
Statutory Architecture of Redressal Mechanism for Sexual Harassment at Workplace: A Critical Overview

Sushila*

Vivekananda Journal of Research
January - June 2020, Vol. 9, Issue 1, 28-38
ISSN 2319-8702(Print)
ISSN 2456-7574(Online)
Peer Reviewed Refereed Journal
© Vivekananda Institute of Professional Studies
<http://www.vips.edu/vjr.php>



ABSTRACT

The SH Act was enacted with a view for providing protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto. This makes the intent of the legislature quite clear in making the law as comprehensive as possible to address the issue with utmost seriousness. The legislature endeavored to provide a robust framework by defining the key concepts besides providing the procedural safeguards in the law. The paper seeks to examine the statutory framework by discussing and analyzing the key provisions of the law, apart from providing few suggestions to make the law more effective and robust.

Key Words: #MeToo movement, Conciliation, Right to equality, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

INTRODUCTION

Sexual harassment violates the fundamental right to equality of a woman guaranteed under the Constitution of India¹ as also her right to live with dignity under Article

* Assistant Professor (Law), National Law University Delhi (NLUD), New Delhi.
Email: sushila@nludelhi.ac.in

The author is a Member of Internal Complaints Committee of NLUD and was also associated with an empirical study which examined the level of enforcement of Sexual Harassment at Workplace (Prevention, Prohibition and Redressal) Act, 2013 in select hospitals in Delhi. The Study was supported by National Commission for Women.

1 Article 14 of the Constitution of India provides for equality before the law or equal protection of the laws within the territory of India. It states, "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Similarly, Article 15 of the Constitution *inter*

21² thereof besides her right to practise any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment. International conventions and instruments have recognized the protection against sexual harassment and the right to work with dignity as universal human rights.³

Historically and across societies, home has been considered as the “rightful” place for women. Increasing participation of women in workforce was fortunate fallout of a necessity in an otherwise rigidly ascribed role to women. Beginning with industrial revolution in the 19th century to the requirement of more working hands in factories during the first half of twentieth century and subsequent paucity of “able-bodied” men post the world wars, women entry in public space began to shatter the erstwhile stereotyping. The changes in the West resonated in societies in the East as well and with formalization of economies, women were seen working across sectors.

The change was gradual in Indian societal set up and accordingly, women started occupying space at workplaces. However, there was lack of any specific mechanism to check instances of sexual harassment faced by women. The situation changed when the Supreme Court exercised its constitutional and plenary powers under the Constitution.⁴ In its landmark judgment of 1997⁵, the Apex Court laid down the guidelines for protection of women against sexual harassment at workplace in the famous *Vishaka* case. These guidelines were to act as an *interim* measure, until the Parliament framed a corresponding statute. In 2013, the Parliament came up with the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (‘the SH Act’) to make provisions for giving effect to the international convention⁶ ratified by India (which eliminates all forms of discrimination against women) for protection of women against sexual harassment at workplace⁷.

The Protection of Women against Sexual Harassment at Workplace Bill, 2010 was

alia prohibits discrimination against any citizen on grounds ‘only’ of religion, caste, sex, race, and place of birth.

2 Article 21 of the Constitution declares: “No person shall be deprived of his life or personal liberty except according to a procedure established by law.”

3 Convention on the Elimination of all Forms of Discrimination against Women. The above convention has been ratified by Government of India on June 25,1993.

4 Article 141, Constitution of India 1950 provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India.

5 *Vishaka and Ors. v. State of Rajasthan and Others*, 1997 (6) SCC 241.

6 *Supra* Note 4.

7 Preamble to the SH Act.

initially introduced in the Lok Sabha in 2010. The Bill was referred to the Parliamentary Standing Committee on Human Resource Development for further deliberation; which gave its report in 2011. Subsequently, changes were made in the Bill and, after passage in both the Houses, it received President's assent in April 2013. The SH Act finally came into force on 9th December 2013.⁸

STATUTORY ARCHITECTURE OF THE SH ACT: SALIENT FEATURES

The SH Act was enacted with a view for providing protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto.⁹ This makes the intent of the legislature quite clear in making the law as comprehensive as possible to address the issue with utmost seriousness. The legislature endeavored to provide a robust framework by defining the key concepts besides providing the procedural safeguards in the law. The paper seeks to examine the statutory framework by discussing and analyzing the key provisions of the law, apart from providing few suggestions to make the law more effective and robust.

Sexual Harassment

Sexual harassment has been defined in the SH Act in a very and inclusive manner. It includes any unwelcome act or behavior, whether directly or by implication. Such acts or behaviour may include physical contact and advances; demand or request for sexual favours; making sexually coloured remarks; showing pornography; or any other unwelcome physical, verbal or non-verbal conduct of sexual nature.¹⁰ Further, the SH Act, while declaring that no woman shall be subjected to sexual harassment at any workplace, details the various circumstances as amounting to sexual harassment if they occur or are present in relation to or connected with any act or behavior of sexual harassment. They include implied or explicit promise of preferential treatment in her employment; or implied or explicit threat of detrimental treatment in her employment ; or implied or explicit threat about her present or future employment status; or interference with her work or creating an intimidating or offensive or hostile work environment for her; or humiliating treatment likely to affect her health or safety.¹¹

8 Compendium on Parliamentary Enactments, available at : http://rsintranet.nic.in/intrars/SEXUAL_HARASMENT.pdf?cv=1

9 Long Title to the SH Act.

10 Section 2 (n) of the SH Act.

11 Section 3 of the SH Act.

It is stated that though the definition is overarching in its sweep besides being inclusive, and not exhaustive, yet it leaves sufficient ambiguity in determining as to what constitutes unwelcome act or behaviour. While applying such standard, the members of the committees, who are entrusted to examine and inquire such conduct, may have differing and varying views and interpretation by applying their own subjective perceptions. Hence, it is necessary to clarify in the law itself that in determining whether the behavior or the act complained of is unwelcome, the committees shall give due regard to the subjective perception of the complainant.

Workplace

The SH Act defines “workplace” in a very comprehensive and inclusive manner. It includes all public or private offices as also any other place visited by the employee arising out of or during the course of employment including transportation by the employer for undertaking such journey and a dwelling house.¹² The remarkable reach of the law is also reflected in applicability of the law upto dwelling places or houses besides unorganized sector. The SH Act, in fact, defines “unorganized sector” in relation to a workplace meaning as an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten.¹³

Aggrieved Woman

The SH Act provides recourse only to “aggrieved woman”. This has been defined as meaning any woman, whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent.¹⁴ Thus, the definition covers the cases where the victims are not employees at workplace such as students, patients, visitors *etc.*

Complaint Mechanism

The complaint redressal mechanism is the pivot of the SH Act for its effective enforcement. The SH Act sets up two categories of complaint mechanisms. One being the Internal Complaints Committee (ICC) and another Local Complaints Committee (LCC). These committees are entrusted to inquire into complaints of sexual harassment at workplaces and to make recommendations to the employer.

12 Section 2 (o) of the SH Act.

13 Section 2 (p) of the SH Act.

14 Section 2 (a) of the SH Act.

In an ICC, at least 50% of the total members shall be women. A senior woman employee working at the workplace can be nominated as the Chairperson of the ICC. There should be a minimum of two employees, committed to the cause of women or having experience of social work or legal knowledge, as members of ICC. There is also a requirement of an external member from amongst non-governmental organizations (NGOs) committed to the cause of women or a person familiar with the issues relating to sexual harassment. Thus, the Internal Complaints Committee shall have a minimum of four members while no upper limit has been set under the SH Act. The term of office of the members and Presiding Officer and every member of the Committee is three years from the date of their nomination. The member appointed from amongst the non-governmental organization or associations shall be paid fees or allowances for holding the proceedings of the Committee.¹⁵

Further, every District Officer is required to constitute an LCC to receive complaints of sexual harassment from such establishments where the ICC has not been constituted on account of having less than ten workers or where the complaint is against the employer himself. Also, if an ICC has not been constituted for some reason in the workplace of the complainant, LCC may receive such complaints further, LCC may also receive complaints from domestic workers.¹⁶ The constitution of LCC is like that of ICC in accordance with the *Vishaka* Guidelines.¹⁷

The SH Act has, in the constitution of ICC/ LCC, made an attempt to pre-empt inhibition on part of female victims in approaching the complaints committee by making it as far as possible independent of employers and with sufficient women representatives.

Limitation Period

The SH Act provides that a complaint relating to sexual harassment may be made to the ICC/ LCC within a period of three months from the date of incident and in case of a series of incidents, within a period of three months from the date of the last incident. The SH Act, however, enables ICC/ LCC to extend the time limit upto a maximum of three more months in appropriate circumstances, but requires reasons for such extension to be noted in writing.¹⁸

The limitation period for making complaints is a major flaw in the law as in a

15 Section 4 of the SH Act provides for setting up of an Internal Complaints Committee.

16 Section 6 of the SH Act.

17 Section 7 of the SH Act.

18 Section 9 of the SH Act.

traditional societal set up, victims need to consult with family members before going ahead with the complaint. Besides, the limitation period, as provided, is too short and it is observed from MeToo movement¹⁹ that it sometimes takes years before victims feel empowered to report.

Conciliation

The ICC/ LCC, is also empowered to take steps to settle the matter between the aggrieved woman and the respondent through the process of conciliation process. It is, however, provided that monetary settlement shall not be made a basis of conciliation. Where a settlement has been arrived at, the Committee shall record the settlement so arrived at and forward the same to the employer to take action as specified in the recommendations. Where a settlement is arrived at, no further inquiry shall be conducted.²⁰

Inquiry Proceedings

Proceeding before ICC/ LCC are guided by the principles of natural justice. For conducting proceedings in respect of government employees and other bodies where service rules are already in place, the relevant rules are to be followed. In all other cases, where no service rules exist or apply, the procedure under the SH Act and 2013 Rules²¹ are to be followed.

The Committee, on receipt of the complaint, sends copy thereof to the respondent within a period of seven working days directing him to file his reply to the complaint within a period not exceeding ten working days from the date of receipt of the complaint along with his list of documents and names and addresses of witnesses. The Committee is empowered to terminate the inquiry proceedings or to give an *ex parte* decision on the complaint, if the complainant or respondents fails, without sufficient cause to present herself or himself for three consecutive hearings. Before terminating the inquiry or proceeding *ex parte*, the committee shall give a prior written notice of not less than 15 days to the party concerned. It is further provided that legal practitioner will be not be allowed to represent the case at any stage of the proceedings before the Committee. The quorum for the meeting shall be minimum three members including the Presiding Officer.²²

The proceedings of ICC/ LCC are *quasi-judicial* in nature and they have been

19 *Infra* Note 33.

20 Section 10 of the SH Act.

21 The SH Rules.

22 Rule 7 of the SH Rules, 2013.

conferred with the limited powers of civil court such as summoning and enforcing attendance of any person and examining him on oath. They also have the power to require the discovery and production of documents.²³ The time limit provided under the SH Act for completion of inquiry is a period of 90 days.²⁴

On completion of the inquiry, the ICC/ LCC is obligated to submit a report of its findings to the employer/ District Officer, within a period of 10 days from the date of completion of the inquiry. Such report is also to be made available to the concerned parties. Further, where the ICC/ LCC concludes that the allegations against the respondent have not been proved, it shall recommend to the employer that no action is required to be taken in the matter. However, where the ICC/ LCC finds the allegation to have been proved, it has been empowered to recommend many actions against the delinquent. It can recommend the employer to take action for sexual harassment as a misconduct as per the applicable Service Rules or where no such rules have been made or exist, in such manner as may be prescribed. Further, it may recommend such sum as it may consider appropriate to be deducted from the salary of the respondent which is to be paid by way of compensation in favour of the aggrieved woman or her legal heirs. The employer has to act upon the recommendations of the Committee, within sixty days of the receipt of the report.²⁵

Punishment for false and Malicious Complaints

The SH Act provides for punishment for making false and malicious complaints. If ICC/ LCC concludes that allegations made by the complainant against the respondent are malicious or the aggrieved woman has made the complaint knowing it to be false or has produced any forged or misleading evidence or any witness, during the inquiry, has given false evidence or adduced forged or misleading document, it may recommend to the employer, to take action against the woman or the person who has made the complaint/ given evidence, in accordance with the applicable service rules or as per the prescribed Rules.²⁶

Confidentiality

The SH Act enjoins upon all persons involved to maintain confidentiality of the proceedings. It ordains to keep the identity and addresses of the aggrieved woman, respondent and witnesses, contents of the complaint, any information relating to conciliation

23 Section 11 of the SH Act.

24 *Ibid.*

25 Section 13 of the SH Act.

26 Section 14 of the SH Act.

and inquiry proceedings, recommendations of the ICC and the action taken by the employer, as confidential. It is further declared that proceedings or anything related thereto shall not be published, communicated or otherwise made known to the public, press and media in any manner whatsoever. The law further provides punishments for contravening such provisions by way of penalty as per the applicable service rules to the said person²⁷. The employer has been empowered to recover a sum of Rs. 5,000/- as penalty from such person.²⁸ However, an important exception under the SH Act is that information may be disclosed in respect of the justice secured through the proceedings to any victim of sexual harassment. However, such disclosure would not reveal name, identity, address or any other particulars which may result in identification of the aggrieved woman or witnesses.²⁹

Action during pendency of inquiry

ICC/ LCC are also enabled to issue interim measures pending inquiry. If a written request is made by the victim, transfer of the aggrieved woman or the respondent may be recommended to any other workplace by the ICC/ LCC. They can also recommend grant of leave upto a period of 3 months to the aggrieved woman. In addition, ICC/ LCC can also recommend that the respondent be restrained from reporting on the work performance of the aggrieved woman or writing her confidential report, and assigning the same to another officer. In the context of academic institutions, they may recommend to restrain the respondent from supervising any academic activity of the aggrieved woman. The abovesaid recommendations needs to be implemented and the compliance report of such implementation needs to be sent by the employer to the Committee.³⁰

CONCLUSIONS AND SUGGESTIONS

Globalization has brought sea change in the status of women across the world. With the larger induction of women in the workforce, the issue of sexual harassment at workplace has assumed critical importance. Sexual harassment at workplace is a manifestation of gender-based discrimination. It violates a woman's fundamental right to equality and right to life, guaranteed under Articles 14, 15 and 21 of the Constitution of India. Such conduct not only creates an insecure and hostile working environment for women but also constricts their ability to deliver in today's competing world. Apart from interfering with their performance at work, it also adversely affects their social and economic growth and

27 Section 16 the SH Act.

28 Rule 12 of the SH Rules, 2013.

29 *Supra* Note 22

30 Section 12 of the SH Act r/w Rule 8 of the SH Rules, 2013.

puts them through physical and emotional suffering.³¹

A requirement to have a comprehensive law to address the issue of sexual harassment of women at workplaces, was highlighted and reiterated by the Supreme Court of India on many occasions. The importance and utility of the SH Act in providing a safe and secure workplace for women is self-evident.

Based on the analysis and working of the SH Act, it is observed that though the law has been able to concretize and codify the grievance redressal mechanism for sexual harassment at workplace, yet the awareness and effective enforcement thereof remains a work in progress. There is an imperative need to step up the advocacy efforts to spread and create greater awareness about the redressal mechanism amongst the affected group including the employers/ management who are mandated to implement the law. At the same time, it is also required to take suitable capacity building measures for the benefit of the stakeholders who are enjoined upon to implement and enforce the law. No doubt, the law mandates employers to conduct awareness programmes and workshops for the employees at regular intervals to sensitise them with the provisions of the Act and orientation/ training programmes for the ICC members, it is of paramount importance that such measures are taken in an institutional and sustained manner than just to comply the requirements of law on an occasional and *ad hoc* basis.

The SH Act prohibits disclosing identities of parties, witnesses, particulars of the inquiry and action recommended by the ICC/ LCC. No doubt such confidentiality regime is desirable and required due to the nature of such proceedings, yet such blanket prohibition on disclosure in such an all-encompassing manner may also result in employees not being aware of the inquiries that have taken place, whether or not the respondent in these cases have been found liable including the actions taken against them, besides keeping the working of ICC/ LCC secretive and thereby keeping away from public scrutiny and consequent accountability. Thus, except personal and sensitive details, information about the actions taken by ICC/ LCC should be disclosed to generate awareness and deterrence resultant upon the measures/actions recommended by such committees. This would also create transparency in the working of ICC/ LCC and thereby eliminate arbitrary decision-making besides making them accountable.

A major drawback in the law appears to be the lack of empowering provision in

31 “India’s Law on Prevention of Sexual Harassment at the Workplace”, available at http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Prevention_of_Sexual_Harassment_at_Workplace.pdf

the Statute for taking *suo moto* action. Sexual harassment at workplace is a gender-based discrimination and hence, it should not be equated like a *lis* between two parties in a civil suit. Such an adversarial approach is inconsistent with the constitutional scheme and public policy as such acts are grounded in deep rooted patriarchal mindset and hence, any incident of sexual harassment must be taken as a wrong against the society and infraction of constitutional goals. This would require ICC/ LCC to be enabled and empowered to take *suo moto* action.

As a corollary to the above, prescribing of limitation period for filing complaints under the SH Act is a major limitation of the law itself. This discourages reporting of sexual harassment cases particularly in a conservative societal set up where the victims take time. As the #MeToo movement³² showed, it sometimes takes years before survivors feel able and empowered to report. In this context, limitation period of three months, to be extendable by another three months, is too short a period. This limitation be extended with further empowerment of ICC/ LCC to condone the delay even beyond that in appropriate and suitable cases.

The procedure presently provided under the SH Act for dealing with cases of sexual harassment at workplaces is essentially adversarial in nature where complainant and respondent adduce their respective evidences followed by cross examination relegating the role of members of ICC/ LCC to that of a mute spectators or being neutral judges sifting through evidence presented by the parties. A more active and inquisitive approach would help the larger cause as more often than not complainants are lower in administrative hierarchy with limitation in presenting their cases before ICC/ LCC. A paradigm shift from adversarial to inquisitorial approach in the conduct of the proceedings of the ICC/ LCC would go a long way in addressing such gender based discrimination and exploitation at workplaces.

No doubt, women continue to be more prone to suffer from sexual harassment at workplace and as such, at the present stage, a targeted approach and legislation to address the sexual harassment of women at workplace is required than to spread the law and resources thin by making it gender neutral.

The reporting requirements under Section 21 of the SH Act reveals that ICC/ LCC,

32 The Me Too (or #MeToo) movement is a movement against sexual harassment and sexual assault of women. The phrase “Me Too” was initially used in this context on social media in 2006, on Myspace, by sexual harassment survivor and activist Tarana Burke. The Me Too movement in India is a manifestation of the international Me Too movement that began in late 2018 in areas of Indian society including the government, the media, and the Bollywood film industry.

in each calendar year, are mandated to prepare an annual report and submit the same to the “*employer and the District Officer*”. Further, the District Officer is mandated to forward a brief report on the annual reports so received to the State Government. The language of Section 21 of the SH Act creates confusion and ambiguity about the submission of annual reports to both the employer and the District Officer in case of ICCs. A law explicitly enjoining forwarding of such reports by both ICC/ LCC to civil administration would go a long way in keeping an external check on the working of ICC as otherwise there would be no external supervision or monitoring of such committees besides creating fragmentation of data about such incidents- a key requirement for formulating and revising policies.

Further, reporting requirements Section 22 of the SH Act provides that the employer needs to include in its report the number of cases filed, if any and their disposal in the annual report of his organization or where no such report is required to be prepared, intimate such number of cases, if any, to the District Officer.³³ Such requirements need to be made mandatory and non-compliance thereof must be visited with penalties. Absence of data acts as a great handicap for the Government in taking appropriate steps to modulate the policy response. As a way forward, all the reporting requirements must be directed to be done through compulsory disclosure and dissemination on the website of the nodal ministry of the appropriate government. An analogy may be drawn from the enforcement of RTI regime whereunder the Central Public Information Officers are required to submit quarterly reports about the receipts and disposal of RTI applications. Such a database at one level of all committees in the context of the SH Act would serve as a ready reckoner for the policy makers in fine-tuning the law as per the requirements.

In sum, the SH Act, through a robust framework, has been an empowering instrument for the victims of sexual harassment at workplace. The implementation and enforcement of the law is always a work in progress and the law needs to be revised and updated in light of the difficulties faced and experience gained.

33 Section 22 of the SH Act.
