

SEXUAL HARASSMENT AT WORKPLACE: JUDICIAL INTERPRETATION

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ABSTRACT

Sexual harassment of women is a global circumstance which is common both in developed as well as in developing countries. Cutting across religion, culture, race, caste, class and geographical boundaries it has spread like virus in the society. It being offensive to human dignity, human rights and gender equality, has emerged as a fundamental disaster in the world over. It is a complex issue involving women, their perceptions and behaviour, and the social norms of the society which emerges from gender discriminatory attitudes and is a complex interplay of gender, power and sexuality. In India, a woman is sexually harassed every 12 minutes¹. Due to industrialisation, globalization, development in various fields, role of women is changing rapidly in India. Today, women in India are showing progress in majority of the fields like education, economics, politics, media, art, space and culture, service sectors, science and technology, etc. As the role of women has shifted from home work to industrial work, offences against women are also increased day by day. In spite of rising incidences of sexual harassment, their reporting is almost nil as women fear loss of personal & professional reputation and livelihood owing to the social stigma.

I. WHAT IS SEXUAL HARASSMENT?

As a result of growing importance of this issue S. 354A was added to the IPC through the way of Criminal Law (Amendment) Act, 2013 which enlists the acts which constitutes the offence of sexual harassment. They are:

1. physical contact and advances involving unwelcome and explicit sexual overtures; or
2. a demand or request for sexual favour; or
3. showing pornography against the will of a woman; or

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¹ D.K. Srivastava (2010) "Progress of Sexual Harassment Law in India, China and Hong Kong: Prognosis for Further Reform", 51 HILJ 172

4. making sexually coloured remarks, earlier, there were no related laws in the Indian Penal Code that could be evoked.

There were three sections in Indian Penal Code viz. S. 294², 354³ and 509⁴ to deal with such crimes. However, these related laws are framed as an offence that either amount to obscenity in public or acts that are seen to violate the modesty of women. While Section 294 IPC is a law applicable to both men and women, the latter two are specifically oriented towards women.

II. INTERNATIONAL LAWS AND POLICIES FOR ADDRESSING SEXUAL HARASSMENT IN THE WORKPLACE

1. **United Nations General Assembly Resolution 48/104⁵ on the Declaration on the Elimination of Violence Against Women** defines violence against women to include sexual harassment, which is prohibited at work, in educational institutions, and elsewhere (Art. 2(b)), and encourages development of penal, civil or other administrative sanctions, as well as preventative approaches to eliminate violence against women (Art. 4(d-f)).
2. The **Convention on the Elimination of all Forms of Discrimination against Women⁶(CEDAW)** directs States Parties to take appropriate measures to eliminate discrimination against women in all fields, specifically including equality under law, in governance and politics, the workplace, education, healthcare, and in other areas of public and social life. (Arts. 7-16).
3. Moreover, **the Beijing Platform for Action, para. 178⁷**, recognizes sexual harassment as a form of violence against women and as a type of discrimination, and calls on multiple actors including government, employers, unions, and civil society to ensure that governments enact and enforce laws on sexual harassment and that employers develop anti-harassment policies and interference methods.
4. **The ILO Committee of Experts on the Application of Conventions and Recommendations** has confirmed that sexual harassment is a form of sex discrimination

² S. 294 IPC: Obscene acts and song

³ S. 354 IPC: Assault or criminal force to woman with intent to outrage her modesty

⁴ S. 509 IPC: Word, gesture or act intended to insult the modesty of a woman

⁵ <http://www.un.org/documents/ga/res/48/a48r104.htm>

⁶ <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>

⁷ <http://www.un.org/womenwatch/daw/beijing/platform/>

covered by the Discrimination (Employment and Occupation) Convention (No. 111) of 1958. The ILO's Indigenous and Tribal Peoples Convention (No. 169) also specifically prohibits sexual harassment in the workplace.

5. **The International Covenant on Economic, Social and Cultural Rights** contains several provisions particularly important for women. Article 7 recognizes her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate working environment.

III. CONSTITUTIONAL EXPANSION

The Constitution of India ensures and guarantees every individual the right "to practice any profession, or to carry on any occupation, trade or business" as enshrined in Article 19(1) (g). Every woman has a constitutional right to take part in public employment and this right is denied in the process of sexual harassment, which force her to keep away from such employment. Sexual harassment of woman at workplace exposes her to a big risk and danger which puts her at an inequitable position vis-à-vis other employees and this adversely affects her ability to realize her constitutionally right guaranteed under Article 19(1) (g).

Sexual harassment of women at workplace is also a violation and infringement of the right to life and personal liberty as mentioned in Article 21 that no person shall be deprived of his life or personal liberty. Right to livelihood is an integral and intrinsic part of the right to life. Sexual harassment is the violation of the right to livelihood. For the meaningful enjoyment of life under Article 21 of the Constitution of India, every woman is entitled to the elimination of obstacles, problems, difficulties and of discrimination based on gender. Since the 'Right to Work' depends on the availability of a safe working environment and the right to life with dignity, the danger and risk imposed by sexual harassment need to be removed for these rights to have a meaning and to get enforced.

The preamble of the Constitution of India provides that it will secure to all its citizens – "Equality of status and opportunity." Sexual harassment violates this basic objective of the framers of the constitution. The idea of gender equality inscribed in our Constitution would be ineffectiveness if a woman's right to privacy is not regarded as her right to protection of life and liberty guaranteed by Article 21 of the Constitution of India. In view of the fact that sexual harassment of women at the

workplace violates their sense of dignity and the right to earn a living with dignity, it is absolutely against their fundamental rights and their basic human rights.

IV. CASE ANALYSIS

*Vishaka & Ors. v. State of Rajasthan*⁸

Sexual harassment at workplace introduced as specific offence in the case of Vishaka and Ors. v. State of Rajasthan, 1997. In 1985, there was a woman named Bhawari Devi, who was employed as village level social worker which is also known as Saathin under Women Development Project (WDP) which is run by government of State of Rajasthan. She was directed to work for the prevention of child marriage. She went to village in the State of Rajasthan and there she reported a Gujjar family to the police because they are performing marriage of one year old infant. Therefore, to get revenge from Bhawari Devi that family visited (workplace) her home along with five person and they raped her in front of her husband. Later on she filed a complaint against them and due to lack of evidence, trial court acquitted the accused.

Various other organization and women activists also raised their voice and start supporting Bhawari Devi to support her to get justice. Hence, they file a Public Interest Litigation for protection of women from sexual harassment at workplace as all the incident happened during the course of her employment that I her workplace because her work is to visit villages to prevent child marriage.

The Supreme Court has inspected the case which highlighted several issues or problems like gender inequality, outraging the modesty of women, sexual harassment at Workplace and rape which basically means violence against women.

The Supreme Court observed that, —in the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places the contents of International Conventions and norms (CEDAW) are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in arts 14, 15, 19 (1) (g) and 21 of the constitution and the safeguards against sexual harassment implicit therein. Any international convention which is not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to widen the meaning and content thereof, to promote

⁸ Vishaka and Ors. v. State of Rajasthan AIR1997 SC 3011.

the idea of the constitutional guarantee. This can be derived from Article 51 (c) and the enabling power of the parliament to enact laws for implementing the international conventions and norms by virtue of Article 253 read with Entry 14 of the Union list in seventh schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the union shall extend to the matters with respect to which parliament has power to make laws. The executive power of the union is, therefore, available till the parliament enacts legislation to expressly provide measures needed to curb the evil.⁹

Thus, the power of the court under Article 32 for enforcement of the fundamental rights and the executive power of the union have to meet the challenge to protect working women from sexual harassment and to make their fundamental rights meaningful. The progress made at each hearing culminated in the formulation of guidelines to which the union of India gave its consent through the learned solicitor general, indicating that these should be the guidelines and norms declared by this court to govern the behaviour of the employers and all others at the work places to curb this social evil.¹⁰

The Supreme Court introduced VISHAKA GUIDELINES, 1997 for employers as well as other responsible persons or institution to immediately ensure the prevention of sexual harassment and protection of women. According to Article 141 of Indian Constitution, the guidelines passed by Supreme Court is binding on all other courts until proper legislation came into force.

VISHAKA GUIDELINES:

1. It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts, of sexual harassment by taking all steps required.
2. sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:
 - a) Physical contact and advances;
 - b) A demand or request for sexual favors;
 - c) Sexually coloured remarks;

⁹ Vishaka and Ors. v. State of Rajasthan AIR1997 SC 3011.

¹⁰Vishaka and Ors. v. State of Rajasthan AIR1997 SC 3011.

- d) Showing pornography;
 - e) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature
3. All employers or persons in charge of work place whether in public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:
- 3.1 Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.
 - 3.2 The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.
 - 3.3 As regards private employers, steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.
 - 3.4 Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.
4. Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.
5. Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.
6. Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.
7. The complaint committee should be established, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality. The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment. The Complaints
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Committee must make an annual report to the Government department concerned of the complaints and action taken by them.

8. Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.
9. Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action¹¹.

*Apparel Export Promotion Council v. A.K Chopra*¹²

The Vishaka judgment initiated a nationwide discourse on workplace sexual harassment and threw out wide open an issue that was swept under the carpet for the longest time. The first case before the Supreme Court after Vishaka in this respect was the case of Apparel Export Promotion Council v. A.K Chopra. In this case, the Supreme Court reiterated the law laid down in the Vishaka Judgment and upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexually harassing a subordinate female employee at the workplace. In this judgment, the Supreme Court enlarged the definition of sexual harassment by ruling that physical contact was not essential for it to amount to an act of sexual harassment. The Supreme Court explained that “sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favour 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.”

The Apex Court went a step ahead and held that, an attempt to molest would amount to sexual harassment. Outrageous behaviour of the employee is sufficient to constitute sexual harassment and actual assault or touch is not necessary to prove it. In this case AK Chopra, an Employee of Apparel Export Promotion Council was charged with sexually harassing a woman employee working as a clerk

¹¹ Vishaka guidelines, 1997

¹² Apparel Export Promotion Council v. A.K. Chopra AIR 1999 SC 625

cum typist. The clerk had complained that the accused had tried to physically molest her in the office and also tried to sit too closer to her and advertently. Despite her repeated protests, he continued to repeat his offensive and unwelcome overtures. The harassed employee complained to her employers about the demeaning behaviour of her superior. —Following her complaint, the company suspended the alleged harasser and initiated disciplinary proceedings against him as per the guidelines laid down by the Supreme Court. The Disciplinary committee held him guilty of sexual harassment and removed him from service. The parties aggrieved by the above order, he appealed to the Staff Committee but before it could take any decision, —he managed to obtain the unconfirmed minutes of the staff committee, few of which purportedly favored him on certain grounds. He, then, approached the high court without any delay with prayer that company be directed to implement those minutes. The High Court arrived at a conclusion the accused only made an attempt to molest the clerk without actually doing so and *Apparel Export Promotion Council v. A. K. Chopra*, therefore, he could not be removed from the service. Deciding in his favour while allowing the petition, the high court directed the company to implement the decision of the staff committee as per its unconfirmed minutes. The company filed an appeal with the Supreme Court. Criticizing the judgment of the high court, the Supreme Court held that the high court erred while deciding in favour of the alleged harasser and the court should not ordinarily interfere in the findings of the disciplinary proceedings unless: (a) the finding were based on evidence or (b) the finding were legally tenable. In this case, as the findings were based on evidence and were legally tenable, therefore, the High Court should not have interfered.¶ The Apex Court of India applied the law laid down in *Vishaka's* case for the first time in this case and upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council who was found guilty of sexual harassment of a subordinate female employee at the work place on the ground that it violated the fundamental rights guaranteed under article 21 of the constitution of India. The Supreme Court made it clear that sexual harassment is gender discrimination and any act or attempt of molestation by a superior would constitute sexual harassment.¶ The Supreme Court in this case held that, any action or gesture, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of definition of sexual harassment. Each incident of sexual harassment, at the place of work, results in violation of Fundamental Right to Gender Equality and the Right to Life and Liberty the most two precious Fundamental Rights Guaranteed by the constitution of India. As early as in 1993 at the ILO Seminar held at Manila, it was recognized that sexual harassment at workplace was a form of gender discrimination against women.

*Saudi Arabian Airlines, Mumbai v. Shehnaz Mudbhalkal*¹³

It was in *Saudi Arabian Airlines, Mumbai v. Shehnaz Mudbhalkal* probably for the first time that any High Court applied the Supreme Court's guidelines with regard to sexual harassment at workplace. Shehnaz's services with Saudi Arabian Airlines were terminated because she did not give in to the sexual demands made by her superior, Abdul Ellah Bahrani. She has been awarded full back wages and continuity of service from July 25, 1985. Shehnaz joined the services of Saudi Arabian Airlines (SAA) on November 16, 1978 as secretary to the Station Manager. She received the letters of appreciation from the management and was awarded a merit certificate and a merit salary equal to 5 percent of her wages. She had trained various persons in the duties of Customer Service Agent. In July 1983, Abdul E. Bahrani took over as station manager and Shehnaz's problem began. He asked her out for lunch and dinner, he made suggestive remarks, and he asked her which method of contraception she preferred. On one day he even made physical advances at her at a colleague's party from which she could escape with the help of some friends. She even approached the manager with her grievance but was informed not to put anything in writing as this would harm both her career as well as the company's image. Bahrani wanted to take revenge from her as she approached the manager. He used various methods of humiliation like repeatedly threatening her with termination of services and even threatened to jeopardize her husband's job in Saudi Arabia if she did not submit to his demands. Matters came to a head when vacancy for the Lead Customer Service Agent arose. Fearing Bahrani's revengeful response, she made a representation that in view of her seniority and past record she would be given the post. Bahrani telephoned her residence at 12 midnight and asked her to come over to discuss the representation. She refused. The victimization intensified from this point onwards. On January 24, 1985 when she reported back from leave she was not permitted to sign the attendance. This continued for the next three days up to January 28. He forced her to sign a letter of apology with a promise not to use it. For her job she wrote down a letter what was dictated to her and this letter was later used as a trick to issue a suspension order against her. The same letter later convinced the labour court that Bahrani was indeed victimizing her. Subsequently he intensified the pressure by issuing a suspension order for four days from February 6. When she resumed work, she declared that her suspension was illegal and she would complain to authorities in Jeddah. —This is when my fate

¹³ *Saudi Arabian Airlines, Mumbai v. Shehnaz Mudbhalkal* 1999, 2 LLJ 109 (Bom)

was sealed, says Shehnaz. In July 1985 she was assigned very typing work as a result of which she developed severe chest pain. She was compelled to proceed on a month's sick leave when she joined her husband in Jeddah. During her stay there she approached the company head-quarters and made a formal complaint against him. The Executive vice President assured her that necessary steps would be taken and that should resume work. But she was not allowed to work and was advised to stand by at home. A letter of termination was sent to her. The order of termination was pre-dated to 24 July, 1985 to escape from the consequence of the directions received from the Jeddah office in the matter. Brahani vendetta was not yet complete. The very next day he dispatched letters to all the Airline offices in Bombay informing them that she was a terminated employee, thus ensuring that she would find it impossible to obtain another job. She challenged the termination order on the ground that it was served since she had refused the advances of her boss. In 1997, the labour court directed that she can be reinstated with full back wages and continuity of service and the Mumbai High court upheld the directions. On Feb., 5, 1999, Justice B.N. Srikrishna commented on the actions of SAA as operation scuttle and observed, —the conduct of the boss would squarely fit in with the concept of sexual harassment as defined by the Supreme Court. Legal and Women activists hailed the courts verdict, noting that this was the first time a high court had applied the SC guidelines. The judgment is significant, pointed out legal activist Flavia Agnes. Most women don't come forward because they feel that nothing will happen. This may inspire more women to take a stand when they are being forced to compromise. But her tryst with the destiny did not end here¹⁴. On joining SAA on February 24, 1999, she was immediately transferred to Chennai. —She then filed an injunction on the transfer of a suit, where she claimed damages of around Rupees one crore for the sexual harassment and emotional pain and suffering caused to her. It was in response to this suit, that on April 8, 1999 Justice AP Shah of the Mumbai High Court restrained the company from transferring her and directed that she be allowed to resume her duties at the Sahara International Airport with her salary and all other dues. Justice R. C. Kochar held that the company's actions were of malafide intent and directed that she be reinstated on January 3, 2000 with full salaries and back wages. Her case was further complicated by the fact that her then- husband, also an employee with SAA was threatened with retrenchment if she took an aggressive stand against the airline. Her decision, not to put an end this battle, led to estrangement with her husband which was nothing less than a live nightmare. She said, after she emerged victorious, —Working women have to deal with sexual innuendoes and the passes all the

¹⁴ Judgement of Saudi Arabian Airlines, Mumbai v. Shehnaz Mudbhalkal

time. We take it in our stride. Its only when one is pushed beyond excusable limits that we knock the court's door. After that you have to stick it out, even if there are times you want to scream with frustration. Thus, it is clear here that this judgment illustrates that how a typical case of sexual harassment may include both quid-pro-quo and hostile working environment elements.

V. CONCLUSION

India is rapidly advancing in its developmental objectives and more and more women are joining the work force. The identification of the right to protection against sexual harassment is an intrinsic component of the protection of the women's human rights. It is all a step towards providing women independence, equality of opportunity and the right at work with dignity. Sexual harassment at the workplace is a social and legal challenge that needs to be addressed and answered. It is important to enhance the awareness among employers and employees on the existence of forms of sexual harassment at the workplace, preventive measures, and legal framework on preventing and addressing sexual harassment. Dissemination, circularizing and awareness raising activities should be regularly conducted and evaluated in order to improve best practice on how to address sexual harassment in the workplace, and also to forewarn and inform of forms of sexual harassment to enable potential victims to avoid them. Enhancing training courses on sexual harassment and providing documentation or a handbook on the prevention of sexual harassment at the workplace can help in combating it.

“While a murder destroys the physical frame of the victim, sexual harassment degrades and defiles the soul of a helpless woman.”¹⁵

¹⁵ <http://www.slideshare.net/krishcyb/sexual-harassment-of-working-women-in-India>