

## **“Sexual Harassment: The Posh Act, Gender Neutrality and Need to Protect Transgender Rights”**

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### **ABSTRACT**

With industrialisation and globalisation the participation and contribution of women in the workforce has increased significantly and as a result the prevention of sexual harassment has gained more importance in the past 25 years. Sexual harassment is a violation of fundamental right of woman to equality and to work with dignity. It impedes her professional growth and causes her serious physical and mental trauma. Up until a few years ago our country did not have any legislation addressing this issue. Then in 2013, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act ("POSH Act") was enacted as a response to the supreme court's landmark judgment in *Vishaka v State of Rajasthan* where for the first time a need for such law was recognised and the Apex Court laid down certain guidelines to deal with this issue till the legislature brought forth such an Act. However, the legislation has failed to produce the desired results. With cases of sexual harassment going unreported and inquiries not being conducted in the ones that are reported, there is widespread unawareness and non-compliance of the provisions of the POSH Act. Thus, in this article we will analyse the provisions of this Act and its limitations. We will also evaluate the need to broaden the scope of sexual harassment in the light of the observations made by the supreme court in *Nisha Priya Bhatia v. Union of India & Anr.* Lastly, we will briefly espouse the need make this law more gender neutral and to extend this protection to the Transgender community.

### **INTRODUCTION**

“ME TOO”- The phrase was first in 2006 by Tarane Burke, who is a sexual harassment survivor. However, the movement gained huge impetus in 2017, after Hollywood film producer Harvey Weinstein's sexual misconduct was exposed after more than a dozen women claimed to have been sexually assaulted, harassed, and raped by him. Following that actress Alyssa Milano posted on Twitter, "If all the women who have been sexually harassed or assaulted wrote 'Me too' as a status, we might give people a sense of the magnitude of the problem". According to a CNN report, the movement went viral with 4.7 million people engaging with #MeToo within 24 hours of the tweet. In 2018, Indian actress Tanushree Dutta accused actor Nana Patekar of sexually harassing her during the filming of 'horn Ok Please' in 2008. The movement brought the much needed attention to sexual harassment laws in India, highlighting their inadequacies.

Sexual harassment at workplace is any unwelcome sexual advances which create an uncomfortable or hostile environment for women. It is a hindrance in achieving the

constitutional goal of inclusive growth as it reduces the participation of women in the workforce. A workplace where a woman feels safe and secure is her legal right. The preamble to our constitution ensures “equality of status and equal protection” to all citizens. Article 14, 15 and 21 ensure equal protection of law, protection against all forms of discrimination and protection of life and personal liberty. Sexual harassment is deeply rooted in the patriarchal idea that women are not supposed to go out and work and if they do they must somehow be subdued. It is a violation of a woman’s right to equality and her dignity.

India became a signatory to convention on elimination of all forms of discrimination against women (CEDAW) on 30th July 1980 and ratified it on 9th July 1993. It is an international treaty which provides for states’s responsibility to wards human right for women. So India is obligated under the treaty to ensure equality between men and women and to prevent any gender based discrimination against women. Similar obligations were placed on the state by the Beijing declaration. At the International Labour Organization (ILO) seminar held at Manila In 1993 it was declared that sexual harassment at workplace is an affront the woman’s dignity and is a form of gender discrimination. Thus, the need to prevent sexual harassment at workplace is reinforced by international treaties and agreements.

### **JUDICIAL INTERPRETATION**

In *Vishaka v State of Rajasthan (1997)*<sup>1</sup> the SC for the first time gave judicial recognition to the concept of sexual harassment at workplace, relying on the CEDAW convention to define sexual harassment. It laid down certain guidelines to be followed until the enactment of a legislation in this regard. These guidelines have now been incorporated in the POSH Act, however its implementation has been largely disappointing which we shall discuss in the coming sections.

In *Apparel Export Promotion Council v A.K. Chopra (1999)*<sup>2</sup> a secretary was molested by her boss. This case held that sexual harassment could be through any unwelcome sexual act or advances, a request for sexual favours and other verbal or non-verbal conduct that has sexual overtones, when the acceptance or rejection of these advances has consequences over the woman’s employment. It was also observed by the court that sexual harassment has the effect of adversely affecting a woman’s performance at work as it creates a hostile environment. It is certainly a violation of woman’s fundamental right to gender equality and her right to life and liberty. The judgment also emphasised the importance of international treaties and agreements while dealing with this issue.

The judgment pronounced in *Medha kotwal lele v Union Of India (2012)*<sup>3</sup> had a huge impact on sexual harassment at workplaces, as the court directed all states/UTs to amend their civil service code rule to enable the inclusion of sexual harassment. It went on to direct all State

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<sup>1</sup> Vishaka v State of Rajasthan, (1997) 6 SCC 241(India).

<sup>2</sup> Apparel Export Promotion Council v A.K. Chopra, AIR 1999 SC 625(India).

<sup>3</sup> Medha kotwal lele v Union Of India, (2013) 1 SCC 297(India).

functionaries and private and public sector to ensure full implementation of the Vishaka guideline and to ensure that, if the accused is found guilty, the victim is not forced to work with/under such accused. It also directed appropriate disciplinary action against the accused in case attempts are made to intimidate the witnesses and complainants. The judgment directed that, implementation of vishaka guidelines should not just be in form but also in substance and spirit.

Recently in *Punjab and Sind Bank and Others v Mrs Durgesh Kuwar (2020)*<sup>4</sup>, the victim had been transferred after she reported corruption and irregularities at her branch and filed a complaint of sexual harassment against another officer. The court while quashing her transfer order held that sexual harassment is an affront to woman's fundamental rights of equality under Art 14, 15 and her right to life and personal liberty under Art. 21, as well as her right to practice any trade, occupation or business. Commenting on the situation in which she was transferred the court appropriately said, "This is symptomatic of a carrot and stick policy adopted to suborn the dignity of a woman who is aggrieved by unfair treatment at her workplace."

The supreme court has time and again emphasised the need to have proper mechanisms in places to tackle the problem of sexual harassment at workplace however the situation hasn't improved much. The legislative framework is largely lacking.

### **ANALYSING THE POSH ACT AND ITS PROVISIONS**

The POSH Act was enacted 16 years after the Vishaka judgment. It came into force on 9th December 2013. The object for its enactment was to protect women from sexual harassment at workplace and to prevent and provide a redressal mechanism to deal with their complaints of sexual harassment. It defines sexual harassment under section 2(n), as any act of unwelcome and sexual nature, such as:

- (i) physical contact and advances; or
- (ii) demand or request for sexual favours; or
- (iii) making sexually coloured remarks; or
- (iv) showing pornography; or
- (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Sec 3(2) of the Act provides that, any promise or preferential treatment, or threat of detrimental treatment, or threat regarding present or future employment status, or interference with her work or creating an intimidating or hostile work environment, or any humiliating treatment may constitute a circumstance under which an act may amount to sexual harassment. Such threats or promises need not be explicit, they may be implied also.

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<sup>4</sup> Punjab and Sind Bank and Others v Mrs Durgesh Kunwar, Civil Appeal No 1809 of 2020(India).

The Act also provides for an internal complaints committee (ICC) at every organisation (where there are more than 10 employees) to hear and redress complaints of sexual harassment at workplace.<sup>5</sup> Where there are less than 10 employees the district officer is required to constitute a local committee (LC) in every district.<sup>6</sup> Complaint can be filed by the complainant within 3 months of the incident, however, delay of 3 months in filing the complaint can be condoned depending on the facts and circumstances of the case. The complainant has a choice in case she wants to initiate criminal proceedings and not approach the ICC or LC.

Before initiation of any inquiry in the complaint the ICC or LC may try to facilitate a settlement between the complainant and respondent through conciliation<sup>7</sup>. However, if such settlement cannot be reached further inquiry is mandatory and for this the committee has the same powers as a civil court. The inquiry must be completed within 90 days.<sup>8</sup> On the completion of the inquiry the ICC/LC is required to submit a report to the employer/district officer within 10 days. Where allegations are proved the employer/district officer is required to take action against the accused employee for misconduct according to the service rules and where no such rules exist according to rule 9 of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013. Such action has to be taken within 60 days of receiving the complaints.<sup>9</sup> The quantum of compensation is to be determined based on the mental trauma, pain, and suffering of the complainant, loss of career opportunity, medical expenses and financial position of the respondent.<sup>10</sup>

Sec 18 of the Act provides for appeal against the recommendations of the committee. An appeal can be made to the court or tribunal within 90 days from the date of recommendation. Sec 16 of the Act protects the identity of the parties involved by prohibiting publication of the names or the contents of the complaint or inquiry or recommendation. The Act even creates an obligation on the organisation to create awareness about sexual harassment at workplace.<sup>11</sup> Sec 14 deals with situations of false/malicious allegations by the complainant or false evidence by a witness. In such situations action maybe taken in accordance to service rules. Sec 26 lays down the consequences of non-compliance with the provisions of the act which include fine upto Rs. 50,000 or cancellation of license of the employer.

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<sup>5</sup> Sec 4 of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Act of Parliament (2013).

<sup>6</sup> Sec 6 of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Act of Parliament (2013).

<sup>7</sup> Sec 10 of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Act of Parliament (2013).

<sup>8</sup> Sec 11 of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Act of Parliament (2013).

<sup>9</sup> Sec 13 of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Act of Parliament (2013).

<sup>10</sup> Sec 15 of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Act of Parliament (2013).

<sup>11</sup> Sec 19 of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Act of Parliament (2013).

### **LIMITATIONS OF POSH ACT, 2013**

Despite being in force for 7 years now, has failed to achieve its objective. There are some extremely crucial gaps in the act and in this sections we will try to address them.

1. The POSH Act as well as the Vishaka guidelines are largely based on the desire dominance paradigm in the sense that they both define sexual harassment as some sexual advances by men towards their female co-workers and excludes the non-sexual gender based discrimination that women face which is just as capable of creating a hostile work environment. This problem has finally been addressed by the supreme court in *Nisha Priya Bhatia(supra)* case which will be discussed in detail at a later point.
2. The Act only addresses complaints of sexual harassment from women. It lacks gender neutrality as there is no redressal mechanism available to men and even more importantly transgenders who are even today vulnerable to humiliation and exploitation based on their gender. This point too will be discussed in detail later.
3. The Arbitration and Conciliation Act, 1996 in schedule 7 prescribes a list of relationship which make any person ineligible to act as an arbitrator. A similar list should be provided for the members of ICC as relationship (of any kind) of the a member with accused or complainant can adversely and unfairly affect the proceedings. Though it is clear that the proceedings should be based on the principles of natural justice which includes “Nemo judex in causa sua” (no person can judge a case in which they have an interest), however, an exhaustive list laying down grounds of ineligibility for members will serve this purpose better.
4. The Act does not provide for any specific person who is to ensure that there is compliance of the provisions by the organisations and also can be held responsible in case of non-compliance. A provision in this regard will make the institutions more accountable.
5. The Act makes it mandatory for employers to conduct awareness and sensitisation seminars and workshops at ‘regular intervals’. However, it does not define regular intervals. This can result in the employer getting away with not conducting such sessions for months or years, which defeats the whole purpose of the act as our fight here is against the mindset.

### **IMPACT OF NISHA PRIYA BHATIA V. UNION OF INDIA AND ANR<sup>12</sup>**

Though this case did not directly concern with the issue of sexual harassment at workplace it ended up widening its scope to a large extent. In this case the appellant/victim was a raw official and had complaint of sexual harassment by two of her seniors alleging that they had victimised her for refusing to join an internal sex racket. The organisation constituted a ICC

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<sup>12</sup> Nisha Priya Bhatia v Union Of India and Anr., 2020 SCC OnLine SC 394(India).

but 3 months later and also did not include any third party or NGO or other body who is familiar with the issue of sexual harassment as is required to be done according to Vishaka guidelines. Later the PM constituted an External Committee which concluded that the sexual harassment allegations made by appellant were not proved. However, it was found that the appellant's complaint was not given proper redressal. Subsequently, the appellant was compulsorily retired under Rule 135 of the RAW (Recruitment, Cadre & Services) Rules, 1975 ['1975 Rules'] due to her being 'exposed' as an intelligence officer.

The bench comprising of **Justice AM Khanwilkar and Justice Dinesh Maheshwari** held that with regards to the allegation of sexual harassment, the case of the petitioner was "improperly handled" and there was a "denial of timely inquiry", thus subjecting the petitioner to "insensitive and undignified circumstances". The internal committee was constituted 3 months after receiving the complaint. It was also observed that the committee once constituted was not working with clean hands. Notably this judgment extended the scope of sexual harassment at workplace from unwelcome sexual behaviour to including all forms of gender inequality and discrimination at workplace. The move to recognise all forms of gender-based discrimination at workplace, whether sexual or non-sexual fills that gap though the decision states that the compensation will be higher in case of sexual advances being proved.

However, the judgment fails to apply this understanding while dealing with the victim's compulsory retirement from RAW. The appellant had contended that Rule 135 of the 1975 Rules violates Articles 14 and 311 of the Constitution insofar as it confers the discretion to compulsorily retire an intelligence officer who is 'exposed', without the safeguard of an inquiry. The court held rule 135 will not be covered under Art 311 as here the action taken is on grounds of exposure and does not entail any "charge, stigma or imputation" against the appellant. Art 311 is attracted only when the action taken is in the nature of punishment. The court also dismissed the prayer to amend the Central Civil Services (Classification, Control and Appeals) Rules, 1965, to provide adequate representation to sexual harassment complainants, holding that such amendment will infringe "separation of power".

Hence though the court gives a wide interpretation to the term sexual harassment while deciding the question of award it fails to apply that understanding while deciding on the validity of compulsory retirement of the victim.

The problem that this judgment brings forth is that sexual harassment at workplace is treated as wrong against the individual woman and is to be addressed by the organisation internally, rather than a form of employment discrimination for which the organisation should be liable. Now more than ever with women being such active participants in the workforce it is important for the state to understand the gravity of this problem and ensure a healthy work environment for women.



## **GENDER NEUTRALITY**

Gender neutrality within rape statutes means the concept that the criminal law should recognize that men and women and transgender persons can be rape victims as well as perpetrators. It reflects modern understandings of the nature, effects, and dynamics of nonconsensual penetrative and non-penetrative sex acts.<sup>13</sup>

The POSH Act is women specific legislation and has been enacted only to protect women from sexual harassment at workplace. Overtime certain concerns have been raised over the law not being gender neutral. The reason given by the 239th parliamentary standing committee for exclusion of men from the ambit of protection of POSH act was that women face a much larger brunt of this problem and hence this Act is an affirmative action under Article 15 of the Constitution to protect them.

However, this reasoning is not justified, in the sense that true it is the women who have always been at a disadvantage and have struggled because of it, however, that cannot be a ground for denying protection to men. Just because the instances of men being harassed by women are less common than those of women being harassed by men it cannot be used as a ground by states to deny protection to men. Even if one person's rights are violated, the law fails. Sexual harassment is a violation of human rights and thus a gender specific statute cannot be justified. Each person is entitled to right to life and right to live with dignity, and as such statutes that punish sexual offences cannot selectively protect one person.<sup>14</sup>

Also, when it comes to gender neutrality of laws the discussion has always been around the binary genders i.e. men and women. However, there is non-binary gender too and it has been facing the discrimination and prejudice for a long time.

## **SEXUAL HARASSMENT AND TRANSGENDER RIGHTS**

Transgenders are people whose gender identity and expression are not in conformity with their biological sex. The supreme court in *National Legal Services Authority v. Union of India & Ors*<sup>15</sup> upheld the rights of transgenders and recognised them as a third gender. It held that Articles 14, 15,16,19 and 21 do not exclude transgenders from their ambit and not recognising the identity their identity denies them equal protection of law. The court concluded "discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or

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<sup>13</sup> Phil RUMNEY, "In Defence of Gender Neutrality Within Rape" (2007) 6(1) Seattle Journal for Social Justice 481 at 481.

<sup>14</sup> Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law, Asian Journal of Comparative Law, page 376 (2016).

<sup>15</sup> National Legal Services Authority v. Union of India & Ors, AIR 2014 SC 1863(India).

transposing equality by the law or the equal protection of laws guaranteed under our Constitution.”<sup>16</sup>

The Transgender Persons (Protection of Rights) Act, 2019 (TG Act) was enacted on 5th May 2019. Under section 3, it prohibits discrimination against a transgender person on the ground of:

- (a) the denial, or discontinuation of, or unfair treatment in, educational establishments and services thereof;
- (b) the unfair treatment in, or in relation to, employment or occupation;
- (c) the denial of, or termination from, employment or occupation.

The Act imposes a duty on all establishments to not discriminate against transgender in the areas of employment, including but not limited to promotions, recruitments, and other related areas. There is a duty on all establishments to comply with the provisions of TG Act.<sup>17</sup>

Interestingly while the victim in POSH Act can only be woman, there is no specific gender prescribed for respondent. The respondent thus includes all genders. In this way the POSH act protects women against sexual harassment from women and hence may be said to address sexual harassment by individual who recognise themselves as lesbians. (*Hiral P. Harsora v. Kusum Narottamdas Harsora*<sup>18</sup>)

The Apex Court in *Navtej Singh Johar v NAZ Foundation*<sup>19</sup>, while striking down sec 377 IPC recognized the rights of gays, lesbians, transgenders, asexual, queers, and all others who are not heterosexual. It held that such right flows from the Constitution itself and hence, sec 377 cannot be used to discriminate/oppress them. The court went on to conclude that the LGBT community can truly achieve equality, liberty and freedom only when we realise that they possess equal rights as any other citizen.

Recently the US supreme court in *Bostock v Clayton County*<sup>20</sup> held that the employees cannot be fired from the jobs merely because of their transgender and homosexual identity.

The transgenders have suffered throughout the history for recognition and have constantly been victimised for their sexual orientation or gender identity. Inclusiveness being a cherished constitutional ideal in our country, it is important that we provide them with the requisite protection and foster their growth.

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<sup>16</sup> ibid para 77.

<sup>17</sup> Sec 9 and 10 of The Transgender Persons (Protection of Rights) Act, 2019 No 40, Act of Parliament (2019).

<sup>18</sup> Hiral P. Harsora v. Kusum Narottamdas Harsora, (2016) 10 SCC 165(India).

<sup>19</sup> Navtej Singh Johar v NAZ Foundation, (2018) 10 SCC(India).

<sup>20</sup> Bostock v Clayton county, 2020 U.S. LEXIS 3252(U.S).



## **CONCLUSION**

Based on the above discussion, we are drawn to the conclusion that the current legislative framework is insufficient and there is a need to address the gaps based on the modern scenario. There is a lack of awareness about the provisions of this act and the consequences that its non-compliance entails. In order for the POSH Act to produce the desired result it is important to create awareness about the act and to create such an environment where women can fearlessly speak up about their grievances.

The state's approach regarding sexual harassment at workplace needs to change. The concept of sexual harassment needs to be made more comprehensive by recognising non-sexual forms of gender-based discrimination too. It is to be understood that it is not only sexual advances that can create a hostile work environment. Our fight here is against the patriarchal mindset of our society. Now that judicial precedents have come to address the plight of the transgender community and recognise their rights, we need to make the legislations more inclusive of them so that they can effectively exercise their rights. Until such amendments are made by the legislature, the organisations themselves can implement gender neutral policies to deal with sexual harassment at workplace and infact, some organisations already have such policies in place. Take for instance the policy of the sexual harassment policy of Godrej<sup>21</sup> or Taj group of Hotels<sup>22</sup>, which are gender Nuetral.

There needs to be a drastic change in how we see sexual harassment laws. In order to be effective, it has to be more than just another brick in the wall of "offences against women". Laying down a law won't take away the stigma attached to it. Victims of sexual harassment are reluctant to come forward due to fear of retaliation and even if they do come forward they face a lot of push back in filing the complaints, the ICCs are not duly formed and when they are formed it is not uncommon for them to indulge in unfair practices. So, the perspective needs to change. There is an urgent need to create awareness and sensitisation towards the issue within the society so that victims can forward without fear or hesitation.

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<sup>21</sup> Himani Chandna, Godrej's anti-harassment policies are gender neutral: Parmesh Shahani, BW People (Feb. 06, 2018), <http://bwpeople.businessworld.in/article/Godrej-s-anti-harassment-policies-are-gender-neutral-Parmesh-Shahani-/06-02-2018-139672/>

<sup>22</sup> The Taj Group of Hotels Policy on Prevention, Prohibition & Redressal of Sexual Harassment at the Workplace (POSH), <https://www.tajhotels.com/content/dam/thrp/investors/Taj-POSH-Policy.pdf>