- It is also important for employers to regularly train their IC members on the nuances of the POSH Act and investigation formalities. In order to keep litigation at bay, a comprehensive understanding of the interpretation being adopted by courts in India and the ability to look at things from the lens of the judiciary, is necessary.
- While employers have in general been following the process of educating/training their IC members on the POSH Act, as a next step, the IC members should be kept abreast of the latest judicial interpretations, so as to avoid any potential mistakes which could end up creating litigation and reputational risks for the employer.

3. SHE-BOX

The Ministry of Women and Child Development has launched "SHe-Box", an online platform for reporting complaints of sexual harassment arising at the workplace. § The SHe-Box facility can be used by both government and private sector employees. § Complaints received on SHe-Box shall be directed by the government to the employer's ICC or LCC. § Progress of the investigation can be monitored by both the complainant and the Ministry of Women and Child Development.

4. GRIEVANCE REDRESSAL UNDER THE ANTIHARASSMENT LAW

As per the Anti-Harassment Law, every employer employing at least 10 employees is required to set up an ICC at each office or branch to investigate and redress sexual harassment grievances. The government is also required to set up a LCC in every district to deal with complaints of sexual harassment arising from the unorganized sector or from establishments where the ICC has not been constituted (on account of the establishment having less than 10 employees) or if the complaint is against the employer. The law imposes a penalty of upto Rs. 50,000 (approx. USD 775) on employers who do not implement the provisions of the Anti-Harassment Law including failure to constitute an ICC.

H) Conclusion:

The POSH Act being a relatively new labour law in India, these judgements analysing various intricate aspects under the POSH Act helps provide better clarity not just for the employer and the IC members, but also for the public at large. The introduction of SHe-Box is a positive step of the Indian government in its continuing efforts to provide a safe and fair working environment for women. With this initiative, female employees now have another channel to raise workplace sexual harassment complaints. In spite of the enactment of the Anti-Harassment Law in 2013, the WCD has been receiving sexual harassment complaints.⁴⁶ This indicates that either there are employers that may not have a fully functional ICC or necessary awareness has not been created at the workplace. It could even be possible that female employees do not have enough confidence in their employer's internal complaint mechanism or that the investigation has been delayed. In the last couple of years, sexual harassment issues have been widely covered in the Indian media. Given the litigational and reputational risks associated with non-compliance of the Sexual Harassment Law, it is high time that employers take affirmative steps in implementing zero-tolerance policies towards sexual harassment at their workplaces and ensure that the complaint is investigated swiftly, comprehensively and confidentially

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