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8 years of PoSH Act: A Critical Analysis

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According to the data of the National Crime Records Bureau (NCRB), there were 371,503 cases of crimes against women registered across the country in 2020, 398,620 people detained in connection with crimes against women, 488,143 people charged, and 31,402 people convicted. The crimes related to Women in the workplace are also one of the major problems of society. Not only does it violate their Fundamental Rights but it also leads to mental torment which even sometimes leads to suicides. This problem was acknowledged by the Supreme Court in 1997 in the Vishakha Guidelines which was about 'sexual harassment at the workplace. After a long wait of 16 years, Indian Legislation passed the PoSH Act on 9th December 2013. The Act is all about the prevention, prohibition, and redressal with regard to the cases only at the workplace. In December 2021, this act completes its 8th anniversary. In this article, I've discussed the Landmark Judgements of Indian Judiciaries which widened the scope of the act not only from 2013 onwards but before it as well. Further, I've also mentioned some of the drawbacks which need to be relooked.

Keywords: NCRB, PoSH, *vishakha* guidelines.

INTRODUCTION

“We must send a message across the world that there is no disgrace in being a survivor of sexual violence. The shame is on the aggressor.”

– Angelina Jolie

The worst thing that can happen to a woman at work is sexual harassment. It not only degrades women's working environment, but it also has a significant impact on their mental health. Because there was no effective procedural law in place prior to 1997, harassed women could only bring a complaint against the accused under sections 354 and 509 of the Indian Penal Code, 1860. Due to a misunderstanding of the term "outraging women's modesty," there was no consistency in the sentence. However, in 1997, the Vishakha Guidelines¹ were issued, which led to the PoSH Act of 2013. The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013², also known as the "PoSH Act," is an Indian law that aims to make workplaces safer for women by preventing, forbidding, and redressing acts of sexual harassment against them. The Ministry for Women and Child Development declared the law applicable across India on December 9, 2013.

The definition of Sexual Harassment by the United Nations³ is: 'Unwelcome sexual advances, solicitations for sexual favours, and other sexually related verbal or physical behaviour when:

- Submission to such behaviour is made a term or condition of employment, either expressly or tacitly, or
- Individuals' acceptance or rejection of such conduct is used as a foundation for employment choices affecting them, or
- Such behaviour is intended or has the effect of unfairly interfering with an employee's work performance or producing an intimidating, hostile, or offensive working environment.'

Section 354A of Indian Penal Code⁴ and Section 2(n) of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 defines Sexual Harassment as any one or more of the following undesirable acts or behaviour (whether directly or by implication) namely -

¹ *Vishakha and others v State of Rajasthan* AIR 1997, SC 3011

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

³ 'What is Sexual Harassment' (UN.Org) <<https://www.un.org/womenwatch/osagi/pdf/whatish.pdf>> accessed 07 January 2022

⁴ Indian Penal Code, 1860, s 354A

- bodily contact and advances that include uninvited and explicit sexual attempts; or
- a demand or request for sexual favours; or
- showing pornography against a woman's desire; or
- making sexually coloured comments.

The PoSH Act requires the following at the workplace:

- Creating a secure working environment in the workplace;
- Every workplace with more than 10 employees should form an Internal Complaint Committee;
- In every district, a Local Complaint Committee should be formed;
- An in-depth investigation into all sexual harassment complaints;
- Workshops and awareness programs should be held at regular intervals to familiarise staff with the Act's provisions;
- Fraudulent and malicious complaints, as well as false proof, are punishable with the provisions of the act.

JUDGMENTS THAT WIDENED THE SCOPE OF THE ACT

"Sexual Harassment" is a social issue that impacts both women and society as a whole. It contributes to societal gender inequality. "Sexual harassment at work" is a form of discrimination against women that also impedes their empowerment. *Apparel Export Promotion Council v A.K. Chopra*⁵ was the first case in which the Supreme Court affirmed the Vishakha Judgement, in which it upheld the finding that sexual harassment of women in the workplace violates Article 14, 19, and 21 of the Constitution. The Supreme Court gave the concept "molestation" a wider definition and stated having physical contact is not the only indicator to deal with incidents. The Supreme Court ruled that the respondent's actions were against decency and dignity, and thus amounted to "Sexual Harassment."

⁵ *Apparel Export Promotion Council v A.K. Chopra* AIR 1999, SC 625

In *Medha Kotwal Lele & Ors. v Union of India & Ors.*⁶, the Supreme Court ruled that numerous states were not following the Vishakha Guidelines correctly. The following instructions were issued by the Supreme Court:

- State governments should ensure that each state has enough complaint panels to hear each and every complaint and that these panels be led by a woman.
- State authorities should develop appropriate measures to ensure that the Vishaka guidelines are implemented effectively.
- The Bar Council of India will be responsible for ensuring that all bar organizations in India and persons registered with state bar councils follow the Vishaka guidelines.
- In the event of non-compliance with the Vishaka rules, disgruntled citizens may file a complaint with the High Court of the relevant state.

The Delhi High Court stressed the use of technology in sexual harassment cases in *Saurabh Kumar Mallick vs The Comptroller and Auditor General of India and Ors*⁷ in 2008. In this decision, the court stated that while it was increasingly conceivable for CEOs to operate their businesses from their homes, if a person were to engage in sexual harassment with another employee, he would not be able to claim that the harassment occurred at his home rather than at his workplace. A restricted meaning of 'workplace' cannot be recognised, according to the court. While it may be difficult to define the term "workplace" in a black-and-white manner because it depends on the events and circumstances of the case at the question, the court established a test to decide whether a given location can be considered a "workplace" by evaluating the following factors:

- Proximity to one's workplace;
- Management control over such a place/residence where a working woman resides; and
- Such a dwelling must be an extension of or adjacent to the workplace.

Further, in the case of *Jaya Kodate vs Rashtrasant Tukdoji Maharaj Nagpur University*⁸, the Bombay High Court held that the POSH Act's term of "workplace" is inclusive and purposely

⁶ *Medha Kotwal Lele & Ors. v Union of India & Ors* [1999]

⁷ *Saurabh Kumar Mallick v The Comptroller & Auditor General of India* [2007]

⁸ *Jaya Kodate v Rashtrasant Tukdoji Maharaj Nagpur University* [2013]

kept broad by the Parliament to guarantee that any location where women could be vulnerable to sexual harassment is not left unchecked. Also in the case of *Jahid Ali vs Union of India & Ors.*⁹, the Delhi High Court ruled that sending sexually charged text messages to a lady is sexual harassment under the POSH Act.

In the case of *Seema Lepcha vs State of Sikkim and Others*¹⁰, the Manager of the bank branch sexually harassed Seema Lepcha, a peon at the central bank. According to the Vishaka standards, there must now be an independent committee in charge of sexual harassment allegations in organisations that are affiliated with the bank. The absence of an independent complaint committee in the bank was the subject of a writ lodged in the High Court of Sikkim. The respondents were ordered by the High Court to establish a complaint committee, provide sufficient training for bank workers, and implement procedures to avoid sexual harassment in the workplace. The High Court's decision was challenged in the Supreme Court, which issued the following guidelines:

- The State government must give comprehensive publicity to the notices and instructions it issues in accordance with the Vishaka guidelines and the Supreme Court's directions in the MedhaKotwal case, and this should be accomplished by publishing all details in the state's most widely circulated newspapers every two months.
- The various actions taken by the state administration to enact the recommendations laid down in the Vishaka case and the orders given by the MedhaKotwal case should be fully publicised on Doordarshan.
- The state government's notifications and instructions for both government and private institutions shall be widely publicised by Sikkim's social welfare and legal service authority.

WHAT NEEDS TO BE RELOOKED

Because the statute makes no provision for punishment, Sexual Harassment at work cannot be classified as a criminal offence. The settlement between the complainant and the respondent is

⁹ *Jahid Ali v Union of India & Ors* [2015]

¹⁰ *Seema Lepcha v State of Sikkim and Others* [2012]

discussed in Section 10 of the PoSH Act. Conciliation should be abolished because sexual harassment is not a problem that can be settled by a settlement. In this age of the Internet, there should also be a platform for online case registration of sexual harassment of women at the workplace. It will not only be simple to make a complaint, but it will also protect the privacy of the women who have been abused. The term "workplace" needs to be redefined. The current debate centers on the judicial enlargement of the definition of "workplace" under the Employees Compensation Act of 1923. (ECA)¹¹. However, unlike sexual harassment, which frequently entails a series of episodes that can occur anywhere thanks to contemporary technologies, most if not all cases under the ECA are one-time incidences.

Since there are no strong penalties for non-compliance with the legislation, organizations regard it as only a compliance obligation, which is not in all situations. The statute has to be made more aware of and has more stringent measures. The Act's goal should be to promote a positive and productive workplace. Many procedural parts of the POSH Act may need to be reconsidered in light of the past eight years' experiences. To begin, the time limit for making a complaint by a victim should be expanded, as the present model of 3+3 months is insufficient. It ignores the fact that many Indian women are still unaware of their rights and must overcome social shame in order to file a complaint. Second, the ICC can only conduct an investigation if the complainant makes a written complaint. While permitting third parties to file complaints presents numerous obstacles, it may be worth considering whether the ICC can at least conduct an initial investigation without a written complaint. Third, the present approach specified in Section 11 of the POSH Act does not appear to take into account current realities: today, a majority of employees in a company may be contract workers. The POSH Act is completely silent on how to deal with a case in which a contract laborer is either the victim or the offender. This is exacerbated by the fact that Section 11 mandates that the ICC launch an investigation if the respondent is deterred from filing a complaint.

Currently, the ICC is made up of personnel who are unskilled in managing investigations and have little legal understanding. A key concern arises in this context: how may an ICC employ

¹¹ Employees Compensation Act, 1923

¹² Code of Civil Procedure, 1908

the civil court's power under Section 11(3)?, which is “for the purpose of making an inquiry, the Internal Committee or the Local Committee, as the case may be, shall have the same powers as are vested in a civil court under the Section 5 of Code of Civil Procedure, 1908¹² when trying a suit”. The external member existing in the ICC, on the other hand, might give these inputs. Strangely, Rule 7(7) simply states that "a minimum of three members of the Complaints Committee, including the Presiding Officer or the Chairperson, as the case may be, shall be present in conducting the inquiry." It does not state that the external member must be present. It's overtime to make some progress in this area as well. One can examine how the independent director system has been systematized over the last few decades, including the creation of the Director Identification Number (DIN), director training, and a director register, among other things. Something along these lines for ICC members may go a long way toward making the ICC more educated.

CONCLUSION

The benefits and drawbacks of judicial activism are frequently discussed in legal circles; there are benefits and drawbacks, but the Vishakha ruling reinforces the positive aspects of judicial activism. Even after five decades since independence and innumerable cases of gender discrimination and sexual violence against women, India lacked legislation against sexual harassment prior to the announcement of Vishakha. Even though sexual harassment had been swept under the rug for a long time prior to the ruling, it was brought to light. Sexual harassment of women deprives them of their dignity, which is a fundamental human right, and a single incident of harassment can lead to a lifetime of misery. This legislation has filled a gap in the law by ensuring that every woman in India, regardless of age or employment status, has a workplace free of harassment. The purpose of the POSH Act is not only to protect but also to prevent sexual harassment in the workplace, as well as to provide a prompt resolution to any complaints made under the act. After such a long stretch of time, the legislation requires significant revisions in order to stay up with societal evil. The Vishakha Guidelines and the PoSH Act, 2013 are unquestionably positive measures, but eliminating the practice of sexual harassment at work remains a long way off, requiring, among other things, the removal of the stigma attached with victims of these kinds of heinous acts.