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SEXUAL HARASSMENT AT WORKPLACE (PREVENTION, PROHIBITION & REDRESSAL) ACT 2013: A LEGAL MIRAGE?

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Abstract

Women at large haven't really remained unemployed but mostly unpaid in the history. No woman has ever sat idle without contributing anything to the making of home or moulding of the society. Though, it's only in the last century that women have been given some representation in the workforce. The definition of employee evolved multifold when the idea of having women at work got acceptance. Almost decades later, after many, many tragic incidents of harassment of women at workplace, Vishaka's case in 1992 being the landmark, India got its first specific legislation to protect women from harassment at workplace (POSH Act) in 2013. The Preamble of the said Act highlighted that sexual harassment violates fundamental rights and it is a woman's right to work in a dignified environment, as emphasized in International Treaties especially CEDAW. Two decades of the 'Me Too' movement has had significant positive impact on working women's voice and agency throughout the world. However, the Act in question still finds its effective implementation in dark. Industries such as sports, films and healthcare, lack an environment to address the challenges that women face there. Lack of awareness, mental health of the victims, Quid pro quo sexual harassment, risk assessment, non-establishment of Internal Complaint Committee, who must be considered an employee, remains shortcomings of the Act. The paper shall highlight the implementation gap, challenges of the Act and propose robust mechanism for effective implementation of the Act, not just in letter but spirit.

Keywords: Sexual Harassment, Multi-Agency Risk Assessment, Constructive Discharge, Economic Disparity

INTRODUCTION

“The fundamental right to carry on any occupation, trade or profession depends on the availability of a “safe” working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and executive¹.”

This citation finds its place in the landmark judgment of Vishaka v. State of Rajasthan which was rendered around three decades back by the apex court. Although Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (Act hereinafter), in the year 2013 which came closely on the heels of this beacon, still, the above cited lines echoes loud in the society. In such a case, the logical inference is that something remains unrealized till date. Legislature and Executive are the two significant wings, upon whom these rays of hope had fallen decades back. However, the legislature seems to have fulfilled its duty, prima facie, by enacting the particular statute, though not going on merits of the same, but the other wing seems to have failed at a certain point of enforcement of the enacted piece, both in letter and in spirit.

With increase in number of female workforce in the country as women try to fight economic disparity with men, with proper acknowledgment and recognition of their rights, challenges such as this of sexual harassment at the very workplace also emerges and is rampant across all industries and spheres of society. This is the most glaring example of human rights violation, gender inequality and injustice²

Sexual harassment at workplace is as much serious as the sexual assault of a child at its own place of residing which, today has become the conventional wisdom that children are far more at risk of the same from their own household and extended family and the same is more serious as compared to an offence by a stranger since the victim continues to be in association with that person or place some way or the other.

¹Vishaka & Ors. v. State of Rajasthan & Ors., AIR 1997 SC 3011.

² Mamta Rao, Law Relating to Women & Children 213 (EBC 2022).

Throughout this paper, we will analyze certain spheres of workplaces which have vehemently failed to comply with the provisions of this act and the enforcement agencies have also reported their miserableness in the same.

LEGISLATIVE INTENT AND BACKGROUND

The Act of sexual harassment at workplace, not only causes a detrimental effect over the career of an individual drastically rather it brings serious health repercussions to the victim including both physical and mental health and if such an issue remains unsolved, it would not be wrong to say that the coming generations will not be able to achieve the dream of a developed state as the fear of an unsafe workplace would continuously be pulling them back to their comfort zone.

Over a period of time, our society has witnessed tragic occurrences across different workplaces including but not limited to healthcare, sports and film industry. The recent tragic incident at a public hospital in Kolkata has once again shaken the soul of the whole society and has raised many eyeballs towards the whole justice system along with law enforcement.

However, before adverting with individual analysis of these industries' compliance towards the laws against sexual harassment, it would be considered apposite to glance through the two significant definitions, i.e., 'Workplace' and 'aggrieved woman' as provided under the said act. "Workplace includes:

(i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a government company or a corporation or a co-operative society;

(ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service;

(iii) hospitals or nursing homes;

(iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;

(v) any place visited by the employee arising out of or during the course of employment including transportation by the employer for undertaking such journey;

(vi) a dwelling place or a house³;

“Aggrieved Woman means:

(i) in relation to a workplace, a woman, of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent;

(ii) in relation to dwelling place or house, a woman of any age who is employed in such a dwelling place or house⁴.”

Upon a careful perusal and analysis of the above stated definitions of ‘workplace’ and ‘aggrieved woman’ it can unequivocally be said that the term workplace has a wide connotation to include all types of industries and organizations including the three cited above and also irrespective of the fact that whether a woman is an employee or not⁵, she is protected under the act and rightful remedy is available against sexual harassment. This conclusion becomes stronger on the fact that this law protects even a visitor to a workplace for a temporary period of time.⁶

NON- COMPLIANCE AND ENFORCEMENT: WHY THE ACT IS FALLING SHORT?

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 is undoubtedly an appreciable work of the legislature, however even after a quarter of a century, its non-compliance and weak enforcement is much reported than matters per se.

³ The sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, § 2(o), No. 14, Acts of Parliament, 2013 (India).

⁴ *Id.* § 2 (a).

⁵ Statement of Object and Reasons, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

⁶ She-Box, https://shebox.wcd.gov.in/assets/uploaded_content/FAQs-_POSH_Act.pdf.

The act mandates for establishing Internal Complaints Committee⁷ and Local Complaints Committee⁸. Recent tragic incidents have revealed that a considerable number of employers especially in entertainment, healthcare and sports industry inter alia have not yet complied with the same and grievance redressal forum for the aggrieved persons there still remains a dream.

Having said so, it is for us to now examine certain instances of non-compliances across workplaces. The very recent incident at Kolkata's public hospital of brutal rape and murder of an on duty female doctor has shaken the soul of the society wherein it had also revealed the true picture of how even after decades of the law on sexual harassment and atrocities; this issue is unaddressed and unchecked. In another case, against one private hospital's senior level employee in marketing division, the hospital administration not only failed to address the issue but terminated the complainant herself, wherein the Hon'ble High Court of Madhya Pradesh imposed fine for not having constituted Internal Complaints Committee in accordance with the provisions of the act as well as directed, inter alia to compensate the complaint.⁹ Yet, another recent case against a Medical Superintendent of a Delhi Government Hospital which has even triggered a political row, the ironical fact of the matter is that the complainant herself was allegedly transferred to an unfavourable location with a junior post than what she was holding, this allegedly comes after upholding her complaint by the Internal Complaints Committee.¹⁰ Such incidents of non-compliance, further victimization upon reporting of the grievance, improper resolution are myriad in number across the healthcare industry.

Further comes the sports industry wherein, the regulatory authorities and organizations themselves have not yet complied with the requirements of the law. In a survey by a National daily newspaper, it was revealed that the majority of sports federations in India has not yet taken the required measures under the said act and has failed to comply with the same.¹¹ The apex court has also observed that it is disquieting to note that there are serious lapses in the

⁷The Sexual Harassment, *supra* note 3, § 4.

⁸The Sexual Harassment, *supra* note 3, § 6.

⁹Global Health Private Limited and Ors. v. Local Complaints Committee, District Indore and Ors. ILR 2019 MP 2482.

¹⁰The Indian Express, <https://indianexpress.com/article/cities/delhi/doctor-accuses-superior-at-delhi-govt-hospital-of-sexual-harassment-sparks-political-tussle-9617553/> (Last visited Dec. 16, 2024).

¹¹The Indian Express, <https://indianexpress.com/article/sports/not-just-wrestling-half-of-national-sports-federations-dont-have-sexual-harassment-panel-mandated-by-law-8590204/> (Last visited Dec. 16, 2024).

enforcement of the Act even after such a long passage of time. This glaring lacuna has been recently brought to the fore by a National daily newspaper that has conducted and published a survey of 30 national sports federations in the country and reported that 16 out of them have not constituted an ICC till date. Where the ICC have been found to be in place, they do not have the stipulated number of members or lack the mandatory external member. This is indeed a sorry state of affairs and reflects poorly on all the State functionaries, public authorities, private undertakings, organizations and institutions that are duty bound to implement the PoSH Act in letter and spirit.

The court further observed that being a victim of such a deplorable act not only dents the self-esteem of a woman, it also takes a toll on her emotional, mental and physical health. It is often seen that when women face sexual harassment at the workplace, they are reluctant to report such misconduct. Many of them even drop out from their job. One of the reasons for this reluctance to report is that there is an uncertainty about who to approach under the Act for redressal of their grievance. Another is the lack of confidence in the process and its outcome. This social malady needs urgent amelioration through robust and efficient implementation of the Act.¹²

However, National Human Rights Commission took cognizance of the matter and sought a report by issuing notices to the concerned federations upon the issue¹³, yet the fact of the matter remains that there are serious lacunae in enforcement of this act. The oversight committee which was constituted by the Indian Olympic Association, headed by boxer and former member of Rajya Sabha M.C. Mary Kom, had also flagged the absence of Internal Complaints Committees and also noted a complete lack of adequate mechanism for awareness-building among sportspersons for grievance redressal.¹⁴

Lastly, the film industry which has largely failed to adhere to and comply with the provisions of this act, alarming findings regarding the same in the Justice Hema Committee Report¹⁵ have left all the stakeholders in nothing but despair. The report revealed several grievous

¹² Aureliano Fernandes v. State of Goa & Ors., AIR 2023 SC 2485.

¹³ NHRC, <https://nhrc.nic.in/sites/default/files/2023-5-15.pdf>

¹⁴ NHRC, <https://nhrc.nic.in/sites/default/files/2023-5-15.pdf>

¹⁵ Justice Hema Committee Report, December 31, 2019

circumstances which the persons go through in their workplace in the industry, it did not only limit itself to women but men as well¹⁶ The gravest issue prevailing¹⁷ in this industry is the presence of severe sexual harassment which occurs even before the commencement of work at a particular workplace. The kind of demands and advances sought by the persons in authority, in our opinion, are the gravest violation of one's right to life and dignity, often termed as Casting Couch. The primary issue here is the fact that the same does not have any relation with workplace, per se as the same occurs much before the commencement of the work for a particular project. Not only this, failure to meet these demands brings serious adverse impact to the artists in their career. It pains our heart while writing that adjustment and compromise were the two repetitive terms¹⁸ in the statements of the witnesses who appeared and deposed before the committee, it shows as to how this exploitation has been normalized. This is nothing but a trade with the dignity of the young aspirants in the field. We fail to understand if the whole career of a female aspirant in the film industry is based upon adjustments and compromises. It happens at the very threshold, the gateway of the industry wherein the majority is forced to compromise at such a devastating situation. The gravity of the situation can be well understood with the perusal of such a statement in the report of the committee which was deposed by several witnesses, "Casting Couch makes jobs in the film industry different from other jobs. It was pointed out by various women in cinema that to get the job of teacher, doctor or the like, no demand is made for sex. It would be enough if a woman proves her ability by undergoing a test and appearing before an interview. But things are different in the film industry, it is stated¹⁹." This statement indubitably reveals the tragic experiences of females in this glamorous industry, the phrase hostile work environment as in the act, is too trivial to address this grave issue. The perpetrators are often influential which leaves the victim with no chances of this being reported. This is but one among innumerable such issues prevalent in the industry which results in the gravest violation of right to life and dignity. Considering such a grave situation rampant in the industry the committee thus observed that we have absolutely

¹⁶ Para 51, Report

¹⁷ Para 76, Report

¹⁸ Para 86, Report

¹⁹ Para 111, Report

no hesitation to state that there must be an independent forum which must be constituted by the government¹ as per a statute, to deal with the problem of women in cinema²⁰

EMERGING ISSUES & CHALLENGES: RISE IN QUID PRO QUO CASES

Sexual harassment of women at workplace is categorically violative of their right to life, liberty and gender equality. It brings an unsafe and hostile environment at the workplace which consequently discourages, not only the direct victim of the said harassment but also those who become acquainted with such incidence, i.e., the coming generations, from participating in work and further brings into halt their economic growth and liberty. In the recent times, there are certain other issues and challenges emerging which are more aggravating in nature viz quid pro quo sexual harassment and issue of constructive discharge, inter alia. Quid pro quo sexual harassment occurs when a beneficial condition of employment is premised upon an employee's submission to sexual advances²¹. This also unveils a distressing scenario of constructive discharge which is the direct and proximate effect of retaliatory actions against the aggrieved person, when there stands a denial to such sexual demands or advances by the victim who is, mostly a subordinate to the harasser. This, in our opinion is an egregious aspect of sexual harassment where such an hostile work environment is created upon failure to get the sexual advances and demands fulfilled. Though it reaches the threshold of sexual harassment at the very juncture when such demands or advances are sought per se, however, this retaliatory actions and quid pro quo element which draws the aggrieved person towards drastic steps like constructive discharge is an aggravating factor which adds insult to the injury and leaves a lasting impact in the mind of such aggrieved person. It undoubtedly takes them back to where they had started and at times far beyond that, which ultimately blows away the very movement against their economic disparity and freedom. It was also pointed out that there lacks a grievance redressal mechanism regarding the same and the need of a distinct law covering such issue expressly is required along with joint committees of various stakeholders including independent persons to address the issue. In *Women in Cinema Collective Vs. State of Kerala and Ors.*, which was sub-judice during the proceedings of Justice Hema Committee also addressed the issue and observed that so far as the film industry is concerned, the production

²⁰ Para 221, Report

²¹ S.L.Mukherjee, Sexual Harassment and Sexual Offences 242 (Lawmann 2018)

unit is the workplace of an individual film and therefore, each production unit would have to constitute an Internal Complaints Committee, which alone can deal with the harassment against the women in contemplation of the provisions of Act, 2013.²² The Court also observed that despite organizations having their own structure and mechanisms, where the number of persons employed is ten or more and females are employed, irrespective of the kind of organization, association or society, the employer is duty bound to constitute an Internal Complaints Committee. Further, it also held that there should exist an employer-employee relationship and workplace as defined to enable the employer to constitute such a committee. The need for a joint committee as discussed above was also felt by the Court.

REGULATION AND MITIGATION: FROM LEGISLATION TO ACTION

The issue of sexual harassment has a variety of fine connotations. Its evaluation may sometimes depend upon the sensitivity of the person concerned and also, whether the perception of the harassed individual was known to the one against whom the accusing finger is pointed.²³

The significant role towards the elimination of this issue is played by the perception of individuals. We all live in civilized society wherein rights are well-informed to the majority, if not all but there is a significant deficiency in the comprehension of duties attached to it. We, as a society must understand that the rights and duties go parallel, the perception of gender-bias, superiority of a particular community over the other, inter alia must feather away.

An integrated portal for the registration of employers and employees linked with all the stakeholders of state should be made which shall have true record of their status regarding complaints of sexual harassment against them, if any, pending and closed. Presence of the same should also be made a consideration for promotions and increments. This registration and disclosure should be made mandatory with regular updation with non-compliance being penalized. Provisions regarding mandatory undertaking for compliance of all provisions and policies of sexual harassment should be made part of appointment or offer letter of all the

²² Women in Cinema Collective v. State of Kerala and Ors., 2022 (2) KLJ 254.

²³ Additional District and Sessions Judge 'X' v. Registrar General, High Court of Madhya Pradesh and Ors., (2015) 4 SCC 91.

employees. Electronic monitoring and verification regarding any previous record of such nature against the employee must also be done before employment.

And, when this would be integrated with all the concerned departments and stakeholders, it would act as a Multi-Agency Risk Assessment²⁴ which shall act as an integrated screening database as any issue cannot be addressed until and unless it is properly identified and screened out. This should not be looked at as a mere bureaucratic necessity; rather all concerned must be proactive in bringing policies and addressing the issues at all levels along with wide publicity of the same.

CONCLUSION

Provisions regarding a distinct column in the workplace's website regarding such grievance's redressal along with all required details of policies, reporting mechanism, legal aid etc. which is linked to the SHe-Box, i.e., a state developed portal for reporting the case of sexual harassment and other government aid portals directly for the reporting should also be brought.

The States should also take proactive steps with the help of technology to monitor all such compliances regularly and annual reports of the same should not only be made public but discussed in the houses of legislature.

It is also disheartening to note that there is not much empirical evidence to show as to how many employers across different industries have failed to adhere to this law and actions taken against them, this may be made a part of our present databases and virtual records available in public domain. It has also been recommended by the Justice Verma Committee as well as Justice Hema Committee that there should be constituted a distinct tribunal to address the issues relating to sexual harassment at workplace, inter alia. The Verma Committee even observed that the present structure mandating Internal Complaints Committee to which any such complaint must be filed is counter-productive to the ends sought to be met. And it was also observed that the in-house dealing of all the grievances would dissuade women from filing complaints and may promote a culture of suppression of legitimate complaints in order to avoid the concerned establishment falling into disrepute. It also noted that the mandatory conciliation

²⁴ Terry Thomas, *Sex Crime Sex Offending and Society* 157 (Routledge 2016)

between the respondent and complainant is in violation of the mandate of Hon'ble Supreme Court's ruling in Vishakha v. State of Rajasthan & Ors. which directed the State to ensure a safe workplace for women. In matters of harassment and humiliation of women, an attempt to compromise the same is indeed yet another way in which the dignity of women is undermined. Additionally, once the inquiry under the act establishes the guilt of the respondent, filing of criminal complaint should be made mandatory in all cases as directed under the Vishakha guidelines by the apex court, and the same should not only be restrained to the cases before the Local Complaints Committee as this particular act is complementary to other available remedies against sexual harassment including criminal laws and not a substitute.

As the hon'ble Supreme Court observed that however salutary this enactment may be, it will never succeed in providing dignity and respect that women deserve at the workplace unless and until there is strict adherence to the enforcement regime and a proactive approach by all the State and non-State actors. If the working environment continues to remain hostile, insensitive and unresponsive to the needs of women employees, then the Act will remain an empty formality. If the authorities/management/employers cannot assure them a safe and secure workplace, they will fear stepping out of their homes to make a dignified living and exploit their talent and skills to the hilt. It is, therefore, time for the Union Government and the State Governments to take affirmative action and make sure that the altruistic object behind enacting the PoSH Act is achieved in real terms.