

SEXUAL HARASSMENT AT WORK PLACE: VISHAKA GUIDELINES

- Ashutosh Kumar Shukla*

“To call woman the weaker sex is a libel; it is man’s injustice to woman. If by strength is meant brute strength, then, indeed, is woman less brute than man. If by strength is meant moral power, then woman is immeasurably man’s superior.”

- M. K. Gandhi

INTRODUCTION

Sexual harassment is coercion of a sexual nature, or the unwelcome or inappropriate promise of rewards in exchange for sexual favors. Sexual harassment at work is an extension of violence in everyday life and is discriminatory, exploitative, thriving in atmosphere of threat, terror and reprisal. India is facing the problem of increasing cases of sexual harassment that despite numerous laws in place to tackle the menace. Sexual harassment has come to be widely condemned as a form of human rights violation, and as an infringement on life and liberty as defined by the Constitution of India. Such behavior is seen to transgress common dignity, gender equality, and fundamental rights. Sexual harassment is contrary to anti-discrimination laws of the land. One of the primary reasons of the cases of sexual harassment is the gender insensitiveness ingrained in the Indian society. This gender bias towards women cuts across place, religion, political spectrum and organizations.¹ The present system is often not gender-responsive, that despite increased awareness and laws to curb the same. This is partly because the governance objectives, systems and services at all levels have been defined, designed and managed by men, who are the principal decision makers. They therefore reflect men’s priorities and perspectives. Even where women are targeted, this remains largely within the framework of men’s assumptions and perspectives on women’s needs and situations. The gender insensitiveness is the

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¹ Dayanand B. Shetty, “Sexual Harassment At Workplace: Responses And Challenges” Indian Streams Research Journal, Volume 4, Issue 1, Feb 2014

genesis of the problem which needs to be addressed so that the medieval mindset is prevented from spreading its tentacles.

In recent times, the issue of sexual harassment of women at the workplace has assumed prominence with serious allegations being made against a former Supreme Court judge, whose court pronounced verdict on huge scams, and the editor of a magazine with truth and exposure as its masthead. In the case of the former, a court-appointed committee found that the complainant's statement prima facie disclosed an act of unwelcome behavior of sexual nature, but matters went no further as the judge was found to have demitted office prior to the commission of the alleged offence. The second case has followed the traditional process of criminal law, beginning with investigation and arrest. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, brought into force on December 9, 2013, provides an alternative method of handling complaints of sexual harassment made by working women.

WHAT IS SEXUAL HARASSMENT?

Harassment is behavior, which has the effect of humiliating, intimidating, or coercing someone through personal attack. It is also behavior that can cause the recipient to be embarrassed, uncomfortable and because emotional distress sexual harassment is any sexually oriented conduct that may endanger the victim's job, negatively affect the victim's job performance or undermine the victim's personal dignity. It may manifest itself physically or psychologically. Its milder and subtle forms may imply verbal innuendo, inappropriate affectionate gestures or propositions for dates and sexual favour². However, it may also assume blatant and ugly forms like leering, physical grabbing and sexual assault or sexual molestation.

As noted by *Dickson*, CJ of the Supreme Court of Canada in **Janzen v. Platy Enterprises Ltd.**³ in most cases of sexual harassment, the perpetrator misuses "*a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands*". Sexual harassment involves "*the unwanted imposition of sexual requirements in the context of a relationship of unequal power*".

² Dr Prema Devaraj, 'Parliament, Gender Sensitivity and Sexual Harassment', (online) Available at: <http://aliran.com/archives/monthly/2000/02h.html> (Accessed 19th Dec. 2012)

³ [1989] 1 SCR 1252

It is important to bear in mind that the perpetrator of sexually harassing behavior may not be motivated only by sexual desire or lust. The perpetrator may simply be demonstrating his or her power to the victim. In many cases, such behavior may be a by-product of the prevailing stereotypes in the system. Thus, male perpetrators may indulge in sexually-harassing behavior to simply show the female victim 'her place' or to convey to her that she is good only for gratifying their sexual desires. While cases involving sexual harassment of subordinates by superior officers may be characterized by the perpetrator's desire to assert power over the recipients, those involving sexual harassment by co-employees (including subordinates) and outsiders (like the employer's customers) may be actuated by sheer lust or sexual stereotyping⁴.

SUPREME COURT ON SEXUAL HARASSMENT

The Supreme Court in **Vishaka v. State of Rajasthan**⁵ for the first time recognized, acknowledged and explicitly defined sexual harassment as an unwelcome sexual gesture or behavior aimed or having a tendency to outrage the modesty of woman directly or indirectly. Defining sexual harassment as an act aimed towards gender based discrimination that affects women's right to life and livelihood, the Supreme Court developed broad based guidelines for employers. This mandatory guidelines known as Vishaka guidelines are aimed towards resolution and prevention of sexual harassment. These guidelines bring in its purview all employers in organized and unorganized sectors by holding them responsible for providing safe work environment for women. The Vishaka guidelines apply to all women whether students, working part time or full time, on contract or in voluntary/honorary capacity. Expressly prohibiting sexual harassment at work place these legally binding guidelines put a lot of emphasis on appropriate preventive and curative measures. (The guidelines include the following as acts of sexual harassment: Physical contact and advances, Showing pornography, a demand or request for sexual favours, any other unwelcome physical, verbal/non-verbal such as whistling, obscene jokes, comments about physical appearances, threats, innuendos, gender based derogatory remarks, etc.)

⁴ Kumar Kailash, "*Sexual exploitation of women at work place in India- A Study of legislative and judicial trends*" Indian Streams Research Journal, Volume 4, Issue 2, March 2014

⁵ AIR 1997 SC 3011

IMPORTANT GUIDELINES

The onus to provide a harassment free work environment has been laid down on the employers who are required to take the following steps:

- Employers must form a Complaints Committee.
- Express prohibition of sexual harassment in any form and make the employees aware of the implications through in house communication system / posters / meetings.
- Must include prohibition of sexual harassment with appropriate penalties against the offender in Conduct rules.
- Prohibition of sexual harassment in the standing orders under the Industrial Employment (Standing Orders) Act, 1946 to be included by private employers.
- Provision of appropriate work conditions in respect of- work, leisure, health, hygiene to further ensure that there is no hostile environment towards women.
- No woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment. Victims of sexual harassment to be given an option to seek transfer of the perpetrator or their own transfer.⁶

Thus, the Vishaka guidelines stipulated that all organizations would form a complaints committee to look into any such allegation. It would be headed by a woman employee and not less than half of its members would be women. All complaints of sexual harassment by any woman employee would be directed to this committee. The committee would advise the victim on further course of action and recommend to the management the course of action against the person accused of harassment.

The Supreme Court stated that the Vishaka Guidelines had to be implemented in form, substance and spirit in order to help bring gender parity by ensuring women can work with dignity, decency and due respect. It noted that the Vishaka Guidelines require both employers and other responsible persons or institutions to observe them and to help prevent sexual harassment of women. The Court held that a number of states were falling short in this regard. It referred back to its earlier findings on 17 January 2006, that the Vishaka Guidelines had not been properly

⁶ *Supra* Note 4

implemented by various States and Departments in India and referred to the direction it provided on that occasion to help to achieve better coordination and implementation. The Court went on to note that some states appeared not to have implemented earlier Court decisions which had required them to make their legislation compliant with the Vishaka Guidelines.

COMPREHENSIVE PIECE OF LEGISLATION

On 23rd April 2013, the legislature finally brought into force a comprehensive legislation⁷ dealing with the protection of women against sexual harassment at workplace by enacting “The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013. The Act has in fact sought to widen the scope of the guidelines issued by the Supreme Court by bringing within its ambit (amongst other things) a “domestic worker” (Sec 2e) defined to mean a woman who is employed to do the household work in any household for remuneration whether in cash or kind, either directly or through any agency on a temporary, permanent, part time or full time basis, but does not include any member of the family of the employer. The Act has defined “sexual harassment”, Sec 2 (n) to include any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely: (i) physical contact and advances; (ii) a demand or request for sexual favour; (iii) making sexually coloured remarks; (iv) showing pornography; or (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature. Further, the following may also amount to sexual harassment: (i) implied or explicit promise of preferential treatment; (ii) implied or explicit threat of detrimental treatment; (iii) implied or explicit threat about present or future employment status; (iv) interference with work or creating an intimidating or offensive or hostile work environment; or (v) humiliating treatment likely to affect health or safety. The term ‘employee’ Sec 2 (f) includes regular, temporary, ad hoc, daily wage employees and persons who are working on a voluntary basis i.e. without remuneration. The term also includes contract workers, probationers, and trainees. The Act defines “aggrieved woman” Sec 2 (a) to mean: (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 a dwelling place or house, a woman of any age who is employed in such a dwelling place or house. As per the Act workplace Sec 2 (o) includes:

⁷ The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 Published in The Gazette of India. Press Information Bureau

(i) any department, organization, 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 cooperative society; (ii) any private sector organization or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organization, 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 provided by the employer for undertaking such journey; (vi) a dwelling place or a house.

COMPLAINT MECHANISMS UNDER THE 2013 ACT

The Act contemplates the constitution of Internal Complaints Committee (“ICC”) (Sec 4) at the work place and Local Complaints Committee (“LCC”) at district and block levels (Sec 6). A District Officer (District Collector or Deputy Collector) shall be responsible for facilitating and monitoring the activities under the Act. Every workplace employing 10 or more employees is required to constitute an ICC. The ICC is required to consist of at least four members, and its presiding officer is required to be a woman employed at a senior level. Provisions have been made in case no senior woman employee is available, to nominate a woman presiding officer from another office, administrative unit, workplace, or organization. Further, one half of the members must be women. LCCs are to be set up by the appropriate government which shall receive complaints in respect of establishments that do not have ICCs on account of having fewer than 10 employees and to receive complaints from domestic workers.

Steps involved in the Complaint Process Empowerment

Step 1

A complaint is to be made in writing by an aggrieved woman within 3 months of the date of the incident. The time limit may be extended for a further period of 3 months if, on account of certain circumstances, the woman was prevented from filing the complaint. If the aggrieved

woman is unable to make a complaint on account of her physical or mental incapacity or death, her legal heirs may do so.

Step 2

Upon receipt of the complaint, the ICC or LCC must proceed to make an inquiry in accordance with the service rules applicable to the respondent or in their absence, in accordance with rules framed under the Act.

Step 3

The inquiry must be completed within a period of 90 days. In case of a complaint by a domestic worker, if in the opinion of the LCC a prima facie case exists, the LCC is required to forward the complaint to the police to register a case under the relevant provisions of the Indian Penal Code.

Step 4

Where the ICC finds that the allegations against the respondent are proven, it must submit a report to the employer to: (i) take action for sexual harassment as a misconduct in accordance with the provisions of the applicable service rules or where no service rules exist, in accordance with rules framed under the Act; (ii) to deduct from the salary or wages of the respondent such sum as it may consider appropriate to be paid to the aggrieved woman or to her legal heirs.

Step 5

The employer must act on these recommendations within 60 days.

SCOPE FOR CONCILIATION AND SETTLEMENT

Before initiating an inquiry, the ICC or LCC may, at the request of the aggrieved woman, take steps to arrive at a settlement between the parties. However, no monetary settlement can be made as the basis of such conciliation [Sec. 10(1)] In case the ICC or LCC is of the view that a malicious or false complaint has been made, it may recommend that a penalty be levied on the complainant in accordance with the applicable service rules (Section-14). However, an inquiry must be also made. Mere inability to substantiate a complaint will not attract action under this provision.

THE DUTIES OF AN EMPLOYER

The Act makes it the duty of every employer to: a) provide a safe working environment at the workplace which shall include safety from all the persons with whom a woman comes into contact at the workplace; b) display at any conspicuous place in the workplace, the penal consequences of sexual harassment and the order constituting the ICC; c) organize workshops and awareness programmes; d) provide necessary facilities to the ICC for dealing with complaints and conducting inquiries; e) assist in securing the attendance of the respondent and witnesses before the ICC; f) make available such information to the ICC or LCC, as it may require; g) provide assistance to the woman if she so chooses to file a criminal complaint; h) initiate criminal action against the perpetrator; i) treat sexual harassment as a misconduct under the service rules and initiate action for such misconduct; and j) monitor the timely submission of reports by the ICC.

PENALTIES

Where the employer fails to comply with the provisions of the Act, he shall be liable to be punished with a fine which may extend to Rs. 50,000. In case of a second or subsequent conviction under this Act, the employer may be punished with twice the punishment prescribed or by cancellation of his license or withdrawal of his registration.

PREVENTION OF SEXUAL HARASSMENT

The most effective weapon against sexual harassment is prevention. Harassment does not disappear on its own. In fact, it is more likely that when the problem is not addressed, the harassment will worsen and become more difficult to remedy as time goes on.

EMPLOYER RESPONSIBILITIES

The burden of preventing sexual harassment rests on the employer. In the United States, Canada and in some European Union Member States, employers are responsible for providing their employees with a work environment that does not discriminate and is free of harassment. Employers are, therefore, required by law to take steps to prevent and deal with harassment in the workplace. If the employer has not taken all reasonable steps to prevent and deal with

harassment in the workplace, the employer may be liable for any harassment. Anti-harassment policies explain what harassment is, tell all employees that harassment will not be tolerated, and set out how employers and employees should respond to incidents of harassment. Anti-harassment policies should also set forth a detailed mechanism by which employees can make complaints when sexual harassment occurs.

Having an anti-harassment policy does not mean that there will be no harassment complaints. However, having an effective policy and procedures, coupled with anti-harassment training for all staff, will assist in preventing harassment and support individuals who are being harassed to come forward and ensure that the problem is addressed quickly and effectively.

CONCLUSION

Gender inequality is contrary to the unifying idea of a sovereign, democratic republic of our country. Although, Act is one step ahead for the protection of women from sexual harassment at work place, however, the real solution lies in developing a gender sensitive society where women are accorded dignity and respect, their opinions are valued, their rights are not violated, and their desires and aspirations are nurtured and allowed to flourish. The education of gender sensitivity starts from home. The culture should be developed to respect women be it your own or other's mother, sister, wife and daughter. Most importantly gender-sensitive society can be created if women themselves acquire the feelings of dignity, self-respect and self-esteem and consider themselves to be at par with men. They should not consider themselves to be any less than men. If they get these feelings they will inject them into their children, especially their sons, and teach them to respect women instead of perceiving them as inferior beings who have no identity of their own. This will lead to a significant reduction in the number of such incidents. Policy measures backed by the proper implementation of the laws and legislations created to protect women will act as a protective valve that will protect women from sexual harassment and violence. It is only in such a situation that the well-being of women will be ensured which will lead to the true empowerment of women.