



Sexual Harassment of Women at Workplace

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INTRODUCTION

Sexual Harassment is an insidious problem that poses a serious impediment to society. Particularly, sexual harassment of women at their place of work is a deep-rooted problem which has severe negative repercussions on the productivity, performance, longevity of women in their careers and jobs. It can hinder the professional growth of women as it creates an environment which is not conducive for women to thrive and evolve in. The problem of sexual harassment of women at the workplace has been recognized by Courts and governments, in most countries across the world, and steps have been taken to ensure that there are adequate safeguards to protect women.

SEXUAL HARASSMENT OF WOMEN AT THE WORKPLACE AND THE LAW IN INDIA

In India, the problem has been attempted to be addressed by enacting the Sexual Harassment of Women at Workplace Act (Prevention, Prohibition, and Redressal) Act, 2013 (“The Act”), colloquially known as the “POSH Act”. The Act is to prevent and protect women against sexual harassment at workplace and provide a redressal mechanism to address complaints of sexual harassment or connected or incidental matters.

The Act is a product of the “Vishaka Guidelines” that were formulated by the Hon’ble Supreme Court of India (“The Supreme Court”) in the case of Vishaka vs State of Rajasthan ¹ (“Vishaka Case”). This case is monumental as it started a dialogue about the problems and perils that women face during the course of their employment or while trying to carry out their professional duties and steps that can be taken to rectify this problem. The Vishaka Case was brought in as a class action by certain NGOs to focus the attention towards preventing sexual harassment of working women in all workplaces through judicial process. In this case, a social worker, as part of her professional duties, attempted to stop a child marriage from taking place and was gangraped by members of a community as they viewed her intervention as an “assault” on their customs and traditions. The Supreme Court realised that the incident reveals the hazards to which working women may be exposed to and the depravity to which sexual harassment can degenerate and the urgency for safeguards by an alternate mechanism in the absence of the legislative measures and took the view that such incidents of sexual harassment are a violation of the fundamental rights under Article 14 ², 15 ³, 21 ⁴ of the Constitution of India and consequently a violation of the victim’s fundamental right under Article 19(1)(g) ⁵. The Supreme Court also focused on the contents of international conventions and norms such as the Convention on the Elimination of All Forms of Discrimination against Women and the Beijing Statement of Principles on the Independence of the Judiciary in the LAWSIA region, for the purpose of interpreting the aforementioned fundamental rights as the international conventions enlarge the meaning and content of these provisions and promote the object of the constitutional guarantee. Thereafter, the Supreme Court, under their power under Article 32 and consequentially Article 141 of the Constitution, guidelines and norms were laid down which were to be followed and observed at all workplaces or other

institutions until a legislation was enacted for the same purpose. The guidelines defined sexual harassment, mentioned preventive steps to be taken, stated the procedure of adopting a complaint mechanism and committee, amongst other crucial steps to be followed.

However, the guidelines were not promptly implemented and a legislation was enacted at an extremely belated stage and consequently the Supreme Court observed in the case of *Medha Kotwal Lele v Union of India* ⁶ that the directions are not supposed to be symbolic but must be followed. The Supreme Court directed States and Union Territories to carry out amendments in their respective Civil Services Conduct Rules, carry out amendments in the Industrial Employment (Standing Orders) Rules, form adequate number of Complaints Committees so as to ensure that they function at taluka level, district level and state level. Further, organisations such as The Bar Council of India shall ensure that all bar associations in the country and persons registered with the State Bar Councils follow the Vishaka guidelines and Medical Council of India, Council of Architecture, Institute of Chartered Accountants, Institute of Company Secretaries and other statutory Institutes shall ensure that the organisations, bodies, associations, institutions and persons registered/affiliated with them follow the guidelines laid down by Vishaka. Thereafter, in the *Seema Lepcha vs State of Sikkim* ⁷, the Supreme Court directed all States and Union Territories to publicise and broadcast the compliances and committees that they have formed. Further, the enactment of the Act was thoroughly belated and prolonged as it was enacted 16 years after the guidelines were formulated by the Supreme Court. The Act was also introduced in the Lok Sabha 10 (ten) years (in 2007) after the guidelines were formulated and was ultimately passed by the Rajya Sabha, after an amendment was introduced in 2012, only on 26.02.2013 and it was eventually enacted and in force on 22.05.2013.

It is pertinent to note that there also exists a penal provision for sexual harassment under the Indian Penal Code, 1860 (“IPC”). Section 345A contains the provisions of what constitutes as “sexual harassment” and the punishment for it as well. However, it is pertinent to note that this provision is not only restricted to those acts of harassment committed in the workplace and by invoking this provision for a case of sexual harassment at the workplace, it would take the form of a regular criminal complaint and the rules and provisions of the Act would not be applicable. However, a person can invoke Section 345A IPC and also file a complaint under the Act as both the remedies can co-exist in a parallel manner.

SALIENT FEATURES OF THE ACT

It is pertinent to note that the Act is a work in progress as its provisions are constantly being interpreted in order to give them a broad and liberal meaning, so that the actual spirit and intent of the Act is being fulfilled. Therefore, several definitions in the Act and in the guidelines are not solely restricted to the description given in the Act or the guidelines and their interpretation is constantly evolving and expanding.

What constitutes as sexual harassment

The Act states certain behaviour, act or circumstances ⁸ that may amount to sexual harassment. However, sexual harassment is not only restricted to such behaviour and through various case laws, the Courts have enlarged the definition of sexual harassment to give a broad and liberal interpretation to behaviour or acts that constitute as sexual harassment. In the case of *Apparel Export Promotion Council vs AK Chopra* ⁹, the Supreme Court held that sexual harassment is not just restricted to physical contact but 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, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee. Further, in the case of *Shanta Kumar vs Council of Scientific and Industrial Research & Ors* ¹⁰, the Delhi High Court held that even though physical contact or advances would constitute sexual harassment, such physical contact must be a part of the sexually determined behaviour and be in the context of a behaviour which is sexually oriented. Plainly, a mere accidental physical contact, even though unwelcome, would not amount to sexual harassment. Similarly, a physical contact which has no undertone of a sexual nature and is not occasioned by the gender of the complainant may not necessarily amount to sexual harassment. Therefore, the definition of sexual

harassment and what it constitutes is a grey and nebulous area, which is not static either; the definition and ambit is being constantly evolved and enhanced, in order to ensure that the actual spirit and intent of the Act is being fulfilled.

What constitutes as a “workplace”

Another important definition is that of “workplace”¹¹ which is not restricted solely to that mentioned in the provision and has been interpreted by Courts in order to ascribe a broader meaning to it. In the case of Saurabh Kumar Mallick v Comptroller and Auditor General of India and Anr¹², the Delhi High Court stated that a narrow and pedantic approach cannot be taken in defining the term ‘work place’ by confining the meaning to the commonly understood expression “office” that is a place where any person of the public could have access. Therefore, each incident of sexual harassment at the work place has to be considered in the facts and circumstances of that particular case and the definition of workplace cannot be generalized to include all residences within the meaning and ambit of work place, as it may lead to absurdity. Further, the test laid down to determine a particular place is work place or not (by the Tribunal in this case), is the proximity from the place of work, control of management over such place/residence where working woman is residing; and such a ‘residence’ has to be an extension or contiguous part of working place. At the same time, for proceeding against an employee in a departmental inquiry, a sweeping definition of ‘work place’ is not necessary where it is interpreted to include the conduct of an employee which would have no relation to work and private disputes are not to be included.

That one of the most crucial aspects of the act is the constitution of an Internal Complaints Committee (“ICC”) and consequently the guidelines for their functioning. The Act also provides for the constitution of a Local Complaints Committee which is a significant aspect of the Act. A Local Complaints Committee¹³ is one that is to be set up in every district to receive complaints of sexual harassment from establishments where the Internal Complaints Committee has not been set up or the complaint is against the employer. This provision of a Local Complaints Committee is extremely crucial as it provides a redressal mechanism to victims of sexual harassment in the absence of a redressal mechanism, i.e. the Internal Complaints Committee in their place of employment. This provision gives a redressal mechanism to those victims who are engaged in the “unorganised” sector such as agricultural workers, labourers, domestic workers, etc. A detailed analysis of the ICC and its mechanism is given subsequently in this article.

Statute of Limitation

It is pertinent to note that there does exist a period of limitation in filing a complaint. A victim can file a complaint only within a period of three months from the date of the last incident¹⁴. However, this period of three months can be extended to an additional period of three months if the Committee is satisfied that the circumstances were such that they prevented the victim to file the complaint¹⁵ and the same was held by the Delhi High Court in the case of Tejinder Kaur v Union of India¹⁶. Therefore, only in extraneous circumstances when a victim could not file a complaint within three months, would the maximum time limit of filing a complaint be that of 6 (six) months, albeit the discretion to extend the time limit lies with the Committee and the Committee can dismiss the extension request.

Conciliation and Inquiry

The Act also envisages that the Committees should attempt conciliatory methods to settle the matter between the concerned parties before proceeding with conducting an inquiry or investigation however no monetary settlement can be made as a basis to the conciliation¹⁷. Thereafter, in the event that the conciliatory proceedings fail, the Committee is to conduct an inquiry¹⁸. After this, an inquiry report is to be submitted to either the District Officer or the employer, depending on the Committee, within 10 days of inquiry, with either the fact that the allegations have not been proved or recommendations in the event that the allegations against the Respondent have been proved and the same has to be acted upon within a period of 60 (sixty) days from the date of receipt of the report¹⁹.

The Act also safeguards those who are a victim of false or malicious complaints by directing a punishment in accordance with the service rules applicable to the person or in a manner as may be prescribed ²⁰ and the recommendation will be made only after an inquiry is carried out. In the event that employers do not comply with the provisions of the Act, a fine which may extend to Rs.50,000/- shall be imposed on them ²¹.

WORKING AND MECHANISM OF THE INTERNAL COMPLAINTS COMMITTEE

Importance of a sound ICC

The ICC is the bedrock of this Act and the smooth and proper functioning of ICCs is extremely crucial to ensure that the intent and spirit of the Act is fulfilled. It is also important for the ICC to be constituted exactly in accordance with the Act as an improperly constituted and infirm ICC leads to their recommendations or decisions being vitiated and set aside by Courts. Further, a procedurally sound and fair or just composition of the ICC will attempt to ensure that a fair inquiry investigation is conducted, a proper and just recommendation or report is arrived and both, the victim and the Respondent, get the justice they deserve.

Further, a properly constituted ICC ensures that a tangible outcome is arrived at, and this is especially important in present day, as newer mediums of voicing one's "grievances" and alleged "redressal" are emerging such as narrating one's grievances on social media. This itself poses several problems, namely lack of accountability on part of the victim and lack of impact or retribution on the "perpetrator" and more often than not, does not bring any justice to the party who has been wronged. In order to curb this problem, ICCs must be constituted and strengthened in order to provide a proper and adequate redressal mechanism to victims of sexual harassment or to those who have been falsely accused of it.

Composition of an ICC

The ICC has to have a presiding officer who shall be a woman employed at a senior level or in the absence of a senior level employee, one who is from other offices or units of the workplace or in the absence of this as well, a senior level woman employee from any other workplace of the same employer or organization or department ²². It is pertinent to mention that there is nothing to the contrary to indicate that the "lady member" is to be senior in rank to the officer against whom the allegation of sexual harassment are brought and the same was held by the Allahabad High Court in the case of Shobha Goswami v State of Rajasthan ²³. Further, there have to be two other members in the ICC who are employees who are preferably either committed to the cause of women or who have experience in social work or legal knowledge ²⁴. Further, one member of the ICC has to be a person from an NGO or associations committed to the cause of women or who is familiar with issues of sexual harassment ²⁵. This provision of an "external member" is important and an ICC must adhere to appointing an external member in consonance with this provision as the report or the ICC can be vitiated and invalid if the appointment and qualification of the external member is not in conformity with the requisite provision. The Bombay High Court held in the case of Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University, Bombay High Court ²⁶ that the ICC without the presence of an external member (either dedicated to the cause of women or having experience in social work or have legal knowledge related to sexual harassment) would be illegal and contrary to the provisions of the Act. Further, In the case of Ruchika Singh Chhabra v M/S Air France India & Ors. ²⁷, the Delhi High Court invalidated the report of the ICC and set it aside as the external member was not associated with a non-governmental organization and his qualifications have not been informed to the complainant.

Further, the Court stated that the external member is not protected under Rule 4 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rule, 2013 ("Rules 2013") as they only apply District Committee under Section 7 because the constitution of district committees already includes independent members and not to ICCs. Further, all ICCs have to have at least one-half (50%) of their members as women. The tenure of all the members of the ICC is three years and any vacancy should be filled expeditiously. Also, a proper ICC is that it cannot have less than 3 (three) members and if there are less than three members, then the recommendation of the ICC is liable to be vitiated.

Composition of a Local Complaints Committee

The Local Complaints Committee is to have a composition in which the Chairperson must be a woman who is an eminent in the field of social work and committed to the cause of women, one woman member who is a woman working in the block, taluka, tehsil or ward or municipality in the district ²⁸. Further, two other members must be nominated out of which atleast one is from an NGO or association committed towards cause of women or person familiar with issues of sexual harassment ²⁹. Further, out of these nominees, atleast one must have a background in law or legal knowledge and atleast one shall belong to Scheduled Castes or Scheduled Tribes of Other Backward Classes or minority communities as notified ³⁰. The tenure of the members is three years ³¹.

It is also pertinent and crucial to note that the proceedings of the ICC shall not be published, communicated or made known to the public, press and media ³² and in the event that this is contravened, the person who does so shall be liable for penalty in accordance with the service rules or in the absence of such, in any manner as may be prescribed ³³.

ICC and the Principles of Natural Justice

During the inquiry process, an ICC or Local Complaints Committee is vested with the same powers as that of a civil court under the Code of Civil Procedure, 1908 in terms of summoning and enforcing attendance of any person and examine him under oath, discovery and production of documents or in any other manner as may be prescribed ³⁴. The inquiry process has to be completed within a period of 90 (ninety) days, as the provision for this in the Act is a mandatory provision ³⁵. The inquiry process must be in accordance to the service rules applicable or in any other manner as may be prescribed. Further, the enquiry conducted by the ICC should be a full-fledged inquiry complying with the principles of natural justice, as stated in the case of M/S Air India Represented By Its Chairman and Managing Director and Others v L.S. Siblu and Others ³⁶ and also under Rule 7(4) of the Rules 2013. Further, in enquiry proceedings, strict rules of evidence are not required to be followed and the enquiry committee can adopt its own procedure in conformity with the principles of natural justice, as held by the Delhi High Court in the case of Gaurav Jain vs Hindustan Latex Family Planning Promotion Trust & Ors ³⁷. The principles of natural justice and rules in conformity with thus would include a sufficient and reasonable opportunity given to Respondent (accused) to respond to the allegations made against him ³⁸, amongst other various principles of natural justice.

Often decisions or recommendations of an ICC is challenged in a Court on the grounds of bias in the proceedings or in the composition of the Committee. This problem and issue of bias in the ICC inquiry and report has been adequately addressed by various courts. In the case of Somaya Gupta v Jawaharlal Nehru University and Anr. ³⁹, the Delhi High Court held that a real likelihood of bias must be established and a mere apprehension in the Petitioner's (victim) mind would be insufficient for securing such relief. Further, since there was no allegation that any of the members of the ICC have any pecuniary or personal interest in the matter and no material on record which would even remotely lead to any suspicion that the members of the ICC have any personal interest that would conflict in their obligation to conduct an inquiry fairly and make a fair recommendation, is insufficient to doubt the integrity or ability of the ICC to render an unbiased opinion ⁴⁰. In the case of U.S. Verma, Principal, DPS & Anr. vs. National Commission for Women & Ors, ⁴¹ the Delhi High Court held that an elementary principle of natural justice is that the administrative authority should be free from bias. Bias or impartiality is fairly easy to comprehend however there frequently are situations when the dividing line between what is acceptable, and what is not, is not a bright one. On such occasions, Courts have chosen to follow the "reasonable likelihood" of bias standard, which has now been reiterated as a "strong suspicion" of bias standard and this, coupled with the sound aphorism that not only impartiality, but the appearance of impartiality, should be the guiding standard, is the criterion which Courts ordinarily follow ⁴². In the case of Vidya Akhawe v Union of India & Ors. ⁴³, the Bombay High Court held that the Court will be slow in interfering with the punishment imposed by the Disciplinary Authority if the Court does not conclude that the penalty imposed is shockingly disproportionate to the misconduct committed by the employee. Therefore, allegations of bias and unfairness and absence of adherence of the principles of natural justice have to be reasonable, strong,

likely and have to be adequately established by the person alleging it in order to a Court to vitiate the proceedings of the ICC on grounds of bias.

INTERNAL COMPLAINTS COMMITTEE AND EDUCATIONAL INSTITUTIONS

Educational institutions, such as school, colleges, universities also come under the purview of the Act and therefore are obligated to set up an ICC in their respective institutions. In schools, all employees, teachers and non-teaching staff, are covered under the provisions of the Act since schools are within the definition of “workplace”. It is however pertinent to note that in schools, the Act only covers the employees and not the students, since the students are under the age of 18 years old and therefore any instance of sexual harassment or violation will attract the provisions of the Protection of Children From Sexual Offences Act, 2009.

The Government of NCT Of Delhi vide notification number “NO.F.DE.15/Act-I/VishakhaGuidelines/2014/25342-47”, dated 28.07.2014, directed all schools to observe guidelines to protect women from sexual harassment at workplace and directed all schools, including private unaided registered school to form an ICC to serve as a redressal mechanism. Notwithstanding these regulations and guidelines, in the event that a school, day care centre, nursery or creche does not have a duly constituted ICC, then the aggrieved woman can file a complaint with the Local Complaints Committee.

Universities and colleges too fall under the purview of the Act. The University Grants Commission (“UGC”), vide letter dated 14.05.2019, bearing number DO. Ni. F. 91-3/2014(GS)Pt. 1, addressed to the Vice-Chancellors of all Universities, directing them to ensure that an ICC and Special Cell is constituted in their institutions to deal with issues of gender based violence. Further, the UGC has formulated the University Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in High Educational Institutions) Regulations, 2015 which applies to all higher educational institutions in India. Under these regulations, the provisions of the Act are extended to higher educational institutions and campuses in India. These regulations direct that an ICC be set up in all universities and direct that the composition of the ICC differ in the event that the matter involves students⁴⁴. Further, the regulations explicitly forbade senior administrative post holders such as the vice-chancellor, pro-vice Chancellor, Deans, Registrar, etc. from being members of the ICC⁴⁵. The process of inquiry of the ICC is similar to that in the Act. However, the punishment is slightly different and differs when the offender is an employee or a student⁴⁶. These regulations are important as they ensure that the provisions of the Act are being implemented and that students and employees in higher educational institutions have an adequate redressal mechanism.

APPELLATE REDRESSAL MECHANISM

Any person who is aggrieved by the recommendations made by the ICC and the Local Complaints Committee, may prefer an appeal to the Court or tribunal in accordance with the provisions of the service rules or in the absence of service rules, any such manner as may be prescribed, within a period of ninety days since the recommendations⁴⁷. Further, under the Rules 2013, a person may prefer an appeal to the appellate authority notified under Section 2(a) of the Industrial Employment (Standing Orders) Act, 1946⁴⁸. However, the problem arises when the appellate authority has not been set up, particularly given the fact that Courts do not function as an appellate authority of ICC decisions. The absence of an appellate authority is detrimental and negates the very purpose of the Act as an aggrieved person is denied an appellate redressal forum in the face of an infirm and disproportionate verdict. It is crucial that a strong appellate authority is set up in, especially in the absence of service rules, so that an aggrieved person has the option and legal remedy to approach an appellate authority, in order to rectify any infirmity in the recommendation of the ICC, so that the purpose and spirit of the Act are intact and fulfilled.

SEXUAL HARASSMENT ELECTRONIC BOX (SHE-BOX)

The concept of Sexual Harassment Electronic Box or “She-Box” has been developed by the Government of India. It is an online platform which is available on the website of the Ministry of Women and Child

Development. The She-Box was developed to ensure that the Act is effectively implemented. It provides a compliant redressal mechanism to all woman working either in the organised or unorganised, private or public sector and who have faced instances of sexual harassment at their respective workplace ⁴⁹. Any woman facing sexual harassment at workplace can register their complaint through this portal and the complaint is thereafter directly sent to the concerned authority having jurisdiction to take action into the matter, such as the ICC of the organisation ⁵⁰. This is an important development as it provides an accessible redressal mechanism to women who are victims of sexual harassment at their workplace.

CONCLUSION

The enactment of the Act, albeit thoroughly belated, has been a crucial step towards combating the menace of sexual harassment at the workplace. The Act provides for a redressal mechanism in order to ensure a fair inquiry and consequentially a just and reasonable recommendation, so that the aggrieved person gets the justice they deserve. The Act is a work in progress and its provisions are constantly being interpreted in a liberal manner by Courts, in order to broaden the purview and ambit of these provisions, so that the true intent of the Act is fulfilled. All workplaces must adhere to the provisions of the Act and ensure that the spirit of the Act is fulfilled. In order to ensure this is done, the penalty of non-compliance should be enhanced to serve as a reasonable deterrence to employers who do not comply with the Act, especially in setting up a procedurally sound and fair ICC. It should also be clarified as to who the fine is paid to, as the Act is silent on it. Further, employees should ensure that an inquiry is carried out as expeditiously as possible and definitely within the period of 90 days, in order to prevent prolonged mental agony to both the parties.

Further, the Act is one that is intended to address and the rectify the problem of sexual harassment at the workplace faced by women and some lacunae in the Act are still prevalent. For example, the Act can also be misused, in the form of a false, vengeful and frivolous complaint filed by a person. In order to ensure that the Act is not misused and abused and that its true intent is intact, the provision regarding penalty and punishment for false or malicious complaint (Section 14 of the Ac) must be clarified and employers should lay down in detail the penalty and punishment for filing false complaints in the absence of any service rules. Further, the limitation period of filing a complaint of 3 months should be enhanced to a significantly larger time period, as such incidents can have serious and negative repercussions of the mental, emotional, physical well-being of a person and person may lack the courage, strength and mental bandwidth to come forward to file a complaint within a period as short as three months from the time when the incident occurred.

The Act is intended to create a safe space for women to thrive and work in and therefore all possible efforts should be made by all stakeholders in ensuring that the ideals and intent of the Act are upheld. Employees should conduct workshops and seminars regularly to acquaint employers with the provisions of the Act and sensitise them about gender and sexuality, in order to create awareness about the problems and perils of sexual harassment. Further, in a broader sense, conversations and dialogues should take place, starting from in schools, in order to create awareness about gender and diversity and consequential to reduce gender based discrimination and stereotypes that are often developed at a young age. By doing thus, the seeds of creating an environment where women can be safe and can thrive and grow in are sown at an early stage.