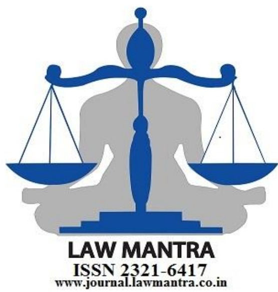

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IMPLEMENTING LAW ON SEXUAL HARASSMENT AT WORKPLACE: HAVE THE EMPLOYERS FAILED WOMEN EMPLOYEES?*

Introduction

The Tehelka and TERI sexual harassment cases demonstrated violation of value of gender equality enshrined in the Constitution of India. It is evident from media reporting that both did not follow legal provisions aimed at resolution of sexual harassment complaints. After outcry in the media, Tehelka formed a complaints committee in haste (Kumar, 2015) while complainant employed with TERI was prompted to approach police after repeated incidents of sexual harassment for more than a year. She did not feel reassured about support within the organisation (Ohri, 2015) which resulted in her quitting the organisation in 2015 (FirstPost, 2015).

In both instances discussed above, employers failed to stand up to their responsibilities as per law. Rather they shielded the individuals who were charged with sexual harassment. In the Tehelka case, the person was allowed to self impose penalty while in the TERI case the person was allowed to proceed on leave in the absence of any interim recommendation by the ICC (Kumar, 2015; FirstPost, 2015). These instances tell us that sexual harassment is rampant but employer attitude continues to be far from positive.

Most of the writings and studies in India done during 1997-2013 reflect poor implementation of the Supreme Court Vishakha guidelines (1997), low reporting of sexual harassment and ineffective resolution of reported complaints (Saheli, 1998; Sakshi, 2000; Sanhita, 2001; SARDI, 1999; Lawyers Collective and ILO, 2002; Yugantar, 2003; CII, 2005; Chaudhuri, 2006; CFTI, 2010). Report by the Joint Parliamentary Committee (JPC) in 2011 summarised the issue pertinently. The JPC recorded that implementation of Vishakha guidelines in the private sector could not be ascertained in the absence of database available with the Ministry of Women and Child Development (MWCD) with regards to the number of complaints, their resolution and action taken in the absence of any laid down central mechanism. The JPC concluded that Vishakha guidelines (1997) remained on paper in majority of workplaces.

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In this context, I argue that in India employer response to reported complaints of sexual harassment has persistently been not compliant with the law. It was so while the Vishakha guidelines (1997) were prevailing and continues to be sluggish Phadnis and John (2014), Singh, (2015) and DNA, (2015). This is substantiated by findings of the research undertaken by me as fulfillment of PhD programme at Tata Institute of Social Sciences, Mumbai.

Researching the Issue

In the studies referred above, specific aspect of employer response to reported complaints of sexual harassment remained unexplored. Therefore one of the objectives of the research was to understand and examine employer response to reported complaints of sexual harassment. Since the research was undertaken before enforcement of the 2013 Act, it provides insights into status of compliance by organisations to then prevailing legal framework i.e. Supreme Court Vishakha guidelines (1997).

Methodological Approach

Research questions required that qualitative approach was followed. More specifically phenomenology was chosen to get a both closer and deeper understanding of lived experiences of individuals who were affected by implementation of the Vishakha guidelines (1997) in their organisations. This helped in bringing out new and context specific knowledge both from the compliance and process point of view.

Mumbai was chosen as the research setting taking into consideration that it is the economic capital of India and home to different kinds of organisations falling in the category of public, government, and private sectors. Few participants were selected using purposive sampling (Welman and Kruger, 1999). Sample was expanded using snowballing technique i.e. by asking one informant or participant to recommend others for interviewing (Babbie, 1995; Crabtree and Miller, 1992). Women's organisations / groups, human and / or women's rights lawyers, State Commission for Women became contact points to get in touch with women who reported sexual harassment to their employers. Lawyers, trade union members and representatives of NGOs functioning as external members with complaints committees were forthcoming to be part of the research. Sample size was twenty seven. Out of these, seven were women who reported sexual harassment at workplaces. Out of seven, four were employed with government organisations while three were working with private sector organisations. Sample was not representative in terms of participant activities except that all participants were employed with the organised sector and reported sexual harassment to their employers. Data collection was done using single in-depth semi structured interviews.

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Experiences of the participants regarding sexual harassment at workplace were captured in three themes. One of the prominent themes that emerged was Employer Response to Reported Complaints of Sexual Harassment. Out of all the themes, this particular theme is of utmost importance because it helps understand the prevailing situation about compliance to the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. This theme brings forth point of view of women complainants who not only reported sexual harassment to their employers but chose to approach external agencies for intervention. This theme was analysed from the point of view of compliance to the Vishakha guidelines (1997).

Employer Response to Reported Complaints of Sexual Harassment - Key Findings

Ravichandar (2010) has discussed five D's i.e. blocks that employers usually have with regard to the issue. She says that employers are found to be in denial and dismissal mode. They usually deny that sexual harassment exists in the organisation and dismiss the problem saying there could be few isolated instances. Most of them resist implementation of the law apprehending danger of misuse.

This was confirmed by the present research. It came through that employers openly flouted the Vishakha guidelines (1997). None of the organisations had constituted complaints committees. As a result none of the complaints were instantly referred to the committees. Complaints committees were either constituted or activated after complainants insisted and / or when there was pressure from external agencies like the State Commission for Women, High Court etc. In all cases, the employers half heartedly implemented the Vishakha guidelines (1997). Therefore the implementation was flawed and lacked spirit.

It was found women did not complain immediately after the incidents of sexual harassment happened. Complaint was the last choice for them. They were compelled to complain because the environment at workplace became hostile. They received information about the Vishakha guidelines (1997) only after they reached out to women's organisations, State Commission for women and the police for help.

It was noticed that women could not name the offensive behaviour as sexual harassment. Therefore the complaint was not seen as that of sexual harassment and dismissed by the employers. It was labeled as psychological problem or administrative harassment arising out of non performance of the complainant, workplace politics, ragging or rude behaviour. When women reported sexual harassment to persons in positions of authority, they either laughed at the

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complaints or did not believe them. Non verbal form of sexual harassment was not seen needing action. In all the cases, employer tried to either suppress the complaints or ignore them.

In all cases, women faced retaliation from the employer in the form of termination from service, hostile working environment or forced resignation. It was pronounced in the private sector. Nature of retaliation within the government organisations differed substantially and did not cost the women their jobs. For these women sexual and administrative harassment escalated after they complained. Almost in all cases, women saw the senior management and persons on responsible positions getting involved in plotting and planning against them.

Experiences of women complainants were substantiated by NGO members (functioning as external members with complaints committees) and practicing lawyers. NGO members stated that most employers were living in a belief that internal environment was good and there was no sexual harassment. There was low awareness about the issue and existence of complaint mechanism. Sexual harassment policies were vague because they did not envisage complex situations.

Lawyers emphasised that multinational companies feigned strict global standards and violated the code of conduct. Employers believed that the woman complained because of some ulterior motive. As a consequence, response to complaints was negative. If women were found challenging the employers through external agencies such as police etc. they retaliated by blaming the woman as a non performer and revenge seeking person. Usually complaints of sexual harassment usually led to employer initiation some action against the woman in the form of memo and charge sheets for some unrelated issues leading to termination from service. According to the lawyers, human resource department of the organisation protected the man who was charged with sexual harassment. Constitution of complaints committees too was a problem because mostly the external member was someone lacking credibility. Additionally, women complainants were not given details about the names and contact details of the committee members.

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Lawyers added that in most cases employers got absolutely vindictive and made it difficult for the women to seek employment elsewhere. This was done by defaming the woman in the job market. On the other hand, confidential record / personal file of the man did not contain reference to the complaint of sexual harassment.

1. **Way Forward**

   Private companies which rest on profit and enhanced performance need to have a foundation of a good stable workforce where every employee irrespective of their gender can work in a fear free environment (Choudhary, 2015). However, data provided by the

Corporate Affairs Ministry shows that number of cases of sexual harassment complaints within the top 100 companies listed on the National Stock Exchange rose more than twice in the financial year 2014-15 (Asian Age, 2015). Though there was escalation in reporting, the FICCI – Ernst and Young study (2015) reveals that one in every three Indian companies i.e. 31% have not set up Internal Complaints Committees (ICC). Of those who have, 40% have not begun training the members in the provisions of the law while 35% are unaware of the penal consequences of not complying with the law. 44% have not circulated information about the law to their employees (Bhattacharyya, 2015; Sharma, 2015).

Need of the day is that as suggested by Ministry of Women and Child Development it is crucial that employers do enhanced disclosure about constitution of Internal Complaints Committees (ICC) under the Companies Act, 2013 without any reluctance (Business Standard, 2015). Here it is important to understand that prolonged struggle and dialogue by the women's movement with the government for more than a decade resulted in enactment and enforcement of the Act. It is an explicit form of affirmative action under Section 15(3) of the Indian Constitution. Objective of the Act states that the legislation aims at providing protection to women from sexual harassment at workplace. Therefore it should be interpreted in the interest of women. Employers who do not follow the law should not be allowed to escape from strict action.

Social legislations are an active process of preventing or changing wrong course in society with an aim to empower groups who are disadvantaged due to certain disenabling factors (Fairchild, 1944; Gangrade, 1978). Interpretation of the law bereft of pro woman point of view can thwart the achievement of gender equality. Therefore is required that the law is understood within the framework of their fundamental rights guaranteed by the Constitution to women and human rights of women. In the Indian context it is important, compliance to the Section 19 of the 2013 Act by the employers would entail concrete and visible and concrete efforts towards prevention of sexual harassment. Combating the trouble requires creation of work culture that promotes zero tolerance to sexual harassment whereby women feel comfortable to report sexual harassment. For this it is important that employers build an efficient anti sexual harassment policy not only in synchrony with the law but a one that addresses silent areas in the law.

These grey areas highlighted below need clear statement from the employer demonstrating zero tolerance to sexual harassment at workplace. Expression of zero tolerance towards sexual harassment will include action not only against specific acts of sexual harassment but sexual offensive behaviours in general. Such behaviours may not be directed towards a particular woman; yet they could create discomfort amongst many women employees. Secondly, one of the major gaps that the Act creates is that it does not specify frequency and number of meetings for the ICC. If no complaint is reported then the ICC members will not meet and consequently will have no role. Interpretation of statute in this manner will result in the ICC remaining only on paper thereby losing its significance. Even though there is no reported instance of the sexual harassment, ICC should meet regularly not only to gain visibility but also to be able to reach out to the women in the organisation. Secondly, when a complaint of sexual harassment at workplace is handed over to the ICC, ample room should be provided by the ICC members to accommodate varying perceptions and comfort levels of women depending on socio-economic background and gendered socialisation. Last but not the least, Section 7 of the Rules does not mention mandatory presence of the external member as part of the quorum for the ICC meetings. This is glaring loophole in the Act can be manipulated by employers to suit their vested interests. Absence of the external member could lead to lack of credible and fair hearings. Therefore compulsory presence of the external member during case proceedings and ICC meetings should be included as part of best practice.

The 2013 Act definitely has the potential to carry forward the process of shifting power relations at work initiated by the Vishakha guidelines (1997). This can happen if the employers become accountable for implementation of the Act. As stated by Hersch (2015) despite being illegal, costly, and an affront to dignity, sexual harassment is pervasive and challenging to eliminate. Therefore only if there is sincerity of purpose on part of the government and employers that the legislation will be able to bring about desired change in the position of women.

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