

DISSECTING “SEXUAL HARASSMENT” AND “WORKPLACE” IN POSH: AN INTERESTING
INTERPRETATION

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Abstract

Sexual harassment is pretty common in almost every geography and almost all countries have tried to prevent it by enacting strict laws. India is no exception and was also needed as it violates fundamental right of women under Article 14 and Article 15 of the Constitution. It was needed to control this menace so that women could work freely. However, “sexual harassment” and what this “workplace” is as mentioned in the Act, i.e. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 needs careful observation through various judicial observations.

Keywords: *Sexual Harassment, Workplace, Judgements*

Introduction

Constitution of India protects every citizen of India. This is enshrined in Article 14 and Article 15 of the Constitution. Sexual harassment results in violation of both these Articles and also Article 21 of the Constitution which is the right to live in dignity and right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment.

The victims of sexual harassment faces psychological pressure like depression, anxiety, fear, loss of confidence, and so on. Sometimes, the amount of victimisation cannot be measured as it leaves terrible impact in the mind of the victim. Sexual harassment was recognised for the first time in India in Vishaka v. State of Rajasthan popularly called as Vishaka Judgement where Supreme court enunciated certain guidelines, i.e., Vishaka Guidelines and directed Union of India to enact laws that paved the way for our own POSH Act called as “*The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013*”.

Sexual Harassment: Uncovered

As per Vishaka judgement, sexual harassment can be defined as ‘Sexual Harassment’ includes such unwelcome sexually determined behavior (whether directly or by implication) as:

a. Physical contact and advances

- b. A demand or request for sexual favours;
- c. Sexually coloured remarks;
- d. Showing pornography;
- e. Any other unwelcome physical, verbal or nonverbal conduct of sexual nature.

The first case before Supreme Court after the Vishaka judgement was Apparel Export Promotion Council v. A.K. Chopra. In this case, the apex court dismissed the senior officer for harassing her subordinate female employee and also enlarged the definition of sexual harassment. The Supreme Court explained that “sexual harassment 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 conduct by the female employee was capable of being used for affecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile work environment for her.” In the above explanations, following points can be framed:

- Sexual Overtones in verbal forms are covered
- Physical Conduct with sexual overtones or request for Sexual favours
- Direct or mere implications in verbal or physical conducts are also within the ambit of sexual harassment.
- Any behaviour of above nature if interferes with her work performances
- Creation of hostile work environment
- Even rejection of such conduct if affects her employment can be brought under the ambit.

Medha Kotwal lele had filed petition in supreme court that implementation of the Act is not effectively done in India and in various states. Supreme Court hence in Medha Kotwal Lele v. Union of India case directed that the implementation of the Act must be in letter and in spirit. The court used strong words while giving judgement, “lip service, hollow statements and inert and inadequate laws with sloppy enforcement are not enough for true and genuine upliftment of our half most precious population – the women”.

It should be noted that protection against sexual harassment and right to dignity to work is the fundamental right of any human being irrespective of gender which is now globally recognised and Government of India

ratified Convention on the Elimination of all forms of Discrimination against Women on the 25th June, 1993 for this reason.

Section 2(n) of the POSH Act defines sexual harassment in line with Vishaka Judgement. "sexual harassment" includes any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely: –

- i. physical contact and advances; or
- ii. a demand or request for sexual favours; or
- iii. making sexually coloured remarks; or
- iv. showing pornography; or
- v. any other unwelcome physical, verbal or non-verbal conduct of sexual nature;

Please look into few important words in the definition "unwelcome", "verbal or non-verbal conduct of sexual nature". For example, if someone body shames a woman for being fat or is not presentable, and the woman feels victimised by considering such remarks as unwelcome and of sexual nature, then that person can be brought under sexual harassment.

Section 3 (2) further widens the term here by including any of the following circumstances as an incident of sexual harassment too. It has following provisions:

- (1) implied or explicit promise of preferential treatment in the victim's employment;
- (2) implied or explicit threat of detrimental treatment in the victim's employment;
- (3) implied or explicit threat about the victim's present or future employment status;
- (4) interferes with the victim's work or creating an intimidating or offensive or hostile work environment for her and
- (5) humiliating treatment likely to affect the victim's health or safety.

We have to look into few terms here again like "implied or explicit", "intimidating or offensive or hostile work environment", "preferential treatment". This can be explained with few common examples mentioned below.

A is the CEO offers new Cabin to his secretary C who is married but regularly offers her for dinner outings which C is not comfortable but she knows if she doesn't go she might lose her job. A's conduct is falling under the definition.

A shouts at C abuses her with sexually implicit remarks for wrong work. C is unable to continue with her work as she is afraid that he would shout and abuse again. If not abuse, shout at her again. Yes A is falling under Section 3.

Hence, it need not to be necessarily sexually exploitive behaviour but can be anything that is intimidating her to continue her work whether explicit or implied. Word implied has deep meaning because what is something to someone, may not be other person on the same page. It completely depends on manner of interpretation. A classic example is observed in *Albert Davit Limited vs. Anuradha Chowdhury and Ors.*, (2004) 2 CALLT 421 (HC) case where the employee requested to switch off the A.C. and in response the defendant had replied "... come close to me, you will start feeling hot" was enough to charge him under the clause of sexual harassment.

In 2010, Delhi High Court opined that Sexual Harassment is a subjective experience. They quoted that "We therefore prefer to analyze harassment from the [complainant's] perspective. A complete understanding of the [complainant's] view requires... an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women... Men tend to view some forms of sexual harassment as "harmless social interactions to which only overly-sensitive women would object. The characteristically male view depicts sexual harassment as comparatively harmless amusement. ... Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive." This was held in " *Dr. Punita K. Sodhi v. Union of India & Ors.* W.P. (C) 367/2009 & CMS 828, 11426/2009 case.

Workplace – Defined

According to section 2(o) "workplace" includes –

- a. 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;

- b. 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;
- c. hospitals or nursing homes;
- d. any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;
- e. 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;
- f. a dwelling place or a house;

Workplace [section 2 (o)] has been defined as private sector organisation / private venture / undertaking / enterprise / institution / establishment / society / trust / non-governmental organisation / unit or service provider and places visited by employee (arising out of or during the course of employment, including transportation provided by employer for undertaking journey).

Hence, if harassment takes place even during transportation or during a lunch meeting at a restaurant, the same will be covered under the Act. In *Saurabh Kumar Mallick v. Comptroller & Auditor General of India*, WP(C) No. 8649/2007 case, the respondent had contended that the victim was not harassed in the office premises and also since she was senior to him by ranks, hence he could not extract favours from her, hence it doesn't fall under the definition of sexual harassment.

However, Delhi High Court ruled that a narrow approach towards the definition would not help to realise the very objective for which this Act was passed. With the advent of new technologies and computer facilities, work is extended beyond the common jurisdiction of office premises. Following factors can be considered while determining whether it is a workplace or not:

- Proximity from the place of work;
- Control of the management over such a place/residence where the working woman is residing; and
- Such a residence has to be an extension or contiguous part of the working place.

Hence, Delhi High Court concluded that official mess where the victim is complaining to be harassed, shall be deemed to be a workplace under the Act.

- Colleague harassing lady colleague in office transport.
- Female colleague touched inappropriately in banquet hall where office seminar going on
- Messaging inappropriately to a female colleague in Office Messenger/Mails

Some of the above common incidents that is construed as “sexual harassment” at “workplace” as per “*The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013*”.

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