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Ensuring Gender – Safe Workplaces: The Role And Liability Of Employer

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Abstract

Women's are the wealth of the world. She is working equally to that of men in all the fields, subjected to various injustices and inequalities at every stage of work life. However, another reality of Indian society is that over the past few years, the issue of women's safety has become a prime focus of public attention and concern as there is fear of sexual violence against them. Sexual harassment at workplace has been recognized as a violation of human rights and it is considered as a crime which violates the dignity and respect of a women. It is yet another form of violence reflecting patriarchal mind sets and gender based discrimination that women experience at work. It reduces the quality of working life, jeopardizes the well-being of women. Sexual harassment which was otherwise invisible menace until quite recently, has now become a major social problem with the widespread entry of women as a work force. Supreme Court decided several landmark cases that set forth new and broader standards for holding employers liable when management-level employees engage in conduct that creates a hostile environment for women subordinates. Meanwhile 'The Sexual Harassment of Women at Workplace Act, 2013' was enacted to overcome this problem. But, most Indian employers have not implemented the law despite the legal requirement that any workplace with more than 10 employees need to implement it. The government has threatened to take stern action against employers who fail to comply with this law. Hence it is focused that employers must ensure that their workplace harassment prevention policies and all other policies are up-to-date and are effectively communicated to each employee. The policy should clearly define what constitutes harassing behaviour, and the employer should reinforce a zero-tolerance response and outline the range of disciplinary consequences for harassers.

INTRODUCTION

"If you want to be safe, better don't exist!!" - The only solution provided to our womenfolk. This represents a very dismal state of affairs. In a country which considers a female baby being born in the family as a bane to its economic position, harassing the woman anywhere is not a surprising phenomenon. Owing to her "incapacity" to fight out openly, thanks to the family prestige, she has been taken for granted in all the situations she faces. Unlike the women of ancient time, the present day woman is almost on par with the men folk, save the dignity and status she has to be given,

struggling to establish her position as a separate entity in the society. However, she is failed to be accorded with the respect she is entitled to claim, as a human being.¹

Over the past few years, the issue of women's safety has become a prime focus of public attention and concern in India. In the 21st century India is fast emerging as a global power but for half of its population, the women across the country, struggle to live life with dignity continues. Women are facing problems in every sphere of life whether employment, access to health care or property rights. The attention required is still not being paid to the issues that concern this section of population. Women empowerment in India is still a distant dream. There still exists a wide gap between the goals enunciated in the constitution, legislation, policies, plans, programs and related mechanisms on the one hand and the situational reality of the status of women in India, on the other hand. India is fast developing but women's in India continue to be discriminated. Women may be have stardom in any stream but are getting harassment every day by their surroundings.²

Sexual harassment is widespread in the Indian workplace, and has a profound impact on women. Women constitute 31.6 percent of the workforce in India and 17 percent of working women in India have experienced sexual harassment at their workplace.³

Sexual harassment in the workplace pollutes the working environment and can have a devastating effect upon the health, confidence, morale, and performance of those affected by it in the working place. Sexual harassment in the workplace may also have a damaging impact on employees not themselves the object of unwanted behaviour but who is witness to it or have knowledge of the unwanted behaviour. There are also adverse consequences arising from sexual harassment in the workplace for employers. It has a direct impact on the profitability of the enterprise where staffs suffer from the harassment will take sick leave or resign their posts because of the harassment.⁴

Most sexual crimes against women in India, however still go unreported. This is primarily because extant assumptions of patriarchy, power and control over women allow such crimes to happen and make it all that more difficult for women to report them. Sexual harassment of women at the workplace is aided by skewed gender equations in the organizational hierarchy.⁵

In India, it has been only few years since sexual harassment was for the first time recognised by the Supreme Court as human rights violation and gender based systemic discrimination that affects women's Right to Life and Livelihood. Supreme Court decided several landmark cases that dramatically changed the legal underpinnings for sexual harassment law. These cases set forth new and broader standards for holding employers liable when management-level employees engage in conduct that creates a hostile environment for subordinates. Until the passing of the 'Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act' 2013, the Judiciary in India has been proactive, viewing the protection against sexual harassment as part of human rights and individual freedoms. The Supreme Court of India for the first time recognized, acknowledged and defined sexual harassment of women at work place in the case of Vishaka vs. State of Rajasthan (JT 1997(7) SC 384).

¹ Dhivya Manivannan, "Vicarious Liability of Employers in Sexual torts committed by employees", <http://www.legalserviceindia.com/article/1235-Vicarious-Liability-of-Employers-in-Sexual-torts-committed-by-employees.html>

² Purnima, "Women's Issues in India: Role and Importance of Media", Vol. IV, Issue I, *Global Media Journal*, 2010.

³ Vijay Bhatt, "Analysis of the Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013", Vol. XLII (1), *Indian Bar Review*, 2015, p. 1.

⁴ Dr. Muzaffar Syah Mallow, "Sexual Harassment in the Workplace: An Overview over the International Law and Current Law and Practice in Malaysia", Vol. 3, No. 13, *International Journal of Humanities and Social Science*, July 2013, p. 75.

⁵ Mrs Rajani Suresh, Dr. Sambatur Sridhar and Ms Sneha S Kairanna, "A Systems Approach to Combat Workplace Sexual Harassment", Volume 19, Issue 10, Ver. III, *IOSR Journal Of Humanities And Social Science (IOSR-JHSS)* (Oct. 2014), P 29.

DEFINITION OF SEXUAL HARASSMENT

The United Nations to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), defines sexual harassment as including:

“Such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable ground to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”⁶

The ILO definition of ‘sexual harassment’ as - “Sexual harassment is a clear form of gender discrimination based on sex, a manifestation of unequal power relations between men and women.”⁷

According to the ‘Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act’ 2013, "sexual harassment" means & 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.⁸

Sexual harassment is emotionally abusive and creates an unhealthy, unproductive atmosphere at the workplace. Sexual Harassment would normally fall under **two categories** – **quid pro quo** and creation of a **hostile working environment**:

- Under the quid pro quo (this for that) form of harassment, a person or authority, usually the superior of the victim, demands sexual favours for getting or keeping a job benefit and threatens the employee of dire consequences if the conditions are not met.
- A hostile work environment arises when a co-worker or supervisor or superior at work, creates a work environment through verbal or physical conduct that interferes with another person’s job performance or creates the workplace environment which is intimidating, hostile, offensive or humiliating and experienced as an attack on personal dignity.⁹

Following are some of the Actions that may constitute sexual harassment:

- Unwanted physical contact such as unnecessary touching, patting, or pinching of another employee's body
- Demands for sexual favours in return for promotion
- Unwelcome sexual advances or propositions
- Continued suggestions for social activity outside the workplace after it has been made clear that such suggestions are unwelcome
- Offensive flirtations
- Suggestive remarks, innuendos, or lewd comments
- Display of sexually suggestive pin ups or calendars
- Leering or eyeing up a person's body
- Derogatory remarks which are gender related

⁶ *Supra* 3, p. 2.

⁷ Geeta M Jaisingh, Dr. Jaya Mathew, “India’s new law on Sexual Harassment and its implications on the Corporate Sector”, Vol 3(1), *Review of Integrative Business & Economic Research*, 2014, p. 419.

⁸ Section 2(n) of the ‘Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act’ 2013.

⁹ Anju Thomas, “Incidents of Sexual Harassment at Educational Institutions in India: Preventive Measures and Grievance Handling”, Vol. 02, Issue 03, *International Journal of Recent Advances in Multidisciplinary Research*, March, 2015, p.0318.

- Sexual assault
- Offensive comments about appearance or dress that are gender related
- Sexist or patronising behaviour¹⁰

Recognition of Human Rights Treatise in India

Though India ratified the CEDAW in 1993, there was no discourse in India on the issue of sexual harassment happening at work in terms of both legal recourse and enacting a special legislation till about late 1990s. Vishakha guidelines (1997) issued by the Supreme Court of India were the first legal intervention in India specifically on sexual harassment at workplace. This particular ruling famous as the Vishakha judgment / guidelines restored the debate that was lying dormant since the Rupan Deol Bajaj vs. KPS Gill case judgement (1995) about sexual harassment of women colleagues by their male counterparts.¹¹

Tracing the Problem within India before Vishakha

Before Vishakha, the language of sexual harassment remained coded, invisible, and frivolous in India. The sexual dimension of harassment was disabling and unspoken. In the eighties there were attempts by the women's groups to challenge to the cultural perception of sexual harassment as eve teasing. While charting out the history of the struggle against sexual harassment it was stated that since the early eighties sexual harassment at the workplace remained one of the central concerns of the women's movement in India. It can be seen the issue emerging for a discussion in India as late as the eighties and gaining momentum only in the nineties. This is confirmed by a report by Forum Against Oppression of Women (1991). The report revealed, during the 1980s, militant action by the Forum against the sexual harassment of nurses in public and private hospitals by inmates and their male relatives, ward-boys and other hospital staff; of air-hostesses by their colleagues and passengers; of teachers by their colleagues, principals and management representatives; of PhD students by their guides and so on and so forth received a lukewarm response from the trade unions and adverse publicity in the media. It is evident that, at that time the issue did not receive importance and attention from the society.¹²

Therefore Pre- 1997 the person facing sexual harassment at workplace had to lodge a complaint under Section 354 of the Indian Penal Code, 1860 that deals with the 'criminal assault of women to outrage women's modesty', and Section 509 that punishes individual/ individuals for using a 'word, gesture or act intended to insult the modesty of a woman. (Now the provisions are covered under Bharatiya Nyaya Sanhita under section 74 and section 79.)

In 1997 the Supreme Court passed a landmark judgement in the Vishakha case laying down guidelines to be followed by establishments in dealing with complaints about sexual harassment. Vishakha Guidelines were stipulated by the Supreme Court of India, in Vishakha and others Vs. State of Rajasthan case in 1997, regarding sexual harassment at workplace. The court stated that these guidelines were to be implemented until legislation is passed to deal with the issue.¹³

¹⁰ Peter Forster, "Sexual Harassment At Work", Vol. 305, No. 6859, *British Medical Journal*, (Oct. 17, 1992), p. 945.

¹¹ Anagha Sarpotdar, "Sexual Harassment of Women at Workplace in India: Journey from a Workplace Problem to a Human Rights Issue", Volume 3, No.7, *Journal of Business Management & Social Sciences Research (JBM&SSR)*, July 2014, p. 21.

¹² *Ibid*, p. 22.

¹³ *Supra* 3, p. 2,3.

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

Keeping in lieu the increase in the number of cases of Sexual Harassment faced by women, on 23rd April, 2013, a comprehensive legislation was finally brought into force with an object to “**provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment**” by enacting ‘The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013’. This new legislation makes every effort to be a user friendly constitutional tool in the hands of the employers and employees, to create healthy and safe workplaces.

The Act applies to all women at all places. This means that any women who feel that she has been the victim of unwelcome sexual harassment in any workplace may file a complaint. This law provides a civil remedy. If the harassment is of criminal nature, the complaint is to be filed with the Police under Sections 354/509 of Indian Penal Code, 1860.¹⁴ Now the provisions are covered under Bharatiya Nyaya Sanhita under section 74 and section 79.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, provides stringent clauses for the protection of women workers from harassment which are as follows:

1. A written complaint has to be filed by the female employee within three months of the date of the incident.¹⁵
2. The inquiry has to be completed within 90 days.¹⁶
3. The inquiry report has to be issued within 10 days from the date of completion of inquiry.¹⁷
4. Employer is required to act on the recommendations of the committee within 60 days of receipt of the inquiry report.¹⁸
5. Appeal against the decision of the committee is allowed within 90 days of the date of recommendations.¹⁹

Employers' responsibilities

- Recognise sexual harassment as a serious offence.
- Recognise the responsibility of the company/ factory/workplace to prevent and deal with sexual harassment at the workplace.
- Recognise the liability of the company, etc., for sexual harassment by the employees or management. Employers are not necessarily insulated from that liability because they were not aware of sexual harassment by staff.²⁰

¹⁴ *Ibid*, p.5,6.

¹⁵ Section 9(1) of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

¹⁶ Section 11(4) of 2013 Act.

¹⁷ Section 13(1) of 2013 Act.

¹⁸ Section 13(4) of 2013 Act.

¹⁹ Section 18(2) of 2013 Act.

²⁰ Pragya Aggarwal, “Legal Awareness among Women against Sexual Harassment at Workplace”, Volume-VI, Issue-I, *Online International Interdisciplinary Research Journal*, , Jan-Feb 201

Following are the Liability of an Employer in Protecting the Women against Sexual Harassment at Workplace

- Under the Act of 2013 all employers must ensure that they provide a safe working environment for their employees.
- Staff Handbooks must include provisions relating to sexual harassment and state that sexual harassment will be treated as misconduct, and employers should take appropriate action if a sexual harassment incident is reported.
- Employers are required to set up an internal complaints committee (ICC) at each office or branch which has 10 or more employees. The ICC, which must have a minimum of four members, at least half of whom are women, will hear the sexual harassment complaints. A Local Complaints Committee (LCC) will be set up in each district to hear complaints from organisations where there are fewer than ten employees, or where the complaint is against the employer himself.
- Another requirement under the Act is for employers to organise regular workshops and awareness training for employees and to also display, in a conspicuous place in the workplace, the order constituting the internal complaints committee (ICC) and the penal consequences for employees who sexually harass female employees.
- Employers also have a duty to help the employee file a police complaint if she wants to press criminal charges against the harasser.²¹
- Treat sexual harassment as misconduct under the service rules and initiate action for misconduct.²²
- According to Section 26 of the Act, 2013, the employer is also required to monitor the timely submission of reports by the Internal Complaints Committee. If an employer fails to constitute an Internal Complaints Committee or does not comply with any provisions contained therein, the Sexual Harassment Act prescribes a monetary penalty of up to INR 50,000 (approx. US\$1,000). A repetition of the same offence could result in the punishment being doubled and / or de-registration of the entity or revocation of any statutory business licenses.²³
[Note - employer is defined as any person responsible for management, supervision and control of the workplace, so even in cases of violation of the statutory liability, the organisation itself will not be liable directly.]
- Moreover, when complaints of sexual harassment are against the senior management of the company, it can lead to serious reputational risks for companies.
- When the senior management of the company or the management has itself is involved in creation of a hostile work environment, the entire involved person will be individually liable under the law.
- In cases, where the complaint is against the employer himself (which can include any person who is responsible for management, supervision and control of the company, or any board or committee responsible for formulation and administration of the policies of the organisation) the complainant can file a complaint with the Local Complaints Committee (LCC) established under the law. In such cases, the LCC may order the harasser employer (and not the business entity) to pay compensation to the complainant. The LCC while awarding the compensation may take into account the following things:
 - i. the mental trauma, pain, suffering and emotional distress caused to the aggrieved woman;
 - ii. the loss in the career opportunity due to the incident of sexual harassment;
 - iii. medical expenses incurred by the victim for physical or psychiatric treatment;
 - iv. the income and financial status of the respondent;

²¹ New law on sexual harassment in the workplace in India, <http://www.lexology.com/library/detail.aspx?g=2c90ff0f-8aad-47aa-a552-9d56a5cef509>.

²² Section 19 of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act.

²³ *Supra* 7, p. 423.

v. feasibility of such payment in lump sum or in instalments.²⁴

Preventive mechanism- Employer obligation to respond proactively

There is a need of effective legal remedies. However, the main aim of most victims of sexual harassment is not to sue their employer for damages, but that the offensive behaviour should stop, that it should not recur and that they should be protected against retaliation for having bought a complaint. Therefore, the most effective way to deal with sexual harassment is to develop and implement a preventive policy at enterprise level.²⁵

CONCLUSION

It appears from the beginning of the human society the women have been exploited mercilessly and indiscriminately. Endeavouring for a violence free environment for women is our constructional commitment and a new thrust of women's right regime.

Sexual Harassment at work is something that most people often face but not many talk about openly. This is usually for the fear of losing their job, facing ridicule at the hands of the society, getting trapped in the lengthy judicial proceedings or due to other unsaid reasons. After enacting The Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act 2013, it can be infer that the legislators have undoubtedly come up with a very comprehensive framework which enables the women of our country to fight for their rights and try and put an end to this menace. Hence its purpose must be to instil a culture that every woman shall have a right to be free from Sexual Harassment and the Right to Work in an environment free from any form of Sexual Harassment.

Besides legislation, there is a need for a change in the male mind-set towards women workers. The mind-set not just to ensure that women employees are not being harassed but also in the way victims gather the courage to speak up for themselves. Social unacceptability is something that needs to be dealt with, with utmost care.

SUGGESTIONS

Sexual harassment is not merely an abuse of power resulting from ignorance about facts or law. It is not merely a legal problem, a cultural problem, a gender problem, or a communication problem.

Large companies have taken a number of steps but most have to still implement measures in order to live up to the spirit of the act. Also, a majority of business establishments are still in the process of figuring out what to do. Hence, it is suggested that:

- All business establishments should ideally have a written sexual harassment policy.
- They should constantly check and update existing policies on sexual harassment based on the new Sexual Harassment Prevention Act, 2013.
- The policy should ideally be drafted or at least examined by a lawyer. The policy should ideally mention the following:
 - Sexual harassment in workplace is unlawful and prohibited under the law,
 - Sexual harassment is prohibited in all the business establishments,
 - clear complaint filing mechanism,
 - Consequences of engaging in sexual harassment,
 - Clear reference to the applicable laws,

²⁴ Amartya Bag, "Liability of employers for sexual harassment in workplace: How to comply with the law?", September 19, 2014, <http://blog.ipleaders.in/liability-of-employers-for-sexual-harassment-in-workplace-how-to-comply-with-the-law/>

²⁵ *Supra* 5, p. 29.

- All new employees should be made aware about the sexual harassment policy during the training program.

Therefore it is necessary to conduct periodical sexual harassment awareness workshops or training sessions. Moreover, it is necessary that all managers and supervisors should be instructed to keep a vigil in the workplace and report any untoward incident to the management at the earliest. All complaints of sexual harassment should be treated carefully and with full seriousness by the management. It is essential to have people who are trained to handle such cases.

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