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## SEXUAL HARASSMENT AT WORKPLACE\*

### Abstract

Women are now breaking the 'glass ceiling' or 'mommy track' and occupying higher post in different sector, but still no improvement has been seen in the graph of harassment. There has been an increase of 45% in the report in the past 3 years. After Vishakha guidelines the Government of India introduced *Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013*. Generally, in many workplaces women are being harassed in the form of *quid pro quo*, or through *hostile work environment*. By harassing women, fundamental rights are also violated i.e. Article-21 which says 'Right to live with human dignity' and Article-19 which says 'Right to practice any profession or to carry on any occupation, trade or business which includes right to a safe environment free from sexual harassment'. Recently, #MeToo movement has opened many unseen scars of sexual harassment at workplaces. Fear of loss of reputation by the *aggrieved woman* has led many cases being unreported. Fear of exposure of the victim through media is also one of the reasons of not filing a complaint. Due to #MeToo movement there has been an increase of 54% complaints. Internal committee should take their duty seriously and no proper implication of *zero tolerance policy* is there in the workplace. This paper aims to critically analyze on sexual harassment at workplace with their loopholes in the implication of acts and guidelines, social reputation of victim, social pressure on victim, role of media and functioning of internal committee and other authorities.

**Keywords:** Sexual Harassment, Vishakha Guidelines, Employer-Employee, workplace, Complaints, SHe-Box, #MeToo, Casting Couch.

## INTRODUCTION

“No women shall be subjected to sexual harassment at workplace”<sup>1</sup>

The pioneering anti sexual assault and women’s empowerment movements’ #MeToo and Time’s Up movement has set up the public conversation on fire about women’s issue around the world, and brought up the global consciousness on women’s obstacle they face in the both phase of their life; Personal as well as Professional. Both these movements have a drastic surge in recent time. Especially in our bollywood, when one of the celebrity put her voice on fire a bunch of incident started coming out and hundreds of allegation were put on against some of the eminent personality. And it was just the tip of the iceberg; many things are still beneath the surface. From the ancient times women are being harassed and now in this modern world where we talk about equality, women are being harassed in every hook and corner; whether it is workplace or home, they are insecure everywhere. There are few men who feel they have license to harass them at workplace just because they thinks that there’s a “women’s place” in the society and these working women have left that far behind i.e. left behind personal integrity. Before 1997, women who were harassed in workplace were having very limited option to put there culprit behind the bars. They have only section 354<sup>2</sup> and section 509<sup>3</sup> of Indian Penal Code, 1860. But a revolutionary judgement came in the year 1997 which was a nightmare for the culprits and it was *Vishakha and ors vs. State of Rajasthan*<sup>4</sup>, which created Vishakha guidelines. It’s an irony that the time gap between POSH act and POSH rule is almost 16 years. Sexual harassment took place in many form some of which are *Quid pro Quo*<sup>5</sup> (‘this if that’ form) or Hostile work environment. This harassment act violates the fundamental right of the women namely article 19, 20 and 21 of the Indian Constitution of India which attracts *Injuria Sine Damnum*<sup>6</sup> concept according to which legal action would taken against you even without any actual damage<sup>7</sup>. On the line of Vishakha guidelines Government of India enacted Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 which

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<sup>1</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

<sup>2</sup> “Assault or Criminal force to women with intent to outrage her modesty”.

<sup>3</sup> “Word, Gesture or Act intended to insult the modesty of a women”.

<sup>4</sup> MANU/SC/0786/1997.

<sup>5</sup> “Something for something”.

<sup>6</sup> “Violation of legal rights without any actual damage”.

<sup>7</sup> “Monetary, Health, property etc.”.

protects women from sexual Harassment at workplace. In the year 2018, Ministry of Women and Child Development (WCD) launched an online portal through which complaint can be lodged of sexual harassment at workplace namely SHE-Box (Sexual Harassment electronic box). It was launched to ensure that there's an effective implementation of Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 since now all the complaint filled will be monitored by WCD.

### **SEXUAL HARASSMENT AT WORKPLACE – WHAT DOES IT MEAN?**

“Sexual harassment” includes any one or more of the following unwelcome acts or behaviour (whether implicitly or explicitly) -

- i. Physical contact and advance; or
- ii. A demand or request for sexual favours; or
- iii. Making sexual coloured remarks; or
- iv. Showing pornography; or
- v. Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.<sup>8</sup>

### **WORKPLACE AMBIT**

Traditionally the meaning of workplace means office where one works for his/her livelihood, but with the change in time the meaning of workplace got broader and broader. It is now not only restricted up to the 4 walls of the office. Its radius has got increased in the recent time. In the case of *Saurabh Kumar Mallick vs The Comptroller and Auditor General of India and Ors*<sup>9</sup>, the ambit of workplace was discussed. In the defendant argued that whether the Glen Mess constitutes the workplace, the tribunal observed that there was no proper definition for ‘Workplace’ neither in the conduct rules nor in the Vishakha’s case. The court then moved towards dictionary definition, and according to The Black’s law dictionary place of employment or workplace is defined as a place where active work either temporary or permanent is being conducted in connection of a business for private or where a person is directly or indirectly employed by another. And after this the

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<sup>8</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

<sup>9</sup> MANU/DE/0956/2008.

tribunal laid down test to determine whether a place is work place or not, as per tribunal, are the following:<sup>10</sup>

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

The parameters laid down by the tribunal would only provide general guidelines and would not be determinative factors.<sup>11</sup> The question whether any place is working place or not is still depends on facts and circumstances.<sup>12</sup>

According to Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, section 2, sub clause (o) "workplace" includes following places –

- i. 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;
- ii. Any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or services provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or services;
- 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.

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<sup>10</sup> *Saurabh Kumar Mallick vs The Comptroller and Auditor General of India and Ors*, MANU/DE/0956/2008.

<sup>11</sup> *Saurabh Kumar Mallick vs The Comptroller and Auditor General of India and Ors*, MANU/DE/0956/2008.

<sup>12</sup> *Saurabh Kumar Mallick vs The Comptroller and Auditor General of India and Ors*, MANU/DE/0956/2008.

## VISHAKHA GUIDELINES

In the year 1992, Bhanwari Devi, a social worker in Rajasthan was brutally gang raped for stopping child marriage as a part of her duties of Women Department Programme. She doesn't get justice at Rajasthan High Court. After this Vishakha and other groups of women filled a Public Interest Litigation (PIL)<sup>13</sup> in the Supreme Court for the enforcement of fundamental rights of women under article 14, 19 and 21 of Constitution of India. In the year 1997, a landmark judgement came in the same case of Vishakha in which court laid down guidelines which would be followed by the employer of the establishment in the sexual harassment cases. The Court that, "in the absence domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all workplaces, the content of international conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in articles 14, 15, 19(1) and 21 of the constitution and the safeguards against sexual harassment implicit therein".<sup>14</sup> International Convention and treaties were too taken into consideration.

### PRE-VISHAKHA GUIDELINES SCENARIO

Before 1997, there was no proper procedural law to followed, women who were being harassed, has to file cases under section 354<sup>15</sup> and 509<sup>16</sup> of Indian Penal Code, 1864. These section left behind the interpretation of "outraging women's modesty" at the discretion of mere police officer. Different police officers interpreted differently. This created an ambiguity regarding the seriousness of this crime. There was no proper procedural law for the prevention of sexual harassment committed at workplace. Every case was dealt differently, so if the accused was proved guilty he would get different punishment in different cases and the degree for the same was solely dependent on the interpretation of the term "outraging women's modesty".

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<sup>13</sup> Vishaha and Ors. Vs State of Rajasthan, MANU/SC/0786/1997.

<sup>14</sup> Vishaha and Ors. Vs State of Rajasthan, MANU/SC/0786/1997.

<sup>15</sup> "Assault or Criminal force to women with intent to outrage her modesty".

<sup>16</sup> "Word, Gesture or Act intended to insult the modesty of a women".

## VISHAKHA GUIDELINES KEY FEATURES

Some key features of the Vishakha guidelines<sup>17</sup> are as follows-

- i. The guidelines put on an obligation on the employer as well as on other responsible authorities to check and prevent commission of sexual harassment and to provide procedure for resolution, settlement or prosecution of acts, of sexual harassment by taking steps required.
- ii. If the offence has been committed then the employer shall initiate action in accordance to the law in force and shall make a complaint in front of proper authority without discriminating the victim or the witness while dealing with the case.
- iii. Proper complaint committee should be formed by the employer, and the committee should be headed by a woman, and not less than 50% of the member should be women. For biasness and zero undue influence a third party should be a member of the committee who is familiar with the issue of sexual harassment.
- iv. Employer should create awareness regarding their women employees' right in their workplace.
- v. If any third person harasses, then the employer and other authorities should take reasonable steps to assist the affected person in terms of support and preventive action.

## POST-VISHAKHA GUIDELINES SCENARIO

Vishakha judgment was made in the year 1997, but even several years no efforts were seen to enact the guideline to law. So, the guideline itself worked as the law in the country for the time being the law is not made. Implication of guidelines was not seen but mere breach was apparently visible everywhere, in every nook and corner of the country. Few complaint committees were set up, service rules were not amended and guidelines were disregarded at both private as well as public employers. But even after this one thing came out to be positive which is that many of the organisations became aware and started to publicise it which ultimately become a driving force for the implementation of the same. In the mean time women who were harassed and were silent started to break their silence and demanded for appropriate action against the accused one. In the mean time National Commission for Women took the responsibility of formulating legislation to

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<sup>17</sup> Vishakha guidelines, 1997 (India).

deal with sexual harassment. After the bill was formulated, it was submitted to the Ministry of Human Resource Development, Department of Women and Child Development which made amendments and invited public at large for suggestions.<sup>18</sup> When Medha Kotwal's<sup>19</sup> case came up in the year 2004, the solicitor general of India made a statement that the government is serious in making a law for the sexual harassment at workplace and the court adjourned the matter so that the petitioner and other organisation study the bill and make recommendations. And after lot of recommendation and suggestion finally the government made a bill namely Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) which passed Lok sabha and Rajya Sabha and finally the act came into force on 9<sup>th</sup> December 2013.

### **LIMITATIONS OF VISHAKHA JUDGEMENT**

There are certain limitations in Vishakha Judgments which are as follows:

#### **1) Safe Place**

Working women are majorly present in the unorganised sector. And almost none of them have a well defined workplace. Works like that of vendors/ hawkers, where ever they go in order to full fill their job requirement that place becomes the workplace for them; and in the case of Journalists and Social Worker there is no well defined workplace. Vishakha guidelines says that, “appropriate work condition 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 women employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.”<sup>20</sup> Thus from the above context an employer can be held liable for the failure to provide safe workplace in the above scenario, Even if it is beyond the reach of the employer. With the advent of latest technology it is very difficult for the employers to provide safe workplaces for their women employees.

#### **2) Vicarious Liability of the employer**

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<sup>18</sup> Mihir Desai, India Together: Starting the battle against sexual harassment, volume 4, Combat Law, 2005.

<sup>19</sup> Medha Kotwal Lele and Ors. vs. Union of India and Ors., MANU/SC/0898/2012.

<sup>20</sup> Vishakha guidelines, 1997 (India).

The Vishakha guidelines has too much faith on the employer which is clear from the context that the guidelines kept the employer at the encumbrance to resolve the matter regarding sexual harassment resulting at their workplace. Such a position does not resolve the fundamental conflict between the employer and the employees or between the management and the workers. It is assumed by the guidelines that the employers have the best interest to resolve the problem regarding the sexual harassment matter. But in real life the scene is just opposite to theoretical things. The employer tries to suppress the matter rather than poking the matter, digging out and solving it as an unbiased party. Vicarious Liability of employer seems to have been conceived to fit a traditional office based employment scenario. India most of the women work in unorganised sector, so hardly in some cases liability on the employer can be raised. Some cases where liability is not able to arise are:

- Self employed women
- Social working women
- Migrant Women
- Women who establish their own nursing home.
- Sole proprietorship.

### 3) Formation of Complaint Committee

The guidelines puts too much trust on the employers and sees them as the best protector of their employees interest and so assumes that the formation of complaint committee will work properly even if they goes against the management or the employer. In the unorganised sector (which includes worker such as construction worker, beedi worker, domestic worker etc.) where women works mainly it is next to impossible to establish committee.

## **SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL)**

Finally in the year 2013 after a long gap of 16 years a proper procedural law was enacted to deal with sexual harassment at workplace. Now there's a direct law for the prevention of sexual harassment.



## KEY POINTS WHICH SHOWS THAT THIS ACT IS FAR BETTER THAN THE VISHAKHA GUIDELINES

1. This act covers almost all types of organizations such as NGOs, hospitals, nursing home, sports complex, school etc.(where there is no strict employer and employee relationship), whereas in the Vishakha guidelines there was no such clarity regarding which organizations are included under the ambit of it, the guidelines expressly covers only public, private and governmental organizations.
2. The term “employee” has much wider meaning in this act as compared to the Vishakha guidelines. Under this act any working women whether temporary or permanent, intern or trainee, unorganised labour as well as contract labour comes under the ambit of “employee” and has a right to approach to the concerned committee in case of some mishappenning.<sup>21</sup> Whereas in Vishakha guidelines, whether intern and trainee are employee or not was a matter of dispute and ambiguity was there.
3. The term “Workplace” has much wider scope under this act as compared to the Vishakha guidelines. This act also considers any place as workplace which an employee visits during the course of employment (including transportation) including the office area. In the case of *Saurabh Kumar Mallick vs The Comptroller and Auditor General of India and Ors*<sup>22</sup> even the mess and residential complex provided by the employer for the work was considered as the workplace. The expanded concept of “workplace” makes the application of the rules difficult in situations on where employees collaborate on offsite work, use shared transport or travel out of station. Whereas in the Vishakha guidelines its definition was very narrow and the workplace only includes government, public and private enterprises.
4. This act puts on too many obligations on the organisation and ignorance or violation of that will attract serious consequences. These obligations includes responsibility to create awareness amongst the employee, create complaint committees which should be in accordance to the act, train member of complaint committee, put up notices and submit the annual report. Whereas in the Vishakha guidelines there was no such significant obligations. Employee training and sensitization obligation were extremely preliminary.

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<sup>21</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

<sup>22</sup> MANU/DE/0956/2008.

5. Under this act, for grievance redressal, a complaint committee is compulsory to be constituted by the employer in accordance to the act. And the entire member should have requisite skill as mentioned in this act and should also satisfy with the minimum number of women participation in the committee. Whereas according to Vishakha guidelines there was no such restriction and rules regarding the formation of committee, there was much flexibility in the formation of the committee. The employer for its own benefit can mould the formation of the committee and without any technical requirement.
6. There is a prescribed time limit for the inquiry process under this act. 90 days is the time limit to complete the inquiry process. But according to Vishakha guidelines there is no such time bound; only it states that the inquiry should be completed within the time bound and the employer has the power to change the timeline according to them.
7. Several remedies have been discussed in this act. Such as disciplinary action, withholding the salary increase and promotion and awarding compensation is apparently expressed. Complaint committee too may provide interim relief. Whereas according to the Vishakha guidelines “appropriate disciplinary action” against the guilty but compensation is not expressly mentioned.
8. For the purpose of smooth functioning of the complaint committee and for fulfilling the sole objective of the complaint committee this act has granted the committee with power similar to a civil court. Whereas under the Vishakha guidelines, no such special power has been granted to the committee except the disciplinary action.
9. The act allows an option of settlement of the complaint through the conciliation provided by the complaint committee. Where as in the Vishakha guidelines there was no settlement mechanism of the complaint.
10. The act imposes a penalty of up to INR. 50,000 for the non compliance with the law, if again found then the penalty may double, coupled with the cancelation of the business license. Whereas according to Vishakha guidelines there is no such punishment for the non compliance of the law.

### **SHE-BOX (SEXUAL HARASSMENT ELECTRONIC BOX)**

SHe-Box which means “Sexual Harassment electronic Box” was created for the effective implementation of the Sexual harassment at workplace act. She-Box was launched by the

Ministry of women and child development headed by Maneka Gandhi in the year 2018. It's a single window access for all the working women whether they belongs to organised or unorganised sector, public, private or government sector can file their case in this box. There case would be directly pass on to the concerned authority under whose jurisdiction such case comes and side by side ministry of women and child development too will monitor it. This will reduce the disposal time of the case and justice will come in reasonable time.

### **CASTING COUCH**

Casting couch is a curse for those who seek their career in the film industry. According to Collins Dictionary, a couch on which a casting director is said to seduce women seeking a part in a film or play is said to commit casting couch. Many great actor and actress came up with their casting couch experience. This is a perfect example of Sexual harassment at workplace.

### **#METOO STORM**

In the year 2006 Tarana Burke used the term MeToo for promoting one of her campaign, an then in the year 2017 Alyssa Milano used hastag before the term MeToo to spread it round the world. Last year, one of the bollywood actresses alleged an actor for sexual harassment and after that incident it spread like fire in a dry forest. A lot of old sexual harassment experience came out and many actresses alleged many actors for their old sins.

### **CASES WHICH SHOOK THE NATION**

#### 1) St. Stephen College Case (*Subramanian Swamy vs. Union of India*<sup>23</sup>)

In the year 2015, a PhD student of St. Stephen College filled an FIR against an assistant professor and alleged that he harasses him in the college. She alleges that the professor sexually harasses her in the lab and in the other college areas. And when she complained about this thing to the principle and to Internal Complaint Committee instead of digging to the solution the concerned authorities tried to protect the professor for the sake of college's reputation.

#### 2) RK Pachauri – TERI

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<sup>23</sup> MANU/SC/0621/2016.

Nobel Laureate and Ex environment minister RK Pachauri was found guilty for sexual harassment against one of her women colleague. TERi committee also recommended for disciplinary action against him.

3) Tarun Tejpal – Tehalka Case

Tarun Tejpal, founder of Tehalka magazine was accused of sexually assaulting a woman employee in Goa in 2013. He was charged under 354, 354-A, 341, 342, 376, 376(2) and 376(2)(k) . A junior colleague alleged rape during Thinkfest in Goa.

4) Ashok Kumar Ganguly case

Former judge of Supreme Court stepped down as head of the West Bengal human right commission in 2014 after a law intern alleged of sexual harassment by him in a hotel room.

## CONCLUSION

Sexual Harassment is the worst thing which women can faces in thier workplace. It's not only detoriates the women's working quality but it heavily affects the mental condition too. Before 1997 we were not having any proper procedural law, harassed women had to file case against the accused only under section 354 and 509 of Indian penal code, 1860. There was no uniformity in the punishment due to no proper interpretation of the term "outraging women's modesty". But in the year 1997, honourable Supreme Court gave a revolutionary judgment in the case Vishakha and Ors. Vs State of Rajasthan<sup>24</sup> and formulated Vishakha Guidelines. Until any legislative law is not formed Honourable court ordered to follow Vishakha guidelines in all the public, private and government enterprise. But still not in much places this guideline was implemented, but many NGO's became aware and started publicising rights of a working women. There were many flaws in the guideline which was noticed and after a gap of long 16 years finally in the year 2013 Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act was enacted. But still after this law many high profile cases came out which shook the nation, such as Nobel Laureate RK Pachauri case, St. Stephen College Case, Tarun Tejpal-Tehelka case etc. In the year 2018 Ministry of Women and Child Development headed by Maneka Gandhi introduced SHe-Box for single window access for filling harassment cases. Through SHe-Box ministry could monitor the status of filled cases and it will definitely help in fast disposal of case. Recently #MeToo Movement has take a great hype when one of the bollywood actress alleged sexual harassment

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<sup>24</sup>MANU/SC/0786/1997.

against a bollywood actor that happened with her 10 year ago, and this proved to be a great stake for lot of other harassed women to break their silence. After that a lot of buried complaints started coming out and women started breaking their silence. And another thing which is very common is Casting Couch which is very normal in the Film Industry. Many great actor and actresses had come up with their experience regarding casting couch. Now it seems that women will not tolerate any harassment and if any wrong happens then definitely there are high chances that they will not try to bury the matter instead of that will speak out against the matter.

