

Overview of Law Relating To Sexual Harassment at Workplace

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Abstract

Sexual harassment constitutes a gross violation of women's right to equality and dignity. It has its roots in patriarchy and its attendant perception that men are superior to women and that some forms of violence against women are acceptable. One of these is workplace sexual harassment, which views various forms of such harassment, as harmless and trivial. Often, it is excused as 'natural' male behaviour or 'harmless flirtation' which women enjoy. Contrary to these perceptions, it causes serious harm and is also a strong manifestation of sex discrimination at the workplace. Not only is it an infringement of the fundamental rights of a woman, under Article 19 (1) (g) of the Constitution of India "to practice any profession or to carry out any occupation, trade or business"; it erodes equality and puts the dignity and the physical and psychological well-being of workers at risk. This leads to poor productivity and a negative impact on lives and livelihoods. To further compound the matter, deep-rooted socio-cultural behavioural patterns, which create a gender hierarchy, tend to place responsibility on the victim, thereby increasing inequality in the workplace and in the society at large.

Keywords: Sexual Harassment, work, place

Introduction:

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was enacted to ensure safe working spaces for women and to build enabling work environments that respect women's right to equality of status and opportunity. An effective implementation of the Act will contribute to the realization of their right to gender equality, life and liberty, equality in working conditions everywhere. The sense of security at the workplace will improve women's participation in work, resulting in their economic empowerment and inclusive growth. The full scale of the problem is not known given the difficulties in documenting the experience of those who have experienced workplace sexual harassment. However, available studies on sexual harassment show that it is certainly prevalent in India today. This is why the legislation is an important step forward within the larger architecture of women's rights, as it tackles this issue to secure the rights of women workers across the country.

Gone are those days of rigid patriarchy where women were exposed to household work and not encouraged to earn a livelihood for their family. In the times of gender equality, even women are trying hard to achieve a successful career and pursue their dreams. Often, the male co-workers become sexual predators of their female colleagues and hence, such females are sexually harassed at workspace.

Sexual harassment is an odious crime. In India, a female gets sexually harassed every 12 minutes.[3] Sexual Harassment at workplace produces an unsafe milieu for women which encroaches their Fundamental Rights as preserved under Article 14, 15 & 21 of the Indian Constitution which provides for equality in status and opportunity and personal liberty. Sexual harassment not only hampers the physical aspect of a female but also damages her emotional and mental growth.

To check such practices at working environment and outfit a progressively protected condition for women, the MWCD enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (PoSH Act) which is formed on the Vishakha Guidelines as laid by the Apex Court in Vishakha & Others vs. State of Rajasthan[4] and Convention on Elimination of all Forms of Discriminations Against Women (CEDAW)[5].

(A) Historical Background

Women in India have been a prey of sexual harassment, however, there was no term, for example, sexual harassment, in our legal frame work. Since the 1980s, this crime had become a serious matter of concern as it jeopardised the safety and security of a women in her work environment. There were many organisations working for women's right which voiced in

opposition to sexual harassment at workplace. Organisations like Forum Against Oppression of Women (Mumbai), Baailancho Saad (Goa), etc. came forward and protested against SHW in forms of demonstrations, sit-ins and later on went to file PIL to amend age-old rape laws.[6]

There was not a specific criminal law on SHW at workplace. However, there were few protections provided by the IPC, 1860 under sections 294, 354 and 509 relating to obscene acts and songs, assault, criminal force and use of words and gestures outraging a woman's modesty. But interpretation whether it is sexual harassment or not in such sections was left at the discretion of the police officer.

Not only talking about the specific criminal law, every citizen of India has Fundamental Rights guaranteed under the Constitution. In this scenario they are Article 14, 15 and 21, if violated, aggrieved can directly move to the Supreme Court u/ Art. 32.

It was in 1990s, the atrocious gang rape of a social worker – Bhanwari Devi made hue and cry in the society. Bhanwari Devi worked with Rajasthan government and helped in Women's Development Programme by campaigning against the social ills such as child marriage, female foeticide, infanticide, hygiene and dowry. It was on 22nd September, 1992 when she was gangraped by men of Gujjar community who were belonged to the dominant caste group of the village. The 'patriarchs' raped her and attacked her husband both of who belonged to low caste because they were agitated by her attempting to put a stop to the marriage of a 9-months old baby which took place a few months earlier. "While Devi made her rape public, she was laid blame of lying. Even the police mocked her and did not take up the case seriously. The medical test was done 52 hours later and her bruises and scratches were not recorded neither her physical pain was taken into account. Accused men were arrested a year after the crime was committed. However, over the years of trial and change of judges, in November 1995, the accused were acquitted of rape and instead found guilty of lesser offences and imprisoned for 9 months." [7] The judgement [8] was immensely resented by the citizens of this nation and globally. It is said that the judgement was politically driven and did not follow the ideologies of natural justice.

The case was then backed by a Jaipur based NGO named Vishakha who filed a PIL in the Supreme Court of India demanding the workspaces necessarily be made safe for women and employer shall protect women employee at every step. [9]

Finally, in 1997, the Supreme Court defined "sexual harassment" and held that a woman has a fundamental right to work in an atmosphere free from "sexual harassment". It also laid down norms which made the head of the institution, whether public or private, responsible for scrutinising "sexual harassment" at workspace.

Based on this revolutionary judgement, 16 years later, the "SHW at Workplace (Prevention, Prohibition and Redressal) Act, 2013" was sanctioned by the MWCD.

(B) Position of Women in India

History has been evident that "behind every unbeaten man, there is a woman."

Evolution of position of women in India has been through its highs and lows. Dated back to the Vedic period, women have been worshipped as goddess in our culture, as goddess of wealth, learning and power. But the reality of Epic period has been a little different. Women were married off at an age where they didn't even have an idea of what nuptial was. They were not entertained to receive education. Birth of a female into a family was unwelcomed.

During the period of civilisation, a son was cherished more than a daughter, as daughter was considered to be a liability. She was married off at an early age. Widows were forced to die at their husband's cremation which was known as the practice of sati. It was considered that this practice of sati will take a woman to heaven.

But the medieval period is considered as a dark age for women in India. It is said that during this period women were considered as a property and that she had no will of her own. Foreign invaders were also one of the reasons in fall off of the freedom of women. As India was attacked by outsiders, they brought in their culture to India. For example, the Muslim conquerors accompanied with them the custom of polygamy in which a Muslim man was allowed to have up to four wives at a time. This practice was highly criticised. Women also

had to follow the 'purdah' ritual where they had to cover their body from head to toe. All of this left an impact on the freedom and movement of a female. Their families felt them as a burden which needed extra shield. Practice of jauhar was also seen in medieval times which was mass suicide of females.

Modern India witnessed many reforms in society which proved to be beneficial for upliftment of women as well. Purdah system was discontinued by Begum of Bhopal. Practice of sati was also eradicated by the social reformer. Sir Syed Ahmed Khan established the Mohommaden Anglo-Oriental College (now known as Aligarh Muslim University) to encourage education amongst the Muslim community. Widows were allowed to remarry too.

But women in contemporary India, although capable of climbing the ladder of success but is not encouraged by her orthodox family. Even she has all the fundamental rights as granted by the Constitution but yet she is not treated equally by her male peers. She is all the same considered as an insecurity by her family. Families of rural India still believe in dowry and are driven by the desire to marry off their daughters early so that they can be relieved off the burden. The woman of today, time and again, has to deal with dowry deaths, female foeticide, sexual harassment, infanticide etc. She is sexually harassed by eve teasers. Metropolitan city like New Delhi is considered to be highly unsafe for a female. The unfortunate Nirbhaya gang rape case was the highlight of 2013 which brought in many amendments in our criminal law. It is sad to say that something infelicitous had to happen to strengthen the laws which protect the females of the nation. The recent case of IAS Rani Nagar's resignation[10] due to "sexual harassment" at workplace also cites the example of how women are still oppressed in our society even being at such a high rank.

(C) Statistical Overview of India

Over the years, it is believed by 56% of the women that there has been an escalation in "sexual harassment" of women at workplace and 53% of them have been subject to sexual remarks by men.[11] According to annual reports by ComplyKaro Services, there was 14% increase in cases of "sexual harassment" in the fiscal year 2018. There was a total of 823 cases reported in 2018 against 722 in 2018 (data based on BSE 100 companies). The increase in the number of cases also show that there has been increment in the awareness amongst women related to "sexual harassment" at workplace. Another aspect to be consider is that there has been progress in women's representation in the companies which is at 33% currently.[12] According the MWCD, 513 complaints have been registered through online complaining portal SHe-Box out of which 203 cases have been disposed (2018).[13] A total number of 539, 570 and 965 complaints were registered in 2016, 2017 and 2018 respectively.[14] According to a report by Martha Farrell Foundation, 33% of the domestic workers faces "sexual harassment" between June 4, 2018 to June 10, 2018 in the National Capital Region.[15] The increased shift in number of complaints is also due to the #MeToo Movement.

(D) Global Statistical Overview

"Sexual harassment" which is an unwelcomed behaviour directly or indirectly by a male in form of sexual favours, showing pornography, making any physical touch or any sexually coloured remarks.

"Occurrences of "sexual harassment" are expanding exponentially, particularly in Asian nations, which have over a large portion of the total populace. In India, a lady is sexually harassed each 12 minutes. In China, 80% of working ladies experienced "sexual harassment" at some phase of their career. In Germany, a survey showed that 93% of working ladies were casualties of "sexual harassment" as of 1998. Approximately 6 of 10 nurses in Australia have encountered "sexual harassment". In Hong Kong most grievances got by the Equal Opportunities Commission (EOC) in some ongoing years were of "sexual harassment". In the United States over half of employed ladies had been sexually harassed. In Canada 51% of ladies revealed having encountered sexual violence at least once their lifetime and in Singapore practically half of the ladies have been casualties of "sexual harassment". The above insights certify that sexual harassment is a worldwide issue." [16]

Vishakha judgement

“Country and Nation which do not respect women have never become great nor will ever be in Future”
– **Swamy Vivekananda**

“Sexual harassment”, a societal issue, has been prevalent in our society since ages, be it in the form of gender discrimination. The Constitution also provides for elimination of this gender bias under Article 14 and 15 and also emphasises on the most important fundamental rights, i.e., Right to life and personal liberty – Article 21.

“Sexual harassment” at workplace in India was reckoned by the Supreme Court in the case of **Vishakha vs. State of Rajasthan**[17]. The incident which took place in the Bhanwari Devi[18] case violates Article 19(1)(g)[19] along with Article 14, 15 and 21. Such violation calls for remedy under Article 32 of the Constitution. The class action was sought by certain activists and NGOs under the banner of Vishakha by filing a writ petition.

The Apex Court acknowledged that there was need of urgency in laying down guidelines to fill the vacuum of legislative inadequacy and provide remedy for “sexual harassment” at workplace which is an infringement of the fundamental right.

The Supreme Court also alluded to various provisions of the Constitution which visualised judicial intrusion necessary for destruction of this social crime. It referred to:

- 15 which prohibits discrimination on grounds of religion, race, caste, sex or place of birth.
- 42 which is a provision for just and humane conditions of work and maternity relief.
- 51 which provides for promotion of international peace and security.
- 51A which is a fundamental duty of every citizen to abide by the Constitution and promote harmony.

“Placing reliance in the international convention UNCEDAW which was signed and ratified by the Indian government, the Vishakha Guidelines were formed and had the effect of law until the legislative framework was drawn by virtue of Art. 253 read with Entry 14 of the Seventh Schedule.”[20]

The norms laid down by the Supreme Court were mandatory for both government and private institutions and are as follows:

- It shall be the obligation of the employer and other head of institution to prevent the commission of acts of “sexual harassment” and provide the process for resolution, settlement or prosecution of such acts and take all the steps required.
- For such purpose, the terminology “sexual harassment” includes such unwelcome sexually determined behaviour (whether directly or by implication) as:
 1. Physical contact and advances;
 2. a demand or request for sexual favours;
 3. sexually coloured remarks;
 4. showing pornography;
 5. any other unwelcome physical, verbal or non – verbal conduct of sexual nature.
- All persons or employers in charge of workplace (whether public or private) should take appropriate preventive steps.
- Where such conduct of a person implies an offence under the IPC, 1860 or under any other law, the employer shall take steps and make complaint to the apt authority. The victims and witnesses shall not be victimized.
- Where such conduct of a person amounts to misconduct in the employment as mentioned under the service rule, the employer shall initiate an apt disciplinary action according to the rules.
- There shall be establishment of appropriate complaint mechanism in the employer’s company so as to redress the complaints of the victim. There should be assurance of time bound treatment by such mechanisms.
- Such complaint mechanisms shall provide for a Complaints Committee, a special counsellor who shall maintain the confidentiality. Such committee shall have women on board as members, such shall be half in number at least. There shall be involvement of third party like NGOs which have sufficient knowledge and awareness about “sexual

harassment". The complaints which are redressed shall be cited in the annual report which will be submitted to the appropriate government authority concerned.

- Employees should be allowed to raise problems and questions regarding "sexual harassment" at appropriate forum and such questions shall be deliberated in the Employer-Employee meetings.
- Female employees shall be made aware of their rights in this regard by notifying the guidelines.
- Where "sexual harassment" is a result of the act or omission by any third party, the employer or person in charge shall be responsible for taking all the necessary steps and shall extend support to the victim.
- The government shall consider taking all the necessary steps to ensure that all the guidelines mentioned herein are taken into account by private sector organisation.
- Guidelines mentioned herein shall not prejudice any rights mentioned under the "Protection of Human Rights Act, 1993".

The guidelines laid are a step towards establishing gender fairness for working women and thus the petition was disposed of.

Post Vishakha Judgement:

After the Vishakha Judgement, several judgments have been passed that stresses on the requirement for a far-reaching law on "sexual harassment" at workplace.

- Apparel Export Promotion Council vs. A K Chopra[21]
The Supreme Court restated the law that was dictated in the Vishakha Judgement and endorsed the firing of the superior officer of the Apparel Council. It also ruled that physical exchange was not necessary to amount the act as one of "sexual harassment". It also highlighted that "sexual harassment" is a form of gender-based discrimination.
- Medha Kotwal Lele & Ors. vs. Union of India & Ors.[22]
Hon'ble Supreme Court took cognizance on the letter submitted by Dr. Medha and converted it into a writ petition. The Court checked the implementation of the Vishakha Guidelines across the nation by directing State Governments to file affidavits which tells about the steps the government is taking to implement the Vishakha Guidelines. Not being content how the Guidelines were implemented, the Court asked the States to put in place suitable mechanism which can ensure such implementation successfully. The Supreme Court affirmed that if there was non-compliance and non-adherence from the guidelines, it would be open to the aggrieved citizen to move to the High Courts of the respective states. Some amendments also took place in the IPC, 1860 post Nirbhaya Rape Case in 2013 in Section 354A[23], 354B[24], 354C[25], 354D[26]

Sexual harassment at workplace

"We do not want to use the term 'harassment.' What is happening today is sexual terrorism."[27]

"Sexual harassment" is evident in almost all the cultures. It is perceivable in both organised and unorganised sector. But, the intensity of the term "sexual harassment" may vary from culture to culture. In a layman's language we can define "sexual harassment" as a sexually oriented conduct which is unwelcomed by a person which interferes with one's dignity. "Sexual harassment" at workspace maybe summarised as any sexual conduct unwelcomed by a person which hampers their ability to perform better or which adversely affects their work outcome, whether physical or verbal.

Catherine Mackinnon (1979) describes sexual harassment as an "unwanted imposition of sexual requirements in the context of relationship of unequal power".[28]

In a "Canadian case David Dotchin v. Saskatchewan (Workers' Compensation Board)"[29], Justice Malone held that plaintiff's conduct which involves leering, looking at the bodies of female employees also amounts to "sexual harassment".

"Sexual harassment" can be understood as any sexual conduct, remark or physical touch by a male colleague against their female colleagues at any workplace.

The International Labour Organisation defines “sexual harassment” as a sexual behaviour that is unwelcome and offensive to the recipient. It also says that to constitute sexual harassment these two conditions must be present.

The ILO also describes two forms of “sexual harassment”:

1. Quid Pro Quo: Literally translates to ‘this for that’. In this scenario, the victim is offered any work-related advantage in exchange of sexual favours. For example, promotion, raise in pay, continuation of employment, etc.
2. Hostile work environment: In this scenario, the employee is subjected to sexual remarks, unwelcomed sexual behaviour or conduct. In these situations, the person in charge neither takes it into account nor discourage such unjustified, unlawful behaviour. Such conditions make the environment hostile for women.

‘Quid Pro Quo’ sexual harassment and ‘Hostile Work Environment’ sexual harassment are recognised under Section 3 (2) of the PoSH Act.[30]

The UNCEDAW in its General Recommendation Number 19 said that “sexual harassment” is a gender-based violence. It is gender-based because it is directed against women.

The definitions laid down by the Supreme Court in the Vishakha Judgement and in the “Apparel Export Promotion Council v. A K Chopra”[31] basically summed up that “sexual harassment” is a sexually coloured behaviour by male colleague which is uncalled for by her female employer shall constitute sexual harassment at workplace. Later on, these definitions became the foundation of the definition that is mentioned in the PoSH Act. Section 2(n) defines ‘sexual harassment’ as “sexual harassment includes any one or more of the following unwelcome acts or behaviour (whether directly or indirectly or by implication) namely –

1. physical contact or advances; or
2. a demand or request for sexual favour; or making sexually coloured remarks; or
3. showing pornography; or
4. any other unwelcome physical, verbal or non-verbal conduct of sexual nature;

With the Criminal Law (Amendment) Act, 2013 the term “sexual harassment” was defined under Section 345A of the IPC as “a man committing any of the following acts-

1. Physical contact and advances involving unwelcome and explicit sexual overtures; or
2. A demand or request for sexual favours; or
3. Showing pornography against the will of the woman; or
4. Making sexually coloured remarks, shall be guilty of the offence of sexual harassment.”

The ‘Handbook on Sexual Harassment’ published by the MWCD defines “sexual harassment” at workplace as “Sexual Harassment” includes anyone or more of the following unwelcome acts or behaviour (whether directly or by implication), namely:

1. Physical contact or advances;
2. A demand or request for sexual favours;
3. Making sexually coloured remarks;
4. Showing pornography;
5. Any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.

The handbook has also laid emphasis that “sexual harassment” need not be violent in nature in all circumstances. There are possibilities that it may start inoffensively but end up being inappropriate and unwelcomed. It also mentioned that “sexual harassment” is a subjective experience[32] and it is important to analyse the situation from plaintiff’s perspective.

While the international definitions of “sexual harassment” describe it as a gender bias and violence against women, the national laws focus more on the conduct aspect.

‘What is’ sexual harassment maybe defined by many organisations, institutions and individuals but what constitutes the sexual behaviour yet remains undetermined.

(A) Constitutional Safeguards Against SHW:

The founding fathers of the Constitution of Republic of India while framing the supreme law of land had a vision about the ubiquitous sexism (still present). Thus, to balance the dominance of males in our society, women were given certain extra privileges by our Constitution.

Preamble of the Constitution reads “equality of status and opportunity” but sexual harassment abrogates the object of the framers.

SHW results in violation of Article 14 & 15 which provides for gender equality and equal protection before law and prohibits gender-discrimination. Article 15(1) provides that State shall not discriminate on the grounds of race, caste, religion, sex and place of birth. But under Article 15(3) it also provides that ‘nothing in this Article shall prevent the state from making any special provision for women and children.’ Thus, this nullifies the effect of (1) and secures women a special status or reservation.

Article 19(1)(g) guarantees every individual the right ‘to practice any profession or to carry on any occupation, trade or business’. It is a woman’s fundamental right to work at any place she desires to but “sexual harassment” at workspace acts as a deterrent and stops them from enjoying their constitutional right. “Sexual harassment” at workplace alongside impacting a woman mentally, physically or socially also deteriorates her ability to perform and excel in her field which is an obstacle for her to earn livelihood.

Article 23 prohibits human trafficking and forced labour. It guarantees right against exploitation. Any breach under this Article shall be a punishable offence.

“Sexual harassment” at workplace also obstructs a woman her ‘right to life and personal liberty’ – Article 21. Right to livelihood which is a vital front of Article 21 is also restrained. It does not let her enjoys the safe environment of work which she is entitled to under this Article. In order to connote her fundamental right to live with dignity, “sexual harassment” needs to be eradicated from workplace.

Part IV of the Constitution[33] denotes that State should keep in mind the following principles while forming policies:

- Article 39A Equal justice and free legal aid
- Article 41 Right to work, to education and to public assistance in certain cases
- Article 42 Provisions for just and humane conditions of work and maternity relief
- Article 43 Living wage and decent standard of life of labourers

These directives shall be used to make, enforce and interpret the law.

Article 51A provides that every citizen should respect and abide by the Constitution and maintain harmony. If taken literally, derogatory practices against women must be curbed.

(B) Governmental Measures

GoI is taking steps to curb this male dominated practice of “sexual harassment” at workplace apart from ensuring the implementation of the ‘Anti-Harassment’ law passed in 2013.

To make sure that organisations obey the Act, all the ministries and government departments have been directed to establish the Internal Complaint Committee as specified in the Act. Workshops and conference are organised by the MWCD[34] with the help of the State Administrations. MWCD reviews the implementation of the Act from time to time. An Inter-Ministerial Committee is also constituted by MWCD to train the ICC which will be appointed under the Act.

In 2017, the MWCD launched an online complaint portal called Sexual Harassment electronic-Box (She-Box) for registering complaints related to “sexual harassment”. This system ensures effective implementation of PoSH Act. For speedier remedy, the registered complaints straight away goes to central and state authorities having jurisdiction to act. With the assistance of this portal, the ministry can also monitor the complaints.

“MWCD has also published a handbook on the PoSH Act, 2013 in order to provide and easy knowledge of the Act. It also organises capacity building programs like training, workshops, etc. on PoSH Act”.[35]

Owing to the #MeToo Movement of 2018, a Government of Ministers (GoM) was constituted by the govt. which is led by the Home Minister with Finance Minister, HRD Minister and WCD Minister on board as members. It was first constituted in 2018 and again reconstituted in 2018 after NDA government again came into power. This group was set up to examine the sexual harassment situation in the country and provide valuable recommendations to strengthen the framework of anti-harassment law.

An important recommendation submitted by the NCW to GoM was to increase the imprisonment from 1 year to 3 years, with or without fine. It also recommended to GoM that the step of conciliation must be let go as it creates a sense of pressure and awkwardness on the victim to withdraw the complaint. It tends to worsen the situation.[36]

GoM recommended that rape shall not be limited to penetration of vagina, mouth or anus only. It also recommended that any non-penetrative form sexual contact should be determined as sexual assault. Establishment of Employment Tribunal instead of ICC was also advised.[37] With top ministries being on board, this situation will certainly receive the deliberation it deserves.

(C) International Laws addressing SHW:

- “Convention on Elimination of all Forms of Discriminations against Women” (CEDAW)- It guides the State members to take fitting measures to remove forms of discriminations against the women in all arena of employment. (Article 11[38]) In its General Recommendation Number 19[39] UN Committee further made it clear that sexual harassment at workplace can prejudice ‘equality in employment’ for women if they continue being subjected to it.
- “Beijing Platform for Action”- Under Strategic objective ‘Eliminate occupational segregation and all forms of employment discrimination’, in para 178 reckons “sexual harassment” as a form of violence and discrimination against women and urges various authorities (government, employers, employees, trade union and women’s organisations) to ratify and apply laws which promotes the development of workplace police in order to eliminate “sexual harassment” and “gender discrimination” and development of preventive strategies.[40]
- “ILO Committee of Experts on the Application of Conventions and Recommendations”- “It has affirmed that sexual harassment is a form of sexual discrimination. The ILO’s Indigenous and Tribal Peoples Convention (No. 169) also specifically prohibits sexual harassment in the workplace.”[41]
- “International Covenant on Economic, Social and Cultural Rights”- Under Article 7 it recognises that women have a ‘right to work’ in fair conditions and must not be put to “sexual harassment” at workplace.

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