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Judicial Approach towards Curbing the Sexual Harassment of Women at Work Place

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ABSTRACT

Democracy cannot exist without justice and justice cannot exist without an independent judiciary. The judiciary is identified as the last bulwark against arbitrariness and all that can be broadly labelled as not only unjust but also immoral. The nation reveres judiciary on various vital issues affecting the country. In fact, the impression of the judiciary as final bastion against what is unjust is not of recent origin; it is discernible throughout the recorded history of mankind.³

The Constitution of India has been regarded as less of a composite ground norm rather it is consider as a document which portrays character of unique human eclecticism through the major social, political, economic justice. The purpose of the Indian Constitution has always been achieving the humanitarian utility by idealizing the concept of welfare state. The framers of our constitution have expresses a sense of unease with the status quo and raised expectations of root-and-branch social revolution and transformation thereby securing “to all its citizens, justice-social, economic and political; liberty, equality and dignity . The judge without judicial activism can perhaps be described as a flower without a colour and fragrance; and a vehicle without fuel and wheels. In protecting the principles of ‘welfare state’ judiciary, should play an active role as a watching tower and judgments should be society oriented. The Indian judiciary has adopted an activist goal-oriented approach in the matter of interpretation of fundamental rights. The Supreme Court judiciary in India has undergone a radical change in the last few years.

I. PRE VISHAKA-SCENARIO

In interpreting the existing law, that is to say, what the law is, the courts are required to keep the particular situation in view and interpret the law so as to provide a solution to the particular problem to the extent possible. This is a legitimate exercise by the judiciary and its constitutional obligation by virtue of the role assigned to it in the constitutional scheme. The gaps in the existing law, which are filled by updating the law, result in the evolution of

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³ AIR 1998, Kar 385 at 386

juristic principles.

Many women who have taken up the legal route to fight sexual harassment have failed to discover even a semblance of justice at the end of a dark tunnel. Take the case of **Shehnaz Mudbhatkal**, who took up the challenge and paid the price, first hand.

The single judge of the High Court upheld the Labour Courts findings that, she had been victimised by the management only because she refused to accede to the demands of her boss and directed the management to reinstate Shehnaz and pay full back wages. The management preferred an appeal to the Division Bench of the High Court but even this appeal was dismissed. After thirteen years of litigation Shehnaz may be able to return to work. Of course she had savings and own house afford to fight against unjust dismissal and to prove sexual harassment though witnesses turned to hostile.

What about the position of women who work to live?

Mrs. Rupan Deol Bajaj v. Kanvar Pal Singh Gill⁴ This case, famously known as “the butt-slapping case” was one of the most criticised high profile cases. Supreme Court in Bajaj judgment has clarified certain issues as to what constitutes ‘modesty’ and how it is to be judged. It has relied on ‘common notions of mankind’ as to judge what is affront to women’s dignity. Also this has been considered bearing in mind contemporary social standards. It is important that the issue gets the attention, it deserves, if a society fails to respect its women-folk then sanity is the first casualty. In the dynamics of today’s society the uncharitable approach towards women cannot be acceptable. Courts have effectively expanded the scope so as to safeguard women’s rights. This case set a precedent for ground-breaking verdict in the case of Vishaka and reinforced the principle that nobody is above the rule of law and justice would be done. But it is a long awaiting judgment took almost 8 years for the disposal.

The Indian judicial experience with sexual harassment started with the case of Vishakha v. State of Rajasthan⁵. The case dealt with the brutal gang rape of Bhanwari Devi, a social worker who was working to spread awareness to end child marriage. In this case Court decided to create a protective framework for the female workforce of this country, an area where there had been huge lacunae in Indian law. Thus comprehensive guidelines were issued by the Supreme Court to ensure that the female workforce of this country is protected from sexual violence and sexually charged gender-discrimination in the workplace. There were several judgments after the Vishakha judgment that emphasized on the need for a

⁴ 1996 SC 309:1996 Cri.LJ. 381.

⁵ AIR 1997 Supreme Court 3011

comprehensive law on sexual harassment.

II. POST VISHAKA

The case of **Apparel Export Promotion Council v. Chopra**⁶ is one of them, which emphasized that sexual harassment is gender based discrimination and quoted the International Labour Organization for the same. The sexual Harassment at Workplace Bill was tabled in the Parliament in 2007. This in turn prompted case such as **D.S. Grewal v. Vimmi Joshi**⁷ that emphasized on the stipulation of the bill while delivering judgments related to sexual harassment. However none of them vigorously asked for a bill to be passed, thereby turning a blind eye to the issue related to sexual harassment.⁸ In **Ropen Deol Bajaj v. K.P.S.Gill** case after being dragged on for more than 18 years, finally, the Supreme Court upheld the conviction of Gill for his offence. He was found guilty under Section 354 and 509 of IPC and the court directed him to pay Bajaj Rupees two lakhs as compensation. This was the first instance where judiciary actually took a stand upholding women's right.⁹ In **Saudi Arabian Airlines, Mumbai v. Shehnaz Mudbhalkal**¹⁰ first time ever an employee won a legal battle in a labour court against her employers on the ground of sexual harassment. This judgment aptly illustrate that how a typical case of Sexual Harassment may include both 'quid pro quo' and 'hostile work environment' elements.¹¹ **Medha Kotwal Lele's** case¹² reveals the sexual harassment of female students in educational institutions. The Apex Court held that the Vishakha guidelines had not been properly implemented by various States and Departments in India and referred to the direction it provided on that occasion to help to achieve better coordination and implementation.¹³ There have been other important cases that have helped in interpreting sexual harassment cases even more clearly. These include- **Swapna Barman V Subir Das**,¹⁴ **Miss Radha Bai vs The Union Territory of Pondicherry**,¹⁵ **A.V. Ramana vs State Of Gujarat**.¹⁶ In all these case **Recently Tehlka editor-in-chief Tarun Tejjpal** has been booked under Section 354-A (Sexual Harassment, Physical contact, advances involving unwelcome and explicit sexual overtures, or any other

⁶ AIR 1999SC625 ; (1991) 1 SCC 759

⁷ (2009) 2SCC 210

⁸ Gibran Naushad & Susanah Naushad, The sexual harassment of women at workplace :An unmanned territory, at www.indialawjournal.org last accessed on 13/12/2016

⁹, (1995) 6SCC 194

¹⁰ (1999)2 LLJ 109 (Bom).

¹¹ Suhani Rao, "Bias and the Anti – Sexual Harassment Law" Lex Witness, Vol 6 Issue 11 June 2015, at 27

¹² 2004 (5) SCALE 573; (2013) 1 SCC 297

¹³ (1999)2 LLJ 109 (Bom).

¹⁴ (2004) 1 GLR 168

¹⁵ 1995 AIR 1476

¹⁶ Criminal Misc Application No. 11878 Of 2007.

unwelcome physical, verbal or non- verbal conduct of sexual nature), 376(rape) and 376 (2) (k) (rape by a person of a women in his custody taking advantage of his position) of the IPC.¹⁷ The former Supreme Court judge has also step down as head of West Bengal Human Right Commission in 2014 after a law intern accused him of sexually harassing her at hotel room. The Chief Justice of India took immediate action and constituted a three- member Supreme Court panel comprising of Justice Lodha, Justice H.L. Dattu and Justice Ranjana Prakash Desai to probe the charges of Sexual Harassment against the retired Supreme Court judge. The panel indicated Ganguly for ‘unwelcome behaviour’ and ‘conduct of sexual nature’ promoting his resignation.¹⁸

Despite the elaborate scheme, the complaints of sexual harassment continue to grow. The problem does not lie with the Act. It lies in its implementation. Several organizations who employ more than the minimum required 10 or more employees do not have the internal committees in place to deal with the complaints. Wherever the committees have been set up, there is no proper functioning or awareness. This extends to the local committees which are to be set up under the Act. The Order of the Supreme Court discussed above is the tell-tale indication.

The allegations of sexual harassment have far-reaching consequences; both for the accused employee and the employer organization. In case, the accused employee belongs to the higher echelons of the organization, the complainant employee finds the situation even more daunting. One of the major challenges faced by a complainant employee is that the committee sometimes acts like a judge in its own cause. This happens because of two key reasons. Firstly, the members know the accused employee personally and closely. Secondly, the fear of backlash both within and outside the organization.

In the event that a complaint ends up being considered, the approach of the committee sometimes poses a great obstacle. The primary reason is that in most organizations, the Human Resource department is entrusted with the responsibility of formation and functioning of the committee.

The expertise to handle such complaints is found lacking – both in terms dealing with the high stakes involved in a complaint of this nature and the ability to function as a fact-finding body. In most organizations, the committee is viewed as necessary evil – a classic case of

¹⁷ Tehlka sexual assault case : Tarun Tejpal in 12- day judicial demand, gets special cell DNA e-paper Wed, 11 Dec 2013 at www.dnaindia.com last accessed on 8/1/ 2019 <https://www.outlookindia.com/website/story/tarun-tejpal-vs-state-of-go/288725>

¹⁸ Sonal Bhadoria, “Judge accused of Sexual Harassment named” November 29, 2013 at www.indiatimes.com last accessed on 8/1/2019

compulsion over commitment to the cause. More often than not, an employee is left with no alternative but to switch organizations rather than go through the ordeal of seeing a complaint to its logical conclusion.

One of the ways to overcome these challenges is to overhaul the complaint redressal mechanism by substituting the internal and local committees with a more empowered authority in the form of a Commission or a Special Court. Such a forum will be more committed, responsive and sensitive to the cause. In addition, the complaint redressal should be made time bound (as in the case of other offences against women) in order to instil confidence in the system. These measures will go a long way in carrying out the mandate of the judgment in Vishaka's Case in its true letter and spirit.¹⁹

In the case of **Shanta Kumar v. Council of Scientific and Industrial Research (CDIR) & Ors, Delhi High Court**²⁰ The Delhi High Court held that there must be physical contact having an undertone of sexual nature to constitute 'sexual harassment' under the POSH Act. It opined that an altercation in the context of unwelcoming environment prevailing at the workplace is not a case of sexual harassment.

In **K.P. Anil Rajagopal v. State of Kerala, Kerala High Court**²¹ another instance, the Kerala High Court held that the act or behavior must be connected with sexual harassment including allegations of promise, threat or an offensive or hostile work environment towards female employees. A solitary allegation of intemperate language against a female employee in a report does not constitute an offence under the POSH Act.

Various cases like *Gaurav Jain v. Hindustan Latex Family Planning Promotion Trust and Ors.*²², *Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University*²³, Rajasthan High Court held in *Shital Prasad Sharma v. State of Rajasthan and Ors.*²⁴, The Delhi High Court in *Sarita Verma v. New Delhi Municipal Corporation & Ors*²⁵, High Court in *Ruchika Singh Chhabra v. Air France India and Anr*²⁶, Rajasthan High Court, *Shital Prasad Sharma v. State of Rajasthan and Ors.*²⁷, *Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University*,

¹⁹ "Sexual Harassment at the Workplace: The Journey so far", by Chinmoy Pradeep Sharma, Bar & Bench May 13 2018, <https://barandbench.com/sexual-harassment-workplace-journey-far/>, last accessed on 12/04/2019.

²⁰ (2018) 156 FLR 719

²¹ (2018) 1 KLJ 106

²² 2015 SCC OnLine Del 11026

²³ 2014 SCC OnLine Bom 814

²⁴ 2018 SCC OnLine Raj 1676

²⁵ 2016 LLR 785 (2)

²⁶ 2018 SCC Online Del 9340

²⁷ 2018 SCC OnLine Raj 1676

Bombay High Court²⁸, Delhi High Court *Tejinder Kaur v. UOI*²⁹ *Confidential v. Indian Institute of Corporate Affairs*³⁰, *Ashok Kumar Singh v. University of Delhi and Ors*³¹, *Akhave v. Union of India, Department of Women & Children & Ors*³², *Tejinder Kaur v. UOI, Delhi High Court*³³, *K.Hema Latha v. State of Tamil Nadu, Madras High Court*³⁴, *Sibu v. Air India Limited*³⁵, *Gaurav Jain v. Hindustan Latex Family Planning Promotion Trust and Ors.*³⁶, *Shital Prasad Sharma v. State of Rajasthan and Ors.*³⁷, *Mohan Kumar Singh v. Chief Manager (HRD) Central Bank of India*³⁸, *Biplab Kumar Das v. IDBI Bank Ltd and Others*³⁹, *Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University*⁴⁰, *Aloshia Joseph v Rev.Dr.Joseph Kollamparambil*⁴¹, *Bankey v State*⁴², *Khair Mohd. V Emperor*⁴³, *Anuradha Khairsagar v State of Maharashtra*⁴⁴, *M. M. Haries v State of Kerala*⁴⁵, that have been decided by the judiciary can be acknowledged as critical to POSH Act's interpretative exercise the purpose for which it has been enacted.

Since the POSH Act is still at a nascent stage, these cases help us clarify the position of law and better analyse the matters relating to sexual harassment at workplace. While several of these cases are specific to their unique backgrounds, they serve as an aid to the IC who are required to investigate complaints.

It is pertinent to note that the courts are recognizing and upholding the powers to the IC as provided by law. Accordingly, employers and their ICs need to ensure that the proceedings are conducted in a fair manner and in compliance with the law and the principles of natural justice.

Sexual harassment allegations in the workplace not only run the risk of loss of employer's reputation but also lead to legal troubles. Needless to mention, sexual harassment at workplace continues to remain one of the most sensitive issues that needs to be dealt with

²⁸ 2014 SCC OnLine Bom 814

²⁹ 2017 SCC Online DeL 12221

³⁰ 2018 SCC Online Del 6801

³¹ 2017 LLR 1014

³² 2017 LLR 357

³³ 2017 SCC Online DeL 12221

³⁴ MANU/TN/1414/2018

³⁵ (2016) 2 KLJ 434

³⁶ 2015 SCC OnLine Del 11026

³⁷ 2018 SCC OnLine Raj 1676

³⁸ 2017 SCC OnLine Pat 2483

³⁹ 2017 LLR 1148

⁴⁰ 2014 SCC OnLine Bom 814

⁴¹ 2009 Cri LJ 2190 (Ker).

⁴² AIR 1961 All 131:1961 (1) Cri LJ 330

⁴³ AIR 1925 Sindh 271: 26 Cri LJ 904

⁴⁴ 1991 Cri LJ 410 (Bom).

⁴⁵ 25 2005 Cri LJ 3314 (Ker).

immense care and sensitively.

Reporting of sexual harassment in the Internet and startup space in India has been dismal, with many large companies recording few or even zero cases in recent regulatory filings—a trend experts find worrying. **Uber India, Google India and Swiggy** reported zero cases of sexual harassment in recent financial years, as per regulatory filings sourced by Tofler. Flipkart, Paytm and Ola each reported not more than a dozen cases in a year. “It is a terrible thing when companies say they received zero complaints of sexual harassment, especially when some companies are known for their toxic work culture globally,” said **Sairee Chahal, chief executive officer of Sheroes**, a community platform for women in community platform for women in the workforce. ⁴⁶Economics Times reported last month that nearly 80 per cent instances of sexual harassment at workplaces are not reported, citing a survey by Local-Circles. India’s recent **#MeToo**⁴⁷ movement against sexual harassment at workplace has emboldened several women across sectors to call out their harassers, forcing companies to initiate investigations and take action, including against senior executives. Companies reached out to say they have constituted ICCs and hold regular awareness programmes on sexual harassment.⁴⁸ This is very much evident from the case that has been filed by the bollywood actress Tanushree Dutta who has accused her co-actor Mr Nana Patekar of sexual violence which occurred while she was shooting for a movie on the sets. She has now filed a complaint in 2018⁴⁹ whereby she has accused other people also like her choreographer Ganesh Acharya, producer Samee Siddiqui and director Rakesh Sarang.

Another major incident that emerged last year was the case of minister of state for external affairs Mr. MJ Akbar this case attracted a huge audience since the minister was said to have caused and has been accused ⁵⁰with sexual violence of women at least 10 or more senior

⁴⁶economictimes.indiatimes.com/news/company/corporate-trends/zero-reporting-of-sexual-harassment-cases-in-internet-cos-a-worrying-sign-experts/articleshow/66518960.cms?from=mdr

⁴⁷ India’s #MeToo: Some of the sexual harassment charges that have surfaced since October

These 49 names span the worlds of journalism, film and TV, music, literature, art, sports, non-profits and advertising. Oct 11, 2018 · 06:00 pm Anand Katakam & Vijayta Lalwani, <https://scroll.in/article/897817/indias-metoo-some-of-the-sexual-harassment-charges-that-have-surfaced-this-week>.

⁴⁸ Zero reporting of sexual harassment cases in internet cost a worrying sign: Experts, Uber India, Google India, Swiggy, Flipkart and Paytm reported zero cases of sexual harassment in recent financial years, as per regulatory filings sourced by Tofler, By Mugdha Variyar, ET Bureau | Nov 06, 2018, 06.50 AM IST There have been allegations of harassment against other prominent personalities from various industries--cinema, television, media, advertising, music and entertainment. These include actors Alok Nath and Rajat Kapoor, directors Vikas Bahl, Subhash Ghai and Sajid Khan, Tamil lyricist and poet Vairamuthu, journalists Prashant Jha, Mayank Jain, Meghnad Bose, KR Sreenivas and Gautam Adhikari, comedian Utsav Chakraborty and advertising consultant Suhel Seth.

⁴⁹ In FIR, Tanushree Details 'Nana Patekar's Sexual Misconduct, Bollywood Boycott & Police Collusion' Tanushree now plans to approach the Bombay High Court, seeking action against the police personnel who did not register her complaint in 2008. Vinaya Deshpande | News18.com Updated:October 12, 2018, 8:06 AM IST

⁵⁰ MJ Akbar accused of sexual harassment by women journalists, Opposition demand resignation TIMES NOW

news correspondent.⁵¹

The role of judiciary has been instrumental in advancing the concept of sexual harassment in India, so much so that the recent Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, has come into being as a direct result of the Vishakha judgment. In this judgment the Supreme Court held that each incident of sexual harassment results in a violation of the fundamental rights of gender equality and the right to life and liberty under the Indian Constitution. The court further held that the fundamental right in the Indian Constitution ‘to practice any profession or to carry out any occupation, trade or business’ is also violated by incidents of sexual harassment.

Judiciary in all the cases of sexual harassment lays down stress on gender equality with protection from sexual harassment and right to work with dignity, which is universally recognized as a basic human right. The Indian judiciary while pronouncing the judgments on sexual harassment cases also relied on international human rights conventions and norms.⁵² So the role of judiciary cannot be undermined and rather the efforts of judiciary should be complimented with greater efforts from the legislature and the executive to create a fool-proof system to protect such incidents and protect the women-workforce otherwise the efforts of judiciary will become ineffective. So the enactment of laws with strict compliance is the need of the hour to protect women from sexual harassment at workplace.

| OCT 11, 2018, 11.19 AM IST

⁵¹ 'Me Too': 16 sexual harassment survivors speak up against minister MJ Akbar Sixteen survivors paint a stomach-churning pattern of former journalist MJ Akbar's sexual harassment. Shiba Kurian Wednesday, October 10, 2018 - 19:09

⁵² The international sources the Indian decision relies upon include women's rights provisions in international conventions, such as CEDAW and the ICCPR and the international customary law.