



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2021 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original work is properly cited.

Reconceptualizing Sexual Harassment: Extending the POSH Act, 2013

Shivi Kanskar^a Debarati Pal^b

^aNational University of Study and Research in Law, Ranchi, India ^bNational University of Study and
Research in Law, Ranchi, India

Received 28 October 2021; Accepted 26 November 2021; Published 30 November 2021

In the current instances of lockdown and isolation at home, working from home and other remote communication systems have become a necessary evil. People are found to be stuck in being extremely dependant on technology which is proving to be a great boon in the 21st century. Technology has taken us a step towards a new direction of evolution for sure This is evident from the fact that almost everyone has access to devices which help them stay with close connect with the techno-linked world and those who are not much aware, constantly try to learn the use of technology to cope with the changing times. With that being expressed, workplaces too have shifted to an online platform and any kind of workplace is prone to sexual harassment. The issue at hand is, "Are women still safe in such working spheres given that harassment could exist through virtual connectivity as well?" This article is aimed to reinforce on the urgent requirement of extension of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 to online workspaces and provide identical safeguards for victims of sexual harassment at such workplaces just as offline workplaces.

Keywords: POSH, covid, cyber, sexual harassment.

INTRODUCTION

With more and more empowerment of women, and women gaining their own financial independence, women are no more confined to their households. They have at the same time, grown more susceptible to crime against them. The fear being socially disgraced and judged for the steps they take or their individuality are some of the very adverse effects it has on the mental space of women these days. It has been seen all over the globe as a common phenomenon that female teaching faculties are facing an infringement of their privacy and issues with a secure cyberspace.¹ The menace is that the misbehaviour of students remains anonymous most of the time because frequently used applications such as Zoom admit any user with a different and unverified username to join a meeting without switching on their cameras.² In such an environment, it is very easy to bully, pass derogatory comments or even cyber flashing, that is the act of sending indecent pictures of mostly private parts³. There exists a disruptive environment and even with a lot of effort, it is difficult to maintain decorum in online classes.⁴ It is provided by the POSH Act in Section 3 that females would not be subject to harassment in any form at 'a workplace'⁵. Advances which explicitly or implicitly express sexual thoughts and offers, discriminatory views on the basis of gender, male colleagues not dressing up appropriately on online workplaces without considering the gravity of the workplace, whether online or offline are only a few things which make women uncomfortable. Calling up female co-workers at odd hours or leading discussions into unfavourable topics with the excuse of work and urgency are few methods through which harassment at workplaces have taken new shape these days.⁶ It is not possible for managers to monitor the inter-personal communication of employees and many aspects among the ones mentioned

¹ Drew Harwell, 'Thousands of Zoom video calls left exposed on the open web' (*The Washington Post*, 4 April 2020) <www.washingtonpost.com/technology/2020/04/03/thousands-zoom-video-calls-left-exposed-open-web/?fbclid=IwAR1M3yRTYKqUuDjhp0rZLz_z8yDcwrZ5CgQN2yzlsgGA2awhPIEOF31CQIA&utm_campaign=wp_main&utm_medium=social&utm_source=facebook> accessed 20 October 2021

² *Ibid*

³ Zoe Betty, 'Why The Uk Needs To Take Cyberflashing Seriously' (*The Times*, 8 December 2019) <www.thetimes.co.uk/magazine/style/why-the-uk-needs-to-take-cyber-flashing-seriously-73c0r02f9> accessed 20 October 2021

⁴ *Ibid*

⁵ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, s 3

⁶ *Ibid*

above are not supposed to be things that women should complain about. In such a position, it becomes difficult to devise a law which correctly addresses the concerns of women.

Online sexual harassment is defined as “*unwanted sexual conduct on any digital platform. It includes a wide range of behaviours that use technology to share digital content such as images, videos, posts, messages, pages, etc.*”⁷ Showing or asking for compromising images, sending pornography, sharing emojis that can make one uncomfortable, personal comment, requesting for favours of sexual nature, capturing screenshots or screen recordings without consent, preferential treatment of employees who provide sexual favours and venting out aggression towards those who say “no” in the professional space have all been common ways in which employers have sometimes, caused such mental agony that employees have been forced to quit jobs.⁸ Anonymity on the internet has also become a very safe option through which misogynists find ease in urging female colleagues to video call them when the matters to be discussed can be sorted over a voice call or even on text. Such hostile practices leave no room for a woman to give her best in her job since she feels insecure and conscious about herself all the time. Her security and privacy, both are breached and at the time, she wants to fit in with the crowd.⁹

LEGISLATIVE FRAMEWORK

Sexual Harassment in general terms includes behaviour that have sexual intentions. It might be a direct gesture or an indirect hint such as *a) Physical contact and advances; b) A demand or request for sexual favours; c) Sexually coloured remarks; d) Showing pornography; e) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature*¹⁰. To add to this, it is also provided by the POSH Act that the intentional creation of an environment that is hostile for the woman or intimidates her is punishable as it might affect the mental health and perception

⁷ ‘Online Sexual Harassment’ (Childnet International) <www.childnet.com/teachers-and-professionals/for-working-with-young-people/hot-topics/online-sexual-harassment> accessed 20 October 2021

⁸ *Ibid*

⁹ *Ibid*

¹⁰ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, s 2(n)

of safety in her mind¹¹. The conclusion that we can draw from these guidelines is that it is not explicitly necessary for there to be any form of physical contact to prove sexual harassment. Sexual harassment can occur at any place, even through an online platform, whether public or private.¹² The intent or mindset of a perpetrator behind any act of sexual harassment, whether online or offline remains the same. The Delhi HC had described the same as an experience that is subjective because most men who harass view some forms of sexual harassment as *“harmless social interactions to which only overly-sensitive women would object. The characteristically male view depicts sexual harassment as comparatively harmless amusement.... Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.”*¹³

The offence of Sexual harassment with a woman is also in alignment with a violation of Articles 14¹⁴ and 15¹⁵ as it prevents the fundamental provision of equality by the Indian Constitution. Not just this, it also violates her right to life and to live with dignity under Article 21 of the Constitution,¹⁶ and this right includes in itself, the right of the woman to have a safe environment at work coupled with the right to practice any profession of her choice and capabilities under Article 19 (1) (g) of the Indian Constitution.¹⁷ The rights against sexual harassment and to work in a dignified manner at a workplace has also been laid down by the cross-border conventions,¹⁸ like the Convention on the Elimination of all Forms of Discrimination against Women, which has been ratified by India¹⁹. Sexual Harassment also affects a woman's work performance,²⁰ economic and social progress²¹.

APPLYING INTERPRETATION

¹¹ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, s 3(2)

¹² *Ibid*

¹³ *Dr Punita K Sodhi v Union of India & Ors* WP (C) 367/2009 & CMS 828, 11426/2009

¹⁴ Constitution of India, art 14

¹⁵ Constitution of India, art 15

¹⁶ Constitution of India, art 21

¹⁷ Constitution of India, art 19(1)(g)

¹⁸ *Ibid*

¹⁹ Convention on the Elimination of all Forms of Discrimination against Women

²⁰ *Ibid*

²¹ Statement of Objects and Reasons, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013

The practical question that needs to be answered now is whether an online forum can be considered a 'workplace' so that such acts come under the purview of the POSH Act. Inferences can be made from the bare provisions under the POSH Act that a workplace has to be "*dwelling place or house*"²². Whenever we are interpreting a legal provision, the aim at the end should be to remove arbitrariness from the interpretation.²³ To facilitate the same, it is important to consider the legal intent of the provision. When we look at the POSH Act, the legal intent is found to be equality of opportunity, status and equal protection in the eyes of law for both working men and women. Although there has always been an evolving and changing method of judicial interpretations, it is the duty of every Court to keep one aspect constant, that is, to interpret laws in a liberal manner²⁴. This approach should be reinforced in those cases which intend to increase the protection for a class of a weak class of people or in public interest.

The issue that we are dealing needs a very wide approach to the phrase "*dwelling place or house*". If we refer to only a domestic space as in a house or duties related to a house, it would narrow down the number of cases which we can encircle to ensure equity of protection. Alternatively, a more dynamic approach would be to include telework of any form or work done on cyberspaces as well. This would surely fulfil the goal that is trying to be achieved and the intent of the legislation, which was to protect the interests of woman at any kind of workplace.²⁵

The POSH Act, 2013 has included the concept and terminology of '*extension of workplace*' and this will include any such place which a female employee might have to visit in relation to carrying out any duties of her job. This also includes transportation to and fro an offline office. The extension has not explicitly included the online work platforms but interpretation in this direction is an urgent requirement.²⁶ The Rajasthan HC, while delivering a historic decision²⁷,

²² Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, s 2 (o)(vi)

²³ *Ibid*

²⁴ *Madan Singh Shekhawat v Union of India & Ors* AIR 1999 SC 3738

²⁵ *Ibid*

²⁶ *Ibid*

²⁷ *Vishaka & Ors v State Of Rajasthan & Ors* 1997 6 SCC 241

laid down the following guidelines to decide whether the act of sexual harassment has occurred at a place of work: (1) Proximity of the workplace; (2) the management's control over the woman's residence and (3) if the residence of the woman is under a requirement of the job. The problem from a social point of view is that most of the people look at sexual harassment as a physical problem but it is not necessary under many circumstances when the harassment is emotional or implied²⁸. POSH Act, 2013 explicitly provides the definition of sexual harassment as "inappropriate physical as well as gestural and verbal behaviour" and this applies in the virtual office as well.

THE DOCTRINE OF NOTIONAL EXTENSION

This doctrine is known as the theory of notional extension of employment as well. It is a widely applied principle of the Workmen's Compensation Act, 1923. In *Saurabh Kumar Mallick vs the Comptroller and Auditor General of India & Another*²⁹, the Delhi HC made the following observation while trying to understand the ambit of a 'workplace'³⁰:

"It is imperative to take into consideration the recent trend which has emerged with the advent of computer and internet technology and advancement of information technology. A person can interact or do business conferences with other people while sitting in some other country by means of video-conferencing... we cannot accept the narrow definition of the expression 'workplace'..."

The Court made an observation that the objective or aim during the formulation of the 'Vishaka Guidelines' was obvious if workplaces had to make sure that harassment of women employees are prevented in any form and criminals of the same are strictly punished. Taking into consideration the intent behind the decision of the Court, a narrow approach is not appreciated by confining the meaning of the term 'workplace' to only an office room. The facts and circumstances of each case is different and the uniqueness must be considered for each

²⁸ Pooja Singh, 'Even in the virtual office, sexual harassment continues' (*Live Mint*, 12 July 2020) <www.livemint.com/news/business-of-life/even-in-the-virtual-office-sexual-harassment-continues-11594561717967.html> accessed 21 October 2021

²⁹ *Saurabh Kumar Mallick v the Comptroller & Auditor General of India & Anr* 2008 SCC OnLine Del 563

³⁰ *Ibid*

case separately. Therefore, the distance between the co-workers that is of a virtual nature is not a factor that would lessen the answerability of an employee under the POSH Act. In *Jaya Kodate vs Rashtrasant Tukdoji Maharaj Nagpur University*³¹, the discussion about determining the ambit of a workplace was ignited. To this question, The Bombay HC had made an open-minded reasoning and opined that when we define a workplace, the definition must cover much more than just the conventional physical work space.³²

To add to this, the SC made an observation that “*the implementation of the Vishaka Guidelines has to be not only in form but also in substance and spirit so as to make available safe and secure environment for women at workplace in every aspect and thereby enabling working women to work with dignity, decency and due respect.*”³³ The Delhi HC made an observation about the factors that must be considered in order to determine whether an act of sexual harassment has occurred at a workplace: (1) Closeness of place of incidence from the place of work; (2) Amount of Control of the employee management over the place of incidence or the working woman’s residence; and (3) Whether such a residence is a contiguous or extension of the working place.

The prime legislation in India for protecting women at a workplace, the POSH Act does not make a mention of sexual harassment exhaustively.³⁴ This is very evident from the way in which sexual harassment has been described as an unwelcome act or comment that makes a woman uncomfortable³⁵. All incidents of sexual harassment against a female employee that have taken place under the normal course of work, not considering whether the sphere was an offline one or an online one, is therefore, given protection under the POSH Act.³⁶ During the pandemic, when most of the professional workplaces have been merged with the personal space of the employees, the policies of these workplaces do not have proper policies to safeguard women³⁷. In the modern online era, the difference between harassment and a light-

³¹ *Jaya Kodate v Rashtrasant Tukdoji Maharaj Nagpur University* 2014 SCC OnLine Bom 814

³² *Ibid*

³³ *Medha Kotwal Lele & Ors v Union of India & Ors* (2013) 1 SCC 311

³⁴ *Ibid*

³⁵ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, s 2(n)

³⁶ *Ibid*

³⁷ Rukmini Rao, ‘Changing Face of Posh’ (*Virtually*, 4 October 2020) <www.businesstoday.in/magazine/most-powerful-women/changing-face-of-posh-virtually/story/416280.html> accessed 22 October 2021

hearted exchange of emotions is as thin as a line.³⁸ The latter part hugely depends on the motive and intention of the person. Motives and intentions of people have started to hold a great deal of importance while determining cases under the POSH Act in the online COVID-19 world.³⁹

ADDED LAYER OF PROTECTION

The Bombay HC expressed that employer need to urgently and sincerely show a concern about woman safety instead of just showing drafted policies in accordance of the POSH⁴⁰. Further, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by India, can be taken as a good source of authority to ensure a safe working environment for female employees, be it 'physical' or 'virtual'. The SC in *Vishaka vs State of Rajasthan*⁴¹ laid down that the employers have a duty as provided by this international convention to ensure a safe working place. It is also important to mention here that when the workplace is an electronic forum, there is another statute protecting women that is the Information Technology Act, 2000. This provides an increased protection.⁴²

The IT Act provides for punitive measures for forwarding obscene content through online media⁴³. It also provides for punishment against transmission of recordings which contain sexual acts through electronic media⁴⁴. Section 66E of the IT Act,⁴⁵ provides for punishment against a person who invades the privacy of an individual by capturing pictures and transmitting them intentionally without consent. These acts are also under the purview of the IPC where Section 354A is against sexual remarks⁴⁶. Section 354C⁴⁷ of the IPC also punished individuals who capture images or recordings of a woman engaging in acts in her private

³⁸ *Ibid*

³⁹ *Ibid*

⁴⁰ *Jaya Kodate v Rashtrasant Tukdoji Maharaj Nagpur University* 2014 SCC OnLine Bom 814

⁴¹ *Vishaka & Ors v State of Rajasthan & Ors* 1997 6 SCC 241

⁴² *Ibid*

⁴³ Information Technology Act 2000, s 67

⁴⁴ Information Technology Act 2000, s 67A

⁴⁵ Information Technology Act 2000, s 66E

⁴⁶ Indian Penal Code, s 354A

⁴⁷ Indian Penal Code, s 354C

space or acts which are meant to be private. This is very close to the act of stalking. Stalking in general and online stalking especially, is punished by Section 354D⁴⁸ of the IPC. Imputation of unchastity which can amount to criminal intimidation comes under Section 506 of IPC.⁴⁹ Section 509⁵⁰ provides against acts, words or gestures that harm the privacy of a woman or hamper her modesty. It is understood that these sections of the IPC will have an effect even on online platforms.⁵¹ Also, most of the time, the online forums have an easy method of filing complaints under the IT Rules and these matters are looked into within 3 days and stops transmission of obscene content online⁵².

The National Commission of Women or the NCW has laid down guidelines on *'how work-from-home should function in an organization'*⁵³. The Ministry of Women & Child Development launched the SHe-Box or Sexual Harassment Electronic Box⁵⁴, which is an electronic forum that collects reports of Sexual Harassment. It aims at providing speedy redressal of sexual harassment complaints.⁵⁵ The information recorded here can be utilised by the complainant, the ministry as well as the investigating departments in the process of investigation. The complainants can be private or government employees.⁵⁶

JUDICIAL INTERVENTION

Since the POSH Act is still in its early phase, judicial intervention has to come to the rescue in order to clarify positions of law. Every case dealt with is unique with its own specific facts and circumstances. The Rajasthan HC held that a woman need not appear in person to make a

⁴⁸ Indian Penal Code, s 354A

⁴⁹ Indian Penal Code, s 506

⁵⁰ Indian Penal Code, s 509

⁵¹ *Ibid*

⁵² Information Technology (Intermediaries Guidelines) Rules 2011, s 3(4)

⁵³ 'Some Dos and Don'ts of #Online #Workspace. #Highlights from #Webinar on #Violence & #Unemployment: Challenges faced by #women in #lockdown' (NCWIndia) <twitter.com/ncwindia/status/1282647160018755586> accessed 24 October 2021

⁵⁴ 'SHe-Box Online Complaint Management System IF YOU ARE FACING SEXUAL HARASSMENT AT WORKPLACE' (Ministry of Women and Child Development) <shebox.nic.in/> accessed 24 October 2021

⁵⁵ *Ibid*

⁵⁶ *Ibid*

complaint. The complaint can be sent by another person to the IC⁵⁷. This can be done within 3 months and an extension of 6 months can be provided by the IC after recording the reasons in a written procedure⁵⁸ as provided by the Delhi HC.⁵⁹

The Delhi HC said further that the fact that a woman has an alternate source of protection holds no significance in deciding whether the IC should investigate the matter.⁶⁰ The findings of the IC should be rejected only after a very thorough reasoning and is not to be taken lightly⁶¹. In another case, the IC was given the power to provide for interim relief in urgent matters⁶². The Patna HC provided the disciplinary committee of a workplace with the power to dismiss an employee on the basis of proven charges of sexual harassment⁶³. The Guwahati HC held the matter of territorial jurisdiction⁶⁴. According to its reasoning, even if the employees are from a different city and the incident might have happened during an office tour, the proceedings can occur at that place of office too.⁶⁵ The fact that investigation only on the basis of strict evidence need not be the requirement. The IC can devise a method of investigation as it deems fit, the only requirement being that they should satisfy the arenas of natural justice⁶⁶.

THE LACUNAS

Employers and organisations are required to explicitly include the term, “work from home” or “online platform” in their policies pertaining to sexual harassment. A speedy and well-informed mechanism which keeps the aggrieved regularly posted about the redressal mechanism or status of investigation is desirable. In case, the aggrieved does not feel satisfied with the quality of investigation of the IC of her company, she may take her case to a specified

⁵⁷ *Shital Prasad Sharma v State of Rajasthan & Ors* 2018 SCC OnLine Raj 1676

⁵⁸ *Tejinder Kaur v UOI* 2017 SCC Online DeL 12221

⁵⁹ *Ibid*

⁶⁰ *Ibid*

⁶¹ *Sarita Verma v New Delhi Municipal Corporation & Ors* 2016 LLR 785 (2)

⁶² *Confidential v Indian Institute of Corporate Affairs* 2018 SCC Online Del 6801

⁶³ *Mohan Kumar Singh v Chief Manager (HRD) Central Bank of India* 2017 SCC OnLine Pat 2483

⁶⁴ *Biplab Kumar Das v IDBI Bank Ltd & Ors* 2017 LLR 1148

⁶⁵ *Ibid*

⁶⁶ *Gaurav Jain v Hindustan Latex Family Planning Promotion Trust & Ors* 2015 SCC OnLine Del 11026

public appellate authority. The drawback here is that in maximum number of cases in India, this government authority has not been identified and as a result, it is difficult for an aggrieved to figure out a process of redressal and appeal.

The *Indian National Bar Association* conducted research in which 68.9% of victims feared to complain about offensive happenings to the IC of the company. They felt that the members of the IC and other employees would empathize with the offender⁶⁷. The responsibility lies upon the IC to formulate a punishment which matches the gravity of the offence.⁶⁸ Most of the times, the IC recommends penalties as prescribed under the POSH Act /or service rules, occasionally, depending on the level and importance of the perpetrator in the company, organisations may have differing views on the manner of implementation of the penalty, fearing business impact. The laws of India are so underdeveloped that even taking intentional screenshots of a woman does not fall under voyeurism as covered under Section 354C of the IPC and 66E of the IT Act. Therefore, such cases are such that they do not have any mechanism to legally redress the grievances. Such cases would most likely be waived off or considered to be a trivial misunderstanding.⁶⁹

RECOMMENDATIONS

Sexual harassment allegations in the workplace not only run the risk of loss of employer's reputation but also lead to legal troubles. It is very obvious that sexual harassment at workplace has always been one of the most sensitive issues to deal with.

- Clear and strict anti-harassment and anti-discrimination policies are required for workers to understand whether they are experiencing harassment and how they should tackle the issue via a formal procedure.
- The law protects the identity of the aggrieved as the accused in most cases but revealing the identity of the accused to create a deterrent effect and greatly reduce the number of

⁶⁷ 'Most women still don't report sexual harassment at work: Study' (*Hindustan Times*, 4 January 2017) <www.hindustantimes.com/delhi/most-women-still-don-t-report-sexual-harassment-at-work-study/story-8EfvY12aScvKBsAkoAxy2I.html> accessed 25 October 2021

⁶⁸ *Ibid*

⁶⁹ *Ibid*

complaints that are found. At the same time, protecting the anonymous status of a victim would lead to a greater number of cases being filed since many do not file cases because of unwanted and uncomfortable attention on the issue.

- Policy framework of companies for a proper code of conduct to be followed online must be established and strictly known to all employees.
- Virtual sensitization workshops should be conducted to help people to navigate through this uncharted territory.
- Employees must be constantly kept in touch with the rules of POSH as well as the latest judicial interpretations in the sphere regarding the same to avoid situations which could turn out to be potential moments of mistakes. This will prevent reputational risks of employers greatly.
- Though organizations had to announce the online work from home suddenly, they didn't really define the process. There are no clear guidelines for even the work time. Therefore, people are working from 9 am to 9pm. It's extremely important that policies are clearly laid out for remote working safety.
- Redressal mechanisms adopted by companies must be at par with the demands of the online workspace and relevant caution must be held to protect such a workplace from turning into a hostile environment.
- While it may sound trivial but we need to train people on how to turn up for the video calls. Being dressed inappropriately, harassing women professionals, making personal remarks, commenting on their home environment, children or pets etc are all signs of harassment. Therefore, these need to be taught clearly as remote working safety tips.
- Management must be sensitised about online gender-based violence and must go through checks of empathetical credibility and reliability about handling such issues.
- The selection process of IC members must include the qualities and virtues of approachability, accessibility, commitment, sensitivity, empathy and understanding. An IC comprising women trained about the POSH Act, POSH Rules and their roles and responsibilities is highly desirable.

- IC should have separate virtual space for conducting their meetings, maintaining records of cases of sexual harassment, holding periodic discussions between the IC members and conducting regular trainings.

CONCLUSION

In this world, where women are being trained to excel and become independent, sexual harassment or even the fear of facing something similar to this, cannot remain to be a deterrent from making progress in a female's career. The pandemic has pushed sexual harassment down the priority list of companies, and companies are now more focused on coping with the crisis. A proactive role of the government at the level of enforcement is what is required. With many companies wanting to continue with the Work from Home culture, even after the pandemic, the urgency of updating our laws and policies becomes acute. Social distancing has forced rapid changes in our working environments, but sexual harassment is unfortunately a constant problem, whether we are all in the office together or not. Taking purposeful steps to maintain the safety of your colleagues at work, will shape the ideal work from home culture in the present and for many years after this.