

THE SEXUAL HARASSMENT OF WOMEN AT THE WORKPLACE (PREVENTION AND REDRESSAL) BILL, 2007: A CRITIQUE

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INTRODUCTION

In India there is a notable gap between the de jure and de facto situation of women. Flavia Agnes, a noted lawyer avers, when she says, 'the power balance is not fair, with the senior harassing you, and even the colleagues do not often lend active support. Women prefer to change jobs for the environment may get hostile'¹. The recent case that came after the Bill for protection of women against sexual harassment at workplace was placed, is the case of Alka Pande (name changed), ex-director of KPMG - one of the country's leading consultancy firms. She had filed a complaint with the National Commission for Women (NCW) for sexual harassment against two of the firm's senior partners. She has also alleged that once she drew the firm's attention to their misconduct, she was denied, 'avenues of promotion, and her clients were taken away from her'. Alka's case isn't isolated. Sexual harassment at workplace is commonplace. In 1988, a woman

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¹ Chandra, Anjali, 'Work's the matter, lady. Keep quiet or get out!' The Times of India, Lucknow, 25 June, 2007. at http://timesofindia.indiatimes.com/Cities/CitySupplements/Lucknow_Times/Works_the_matter_lady_Keep_quiet_or_get_out_/articleshow/2145422.cms.

IAS officer, Rupan Deol Bajaj, had filed a complaint against super cop K P S Gill. In 1992, a case of sexual harassment in Air India made the news when an assistant flight purser misbehaved with an airhostess. In 2001, the Supreme Court took note of sexual harassment of two women IAS officers by a minister in Kerala². But what really amounts to sexual harassment at workplace? While hearing a case of gang rape by a Rajasthan government employee in 1997, the Supreme Court defined 'sexual harassment'. In the light of the above indictment a critical appraisal of the Bill passed by the Ministry of Women and Child Development, would be meaningful in order to look into the development and escalation in the deliverance of justice to women after the Bhanvari Devi's case³. Sexual harassment of a female at the place of work is incompatible with dignity and honour of a female and needs to be eliminated and there may be no compromise with such violations. But one essential must always be kept in focus that discrimination and harassment must always be differentiated and understood in the accurate meaning and must not be colluded to meet the same end. Women may be more harassed than discriminate. Discrimination is the genesis while harassment is species.

² Sexual harassment of two women IAS officers 2001, at http://in.news.yahoo.com/topsection_news.html.

³ *Vishakha vs. State of Rajasthan* 1997 INDLAW SC 2304. 1997 AIR(SC) 3011, 1997(7) SCC 323.

In *A.K. Chopra vs. Apparel Export Promotion Council*⁴ the Apex Court ,setting aside the High Court order directing reinstatement of an employee dismissed from service, for molesting a woman employee in an hotel in 1988 , after a departmental inquiry held that,

There is no gain saying that each incident of sexual harassment, at the place of work, results in violation of the fundamental right to gender equality and the right to life and liberty -- the two most precious fundamental rights guaranteed by the Constitution of India'⁵.

Going a step ahead of the 1997 guidelines, the Supreme Court ruled in 1999 that 'physical contact' is not an essential feature of sexual harassment. It made the observation while dismissing a male worker who sat too close to his typist, despite her protests, and tried to touch her.

ORIGIN OF SEXUAL HARASSMENT AT WORKPLACE

In the case of *Vishaka vs. State of Rajasthan*⁶, a writ petition was filed in the Supreme Court of India, under the collective platform of a NGO Vishakha,

⁴ 1999 INDLAW SC 1320, AIR 1999 SC 625, 1999 (1) SCC 759.

⁵ *Ibid.*

⁶ Facts of the case: A 50 something year old social worker in Rajasthan, fought against the insidious practice of child marriage. As part of her job in the villages, she tried to stop the wedding of an infant girl, less than a year old. Outraged by

asking the court to take action against sexual harassment faced by women in the workplace. The result was the Supreme Court judgment of 1997, popularly known as the *Vishakha* Guidelines. Verma, C.J.I. (as he was then) stated that⁷:

‘Each such incident results in violation of ‘the fundamental rights of ‘Gender Equality’ and the ‘Right to Life and Liberty. It is a clear violation of the rights under Constitution of India, arts. 14⁸, 15⁹ and 21¹⁰. One of

the audacity of this woman ‘of low caste, no less ‘who challenged their traditions, five men from the upper-caste family of the infant gang-raped Bhanwari Devi in the presence of her husband. In the immediate aftermath of the rape, Bhanwari Devi’s unthinkable trauma only festered as the village authorities, the police and doctors all dismissed her situation. The trial court acquitted the accused. Appalled at the blatant injustice and inspired by Bhanwari Devi’s unrelenting spirit, women’s groups all over the country launched a concerted campaign to bring her justice.

⁷ See note *supra* 3, para 3.

⁸ Constitution of India, art. 14: Equality before law - The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

⁹ Constitution of India, art. 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth - The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them,

(1) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and palaces of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of the general public.

the logical consequences of such an incident is also the violation of the victim's fundamental right under art. 19(1)(g) 'to practice any profession or to carry out any occupation, trade or businesses'. Such violations, therefore, attract the remedy under art. 32¹¹ for the enforcement of these fundamental rights of women. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the judiciary. When, however, instances of sexual harassment resulting in violation of fundamental rights of women workers under arts. 14, 19 and 21 are

(2) Nothing in this article shall prevent the state from making any special provision for women and children.

(3) Nothing in this article or in clause (2) of art. 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes.

¹⁰ Constitution of India, art. 21: Protection of life and personal liberty-No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹¹ Constitution of India, art. 32: Remedies for enforcement of rights conferred by this Part-

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by cls. (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under cl. (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

brought before us for redress under art. 32, an effective redressal requires that some guidelines must be laid down for the protection of these rights to fill the legislative vacuum’.

Ten years have passed since 13 August 1997 when the Supreme Court of India gave the *Vishakha* judgement and for the first time acknowledged the existence of sexual harassment at workplace, and the need for in-house complaints mechanism. The guidelines given by the Supreme Court assign the responsibility for prevention and redress of complaints of sexual harassment at workplace to the employer. There is poor implementation of the *Vishakha* guidelines across India, while rare enquiries related to Sexual Harassment are a success and that is needed to go a long way in terms of achieving humanitarian justice.

DEFINING SEXUAL HARASSMENT AND THE GUIDELINES

In general, sexual harassment may be of two types: either ‘quid pro quo’ or ‘hostile work environment’: the former being about seeking sexual favours for work benefits and the latter, where the working environment itself is felt to be hostile, offensive and abusive. In general again, a single incident may be sufficient to establish ‘quid pro quo’, while a pattern of conduct is required to establish the

'hostile work environment'¹². Before 1997, women experiencing sexual harassment at workplace had to lodge a complaint under Indian Penal Code, 1860, ss. 354¹³ and 509¹⁴. But the Supreme Court, applying Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), arts. 11¹⁵ and 24¹⁶, which the Government of India ratified on 25 June 1993, and the general recommendations of CEDAW in this context with art. 11¹⁷, came out

¹² <http://www.de2.psu.edu/harassment/legal/default.html>.

¹³ Indian Penal Code, 1860, s. 354: whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

¹⁴ Indian Penal Code, 1860, s. 509: whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such words or sounds be heard, or that such gestures or objects be seen, by any such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

¹⁵ Convention on the Elimination of All Forms of Discrimination against Women, art. 11: (1) states parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction

¹⁶ Convention on the Elimination of All Forms of Discrimination against Women, art. 24: states parties undertake to adopt all necessary measures at the national level aimed at achieving the full realisation of the rights recognised in the present Convention.

¹⁷ Violence and equality in employment:

- (22) Equality in employment may be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the work place.

with a set of lame guidelines which are yet novel to both the employer and the employee and unimplemented due to lack of legislative will: They are as follows:

Definition of sexual harassment at work

Sexual harassment includes such unwelcome sexually determined behaviour as:

- (1) physical contact;
- (2) a demand or request for sexual favours;
- (3) sexually coloured remarks;
- (4) showing pornography; and
- (5) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature, for example, leering, telling dirty jokes, making sexual remarks about a person's body, etc.

The guidelines categorically state the:

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- (23) Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct may be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensation, must be provided.
- 24 States must include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the work place.

- (1) duty of the employer;
- (2) definition of sexual harassment;
- (3) preventive steps;
- (4) criminal proceedings;
- (5) disciplinary action;
- (6) complaint mechanism;
- (7) complaints committee;
- (8) workers initiative;
- (9) awareness; and
- (19) third party harassment.

AMENDMENT TO THE GOVERNMENT RULES

Pursuant to Vishaka judgment, the Central Civil Services (Conduct) Rules 1964, were amended in 1998 to incorporate r. 3C¹⁸ which prohibits sexual harassment of working women.

¹⁸ Central Civil Services (Conduct) Rules 1964, r. 3C states that:

- (1) No government servant shall indulge in any act of sexual harassment of any woman at her work place.
- (2) Every government servant who is incharge of a work place shall take appropriate steps to prevent sexual harassment to any woman at such work place.

Though not mentioned categorically, this rule invariably applies to all women, whether working in a government set up or coming in contact with government office/officials.

The Supreme Court of India rendered yet another judgment on sexual harassment in *AEPC vs. A.K. Chopra* in which one of the issues that was deliberated at length by this court was ‘whether physical contact with the woman was an essential ingredient of a charge of sexual harassment’.

Further the Supreme Court in its judgment in *Medha Kotwal Lele and Others vs. Union of India and Others*¹⁹ has directed that the complaints committee as envisaged in Vishaka judgment will be deemed to be an inquiry authority for the purposes of Central Civil Services (Conduct) Rules, 1964 and the report of the complaints committee will be deemed to be an inquiry report under those rules. In pursuance of this direction, the Central Government (Department Of Personnel and Training) has amended Central Civil Services (Classification, Control and Appeal) Rules, 1965, r. 14, sub-r. (2) to incorporate the necessary provision.

OVERVIEW OF SEXUAL HARASSMENT AT WORKPLACE LAW IN WORLD

Some countries like Philippines, Russia and France have expressly codified sexual harassment as a separate criminal offence, which in extreme cases may also include rape and other forms of sexual assault. In Japan women have sought

¹⁹ W.P.(cr.) no. 173-177/1999 dated 26 April 2004.

recourse under tort laws. Some countries have provisions in their labour codes that prohibit sexual harassment. For instance, in Spain, sexual harassment is prohibited under the Worker's Charter. New Zealand provides a detailed statutory framework prohibiting sexual harassment in its labour Code. It is generally felt that labour codes prohibiting sexual harassment at the work place may be the most effective method of holding employers and harassers accountable for sexual harassment. It is also essential that legal provisions in the national laws of countries must be combined with the efforts of individual employers to eliminate sexual harassment at the work place by developing appropriate employment policies which clearly state that sexual harassment will not be tolerated at the work place. Besides, every establishment must organise awareness programmes and develop training strategies to prevent sexual harassment of women at the work place.

EVOLUTION OF THE BILL

After the judgment in 1997, a number of women groups including the National Human Rights Commission came up with their report that still many organisations do not have complaint committees to embark upon the problem of sexual harassment. Thus in order to consider and clarify these issues, the Commission convened meetings with various departments²⁰ of the Government

²⁰ Like the Department of Personnel and Training (DOPT), educational departments/institutions like the Department of Secondary and Higher

of India besides meetings with the legal fraternity guidelines. The National Commission for women even came up with Code of Conduct at Workplace. The Department of Women and Child Development, through an order dated 08 June 2001, constituted a Committee to monitor the implementation of the guidelines laid down by the Supreme Court in the *Vishaka* judgment. Then after further lobbying the National Commission for women drafted a bill in 2003, 'Sexual Harassment of Women at their Work Place (Prevention) Bill, 2003'. Then another draft bill came up in 2005. The preceding bills might not be imposed because of the many inadequacies in them.

Now as if to commemorate the tenth anniversary of the landmark judgement, the Ministry of Women and Child Development (WCD) is all set to introduce the Protection of Women against Sexual Harassment at Workplace Bill of 2007. The passage of this Bill, then, would seem to be yet another milestone in fulfilling the Constitutional promise of rendering gender equality and justice in the country. But there is a hitch.

Education, Department of Elementary Education and Literacy of the Ministry of Human Resource Development, University Grants Commission (UGC), Central Board of Secondary Education (CBSE), Directorate of Education, National Capital Territory (NCT) of Delhi, etc.

²⁰ Asha S. Menon, 'what women want by', (the hindu) <http://www.hinduonnet.com/thehindu/thscrip/pgemail.pl?date=2007/03/31/&prd=m p&>.

SIGNIFICANCE OF THE BILL

In June 2004, the National Commission for Women (NCW) and the Press Institute of India jointly released a report that found that a majority of women experienced gender discrimination at their workplaces. But a vast majority of cases are unreported to authorities. The woman is usually scared of being disbelieved, ostracised or accused of 'inviting' attention in some manner²¹.

Many women choose the path of least resistance and quit their jobs. To make matters worse, the Bill does not contain any provisions for the protection of the witnesses. The company is not under any obligation to protect the witnesses from being victimised during or after the proceedings. Workplace sexual offenders are often important within the power structure of a company or valuable to the business. It is often in the company's interest to retain them and lose the woman, who is usually a subordinate. Given these considerations, the woman must have adequate legal protection so that she may continue in her job without being humiliated, threatened or persecuted in any manner.

Without adequate guidelines on these matters, inappropriate or insensitive questions may be asked during the proceedings. Surprisingly, the Bill has also omitted many of the preventive measures recommended by the *Vishakha*

²¹ Sengupta, Anindita, 'It must be comprehensive', Deccan Herald, New Delhi, 14 September 2007, at http://www.deccanherald.com/Content/Sep142007/panorama_2007091325216.asp.

Guidelines.

To be truly effective in checking the scourge of sexual harassment at the workplace, the Bill needs to be much more comprehensive and practical.

CRITICAL EVALUATION

Use of Embellished Terms

‘Committed to the cause of women’: the draft bill mentions of creating Internal Complaints Committee at workplace, which says that the chairperson of that committee will be a senior level woman, ‘committed to the cause of women’ from amongst employees and in case its not available, the chairperson will be appointed from a sister organisation or a Non-Governmental Organisation (NGO). This is objectionable and dangerous provision as it’s making an implicit assumption that only women are capable of arbitrating complaints of sexual harassment and it takes an innate argument that men are inherently incapable, insensitive and biased to the cause of women. It must be reconsidered and an impartial person of integrity must be the criteria for heading such a committee rather than a man or women.

‘Sexual harassment’: the United Nation’s International Children Emergency Fund, (UNICEF) harassment policy including sexual harassment states that, in the workplace, sexual harassment is particularly offensive, and

constitutes an abuse of power, when engaged in by any official who is in a position to influence the career or employment conditions (including hiring, assignment, contract renewal, performance evaluation or promotion) of the recipient of such attentions. It may occur at all levels and may be heterosexual (that man-to-woman or woman-to-man) or homosexual (that is man-to-man or woman-to-woman) in nature²². Hence the word must be adopted for broader interpretation of the problem.

Shortcomings of Internal Complaints Committee (ICC)

Taking off from the *Vishakha* Guidelines, the Bill mandates setting up ICC in all organisations under s. 4²³. S. 4(2)(a) states that, the chairperson must be a women

²² Office of the Focal Point for Women in the United Nations; <http://www.un.org/womenwatch/osagi/fpsexualharassment.htm>.

²³ The Sexual Harassment of women at the Workplace (Prevention and Redressal) Bill, 2007, s. 4:

(1) For the purpose of this Act, every employer of a work place shall constitute, by an Office Order in writing, an Internal Complaints Committee.

Provided that where the offices or administrative units of the workplace are located at different places or divisional or sub-divisional level, the Committee shall be constituted at all administrative units or offices.

(2) The Committee shall consist of the following members namely:

(a) a chairperson, from amongst employees, who shall be a senior level woman, committed to the cause of women. In case a senior level woman employee is not available, the Chairperson shall be appointed from a sister organization or a non-governmental organisation;

from within the organisation, it is submitted that any committee or cell formed or headed by the member of the same organisation will in all probability work to suppress the complaint. The person heading may never be independent and the system takes it toll, in the process it conveys the message - to bear with. As per Supreme Court's order, chairperson must be a woman, but that never helps, law makers forget that chairperson has also to survive in the same organisation. Most of the organisations nominate the most amicable personality as chairperson, thus the purpose is again frustrated. Thus in case of government organisation/department, it must be decided by the concerned ministry. Ministry may draw an inter-organisational list of women officers (preferably group A officer) along with their place of current posting. Availing the above drawn list of women officers, the ministry must appoint the chairperson to its various

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- (b) not less than two members from amongst employees committed to the cause of women or who have had experience in social work; and
 - (c) one member from amongst such non-governmental organisations or associations or other interests committed to the cause of women, as may be specified:

Provided that atleast 50 per cent of the members so nominated shall be women.

- (3) The Chairperson and every member of the Committee shall hold office for such period, not exceeding three years, from the date of their nomination as may be specified.
- (4) The Chairperson and members of the Committee shall be entitled to such allowances or remuneration as may be prescribed.
- (5) Where the Chairperson or any member of the Committee contravenes the provisions of s. 14, such Chairperson or member, as the case may be, shall be removed from the Committee and the vacancy so created or any casual vacancy shall be filled by fresh appointment in accordance with the provisions of this section.

organisations, based on the location of the organisation and the women officers who are posted in that region. For private and other organisations, district officer must appoint the same, subject to the clause that the chairperson must not be from the same organisation.

Further, the Bill makes no mention of what the committee's agenda is to be, how often it must meet. Another concern is that in many organisations there are no women in senior decision-making positions and thus even this requirement is difficult to be fulfilled.

S. 4 (3) provides that the term of the chairperson must be of three years. Term of chairperson must not be for more than two years. The officers appointed as chairpersons must rotate among various organisation in that station, subject to the clause that the same person may not have two consecutive terms.

Redundantness of Local Complaints Committee (LCC)

The s. 6²⁴ of the proposed Bill stipulates the constitution of a local complaints committee (LCC) in a block wherever 'at a workplace, constitution of the

²⁴ The Sexual Harassment of Women at the Workplace (Prevention and Redressal) Bill, 2007, s. 6:

- (1) Where at a workplace, constitution of the Committee is not possible or practicable, or where the complaint is against the employer himself, the District Officer may, constitute at every Block, a Local Complaints Committee.
- (2) The Local Committee shall consist of the following members:

committee is not possible or practicable'. Firstly, the constitution of the LCC is at the discretion of the district officer. The Bill does not give any role to the LCC but just mentions it. Ideally the LCC must exist as a permanent body at all times, and when a case comes up, an enquiry committee, may be drawn out of the LCC. Secondly, The LCC must have the power to penalise employers when they have themselves indulged in sexual harassment, or in case of negligence, delay in enquiry etc. Thirdly, the LCC must be accessible to women workers of unorganised sector as in respect of those sections of unorganised workplaces where an internal complaints committee may not exist. But if complaint is against employer, then maybe the woman may go to the LCC.

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- (a) a chairperson to be appointed by the appropriate Government from amongst women committed to the cause of women;
 - (b) one member to be appointed by the appropriate Government from amongst the registered trade unions or workers associations functioning in that block or district;
 - (c) two members, of whom at least one shall be a woman, to be appointed by the appropriate Government from amongst such Non-Governmental Organisations or associations or other interests committed to the cause of women, as may be specified.
- (3) The Chairperson and every member of the Local Committee shall hold office for such period, not exceeding three years, from the date of their appointment as may be specified.
 - (4) The Chairperson and Members of the Local Committee shall be entitled to such allowances or remuneration as may be prescribed.
 - (5) The jurisdiction of the Local Committee shall be limited to the area within the Block level where it is constituted.
 - (6) Where the Chairperson or any member of the Local Committee contravenes the provisions of s. 14, such Chairperson or member, as the case may be, shall be removed from the Local Committee and the vacancy so created or any casual vacancy shall be filled by fresh appointment in accordance with the provisions of this section.

Harassment By A Third Party

The role of 'third party' in the Bill has also not been clearly spelt out in the bill. Third party harassment and ramifications of widening the definition on the phenomenon of third party harassment, extent of control of the employer on such harassment, recognising outsiders harassing service accessors, that is third party to third party harassment. If during the discharge of services/duties of an employee, harassment from the third party is meted out, employers may be approached and possibly a warning may be issued. Also if during the discharge of an employee's duties, a member of the third party experiences sexual harassment, the employee must be liable for punishment.

Conciliation Not Explained

The Bill, under s. 8²⁵, provides the option of conciliation. This clause presents an opportunity for the offender to put pressure on a woman to withdraw her case.

²⁵ The Sexual Harassment of Women at the Workplace (Prevention and Redressal) Bill, 2007, s. 8:

- (1) At the request of the aggrieved woman the Committee or the Local Committee, as the case may be, may, before initiating enquiry under this Act, take steps to settle the matter between her and the respondent through conciliation.

The conciliation to settle the matter between the women and the respondent must not include monetary settlements. As legally, only the judge after due process may impose a monetary settlement in the form of a fine or penalty. It has provisions to deduct from the salary or wages of respondent such sum of compensation to be paid to the aggrieved woman or to legal heirs, or to direct the respondent to pay such compensation to the aggrieved woman. These provisions have no limits on the liability which say that compensation is to be paid to aggrieved woman will be determined on basis of the income and financial status of the respondent. If the loss of earnings of complainant is to be compensated, then how it is related to the income and financial status of the respondent?

Making the Act Toothless: Punishment for ‘False Claim’

S. 11²⁶ provide that no action will be taken regarding the complaint if ‘the allegation against the respondent has not been proved’. S. 12²⁷ further states that

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- (2) Where a settlement is arrived at under sub-s. (1), the Committee or the Local Committee, as the case may be, shall record the settlement and recommend the employer not to take any action in the matter.
 - (3) The Committee or the Local Committee, as the case may be, shall provide the copies of the settlement recorded under sub-s. (2) to the aggrieved woman and the respondent.
 - (4) Where a settlement is arrived at under sub-s. (1), no further enquiry shall be conducted by the Committee or the Local Committee, as the case may be.

²⁶ The Sexual Harassment of Women at the Workplace (Prevention and Redressal) Bill, 2007, s. 11:

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- (1) On the completion of an enquiry under this Act, the Committee or the Local Committee, as the case may be, shall provide a report of its findings to the employer, or as the case may be, District officer.
 - (2) Where the committee or the Local Committee, as the case may be, arrives at the conclusion that the allegation against the respondent has not been proved, it shall recommend to the employer or the District Officer that no action is required to be taken in the matter.
 - (3) Where the committee or the Local Committee, as the case may be, arrives at the conclusion that the allegation against the respondent has been proved, it shall recommend to the employer or the District Officer, as the case may be, -
 - (a) to take action for misconduct in accordance with the provisions of the service rules applicable to the respondent or where no such service rules have been made, in such manner as may be prescribed; or
 - (b) to deduct from the salary or wages of the respondent such sum of compensation to be paid to the aggrieved woman or to legal heirs, as it may determine, in accordance with the provisions of section 13; or to direct the respondent to pay such compensation to the aggrieved woman.
 - (4) Where any recommendation has been made to the employer or the District Officer under sub-section (1) he shall act upon the recommendation within ninety days of its receipt by him:
Provided that where the employer or the District Officer is not in agreement with any conclusion arrived at or recommendation made by the committee or the Local Committee, he may alter the conclusion or recommendation in consultation with the committee or the Local Committee, as the case may be, and the parties concerned in such manner as may be decided in the consultation and shall act upon the recommendation within ninety days of completion of the consultation.

²⁷ The Sexual Harassment of Women at the Workplace (Prevention and Redressal) Bill, 2007, s. 12:

- (1) Where the Committee or the Local Committee, as the case may be, arrives at a conclusion that the allegation against the respondent is false or malicious or the aggrieved woman or any other person making the complaint has produced any forged or misleading document, it may recommend to the employer or the District Officer to take action

if a committee or local committee concludes 'that the allegation against the respondent is false', then action will be taken against the 'woman or the person who has made the complaint'. Under s. 12, if the allegation is not proven, then the woman may be taken to task. This will only deter women from filing complaints because sexual harassment happens in privacy and, therefore, is difficult to prove. To fight false allegations, a man may choose to press defamation charges. Verma, J., the architect of the *Vishakha* Guidelines, says that these provisions (ss. 11 and 12) would render women even more vulnerable since there was no provision in the draft Bill of appeal against the recommendation of the committee. If passed, the Bill would kill the spirit of *Vishakha*.

Right to Information Abandoned

against the woman or the person who has made the complaint in accordance with the provisions of the service rules applicable to her or him or where no such service rules have been made, in such manner as may be prescribed.

- (2) Where the Committee or the Local Committee, as the case may be, arrives at a conclusion that during the enquiry any witness has given false evidence or produced any forged or misleading document, it may recommend to the employer of the witness or the District Officer to take action in accordance with the provisions of the service rules applicable to the said witness or where no such service rules have been made, in such manner as may be prescribed.

S. 14²⁸, which state that 'the action taken by the employer under the provisions of this enactment will not be published, communicated or made known to the public, press and media in any manner', even under the Right To Information Act, 2005. This might curtail public space for campaigns and advocacy against sexual harassment. Although the clause has been included to apparently maintain the confidentiality of the aggrieved woman, it is felt that the identity of the 'respondent' must be widely disclosed.

Need of Penal Provisions: Monetary Compensation- A Pittance

There is a lot of confusion between the civil and criminal procedure in the Bill in its present form. The nature and impact of the criminal penalties need further discussion, while the Bill also needs to explore civil law to mandate the participation of employers, organisations and trade unions. The draft Bill does not talk about the initiation of criminal proceedings by the employer against the guilty. It provides for compensation to the victim, which only trivialises the

²⁸ The Sexual Harassment of Women at the Workplace (Prevention and Redressal) Bill, 2007, s. 14: Notwithstanding anything contained in the Right to Information Act, 2005, the contents of the complaint made under s. 7, sub-s. (1), the identity and addresses of the aggrieved woman, respondent and witnesses, any information relating to conciliation and enquiry proceedings, recommendations of the Committee or the Local Committee, as the case may be, and the action taken by the employer under the provisions of this Act shall not be published, communicated or made known to the public, press and media in any manner: provided that information may be disseminated regarding the justice secured to any victim of sexual harassment under this Act without disclosing the identity and address of the aggrieved woman, respondent and witnesses.

anguish and trauma of the crime. Simultaneously, the maximum fine that may be imposed on an employer who has not set up a committee is Rs. 10,000/- a pittance. The draft Bill does not embolden the aggrieved woman to file a complaint.

Confidentiality

Further the direct witnesses, if any, who saw the alleged odious conduct and persons with whom the victim may have spoken about the events at the time they occurred, must be told at the outset that they must keep the matter confidential.

Unwavering, Counteractive and Disciplinary Action:

The Bill must be revised to state clearly that, its violation will upshot a 'disciplinary action'. An assortment of types of discipline short of termination must be spelled out in the Bill itself (for instance, suspension without pay, transfer, denial of promotion or increment, demotion, etc). Any review of, appeal from or hearing relating to such corrective action/disciplinary decisions must occur only after these decisions have been made rather than those decisions being held hostage to a drawn out, non-confidential process as presently appears to be the case.

Prolonged Process

In many companies (workplace), the committees are a charade. Women hesitate to complain and even if they do, resolution takes so long that they eventually drop the proceedings. The man must not be allowed to absent himself under any pretext. This often prolongs the process. We must also keep in mind that witnesses are difficult to find since men obviously don't harass women in the presence of others. The procedure regarding taking of action after the commission of enquiry as provided in s. 11(4) is rather too protracted and there is also possibility of the ultimate decision being maneuvered since it is a in-house mechanism. Also the impending victim will be dispirited due to the length of time exhausted in reaching a decision. That will rather be a phase of further humiliation and distress for them as the guilt is still not established. This time span and consultation will endow the harasser with a prospect to influence the victim to take her complaint back.

Establishment of Sectoral Tripartite Board

The legislation must also include a provision to form a sectoral tripartite board, where every employer and employee in the unorganised and the organised sector must register, so that if employees are unjustly treated, action may be taken against the employer. In Tamil Nadu, several sectoral tripartite boards exist.

However, they cover only some sections of unorganised labour²⁹. Each board must have a separate complaints committee that receives these complaints. As per the draft, the women are advised on what to do. The committee must take the case forward and register the case. The provision that allows the employer to change the conclusion (in consultation with the committee) must be removed. The report must be binding on the employer. Immediate action must be taken and the victim must not be further victimised with a transfer.

Procedural Contents

In addition to the substantive aspects, certain procedural matters must also be considered. For instance, the absence of eyewitnesses or delay in filing the complaint must not be the ground for disbelieving a complaint. Instead, the complaint must be seen in the context of the culture of denial that shrouds the issue.

No Guidelines Regarding the Scope Of Charge Made:

Expanding the applicability and scope of coverage from a few illustrations to a whole range of incidents of harassment is needed. According to Women Power Connect (WPC), the Bill in its current form does not clearly state under what

²⁹ Passage of Sexual Harassment Bill, at <http://womenpowerconnect.org/passagesexualharassment.htm>.

circumstances a woman may bring a charge of harassment. It describes a number of scenarios in which sexual harassment must not take place but fails to mention several others. An inclusive list is lacking.

Lack of Counseling Services:

Bill proceeds on the footing that as soon as a complaint of sexual harassment is made a full-fledged enquiry must follow. In most of the cases women may not want this and they may only want counseling services. The committee sorts out many cases just by sternly talking to the man or giving him a warning. Some cases may even be sorted out by mediation. Though the Bill does talk about mediation, no framework for counseling is provided and again the alternate Bill takes this into account.

No Checks and Balances for NGO's

The involvement of NGOs in working of these committees is doubtful under the Bill, as government funding will financially benefit NGOs. It nowhere mentions about any checks and balances, minimum criteria and background check for those NGOs. On one hand, the draft prescribes that no such complaints must not be made public and would be out of the preview of RTI Act, 2005, but on other hand it involves NGOs in such sensitive internal matters of employees that make organisation and their employees susceptible to their extortion and blackmail.

This provision must be reviewed in order to resolve the conflict.

VIEW OF THE OPPONENTS

Abrogates Opportunities for Women

Swarup Sarkar, Director of a Software firm contends that employers would be hesitant to employ women and thereby it would also reduce the employment prospects of competent women by an alarming proportion. This Bill would undoubtedly spell doom for the competent women like s. 498A & The Protection Of Women From Domestic Violence Act, 2005, which has been ruining the hallowed institution of marriage.

False Case

Opponents of the bill contend that government and women groups must implement laws or makes provision in existing laws to deter the women from lodging a false case. There must be provisions where the committee will also recommend to employer or the district officer for appropriate actions to be taken against the accuser if it would arrive at conclusion that the allegations against the respondent has not been proved. The committee must follow-up to ensure that appropriate actions is taken against the malicious complaint for the pain, suffering, loss of career and emotional distress caused to falsely accused, and must

be substantiated with the sufficient compensation to the respondent.

Discrimination against Men

Since men are not sensitive to harassing behavior that women (or at least feminists) construe as harassment, it's not surprising that they are not filing many harassment complaints. It is seen that female bosses and managers exploit their power over men in the office and male victims are more likely to complain of second kind of harassment - where a female manager treats women more favourably than men or criticises male employees more regularly. It affects both women and men, causing stress, health problems and financial penalties when they leave their jobs to avoid it. Men, who complained of sexual harassment were often targeted by female bosses. This even leads to widespread discrimination which is prohibited under the Constitution of India, art. 14.

CONCLUSION & RECOMMENDATIONS

Sexual Harassment in any form is abuse of workers because of their sex. The problem of sexual harassment is that it is inevitable at a place where both the sexes exist. Thus some remedial measures that may be enforceable by law and create a sustainable and coercion free working environment are wanted. An enactment that ensures that the weaker sex is further not harassed and exploited is the need of the hour. The claims of gender equity made under the Constitution

of Indian, art. 14 may be practically enforced only when the Bill qua its flaws is made applicable throughout the territory of India. The Bill when realised would diminish to some extent the de jure and de facto situation of women in the country. Few recommendations for combating sexual harassment at workplace to include in this Bill are as follows:

- (1) a strong policy level thrust must be made to make the implementation of the guidelines mandatory and to provide workplaces that are supportive to women;
- (2) a study must be commissioned to ascertain the extent to which the guidelines are presently being followed, and the kinds of redressal being awarded to women;
- (3) training sessions at workplaces will help in providing information to employers not only of their legal obligations to deal with sexual harassment but also for complying with these obligations;
- (4) mechanisms that are monitorable and enforceable to ensure that the private sector is not outside their ambit must be put in place. The ministry must collect information from various corporate associations like (CII, FICCI etc) and other business associations to ensure that the guidelines are being implemented;
- (5) the current Bill only protects women against harassment by men. As women may also sexually harass men, and same sex harassment is also possible. It would be better to make the legislation gender-neutral. Women groups also said there is a need

to include sex based discrimination, which is not sexual in nature under the ambit of the Bill³⁰;

- (6) reports in the media show that sexual harassment within schools is increasing, which affects female students and teachers. Vishaka guidelines must be implemented in schools. Education department and other departments dealing with schools including teacher's union must ensure that such committees are set up in schools. Supervisors and other cadres must be trained. Ministry of Women and Child Development must liaise with the Education Department on this issue³¹;
- (7) cases of sexual harassment within government programmes like the Integrated Child Development Services (ICDS) have been reported. Sexual harassment committees must be made mandatory within such programmes and this information must be included in the training curriculum so that ICDS workers, gram sevikas and workers of other schemes are aware of the provisions; and
- (8) where any dient or member from public harasses and employer does nothing to stop it, there must be a provision to complain against employer. If the harassment continues and the employer does nothing to stop it, there must be a provision in the enactment to complain against them also.

³⁰ *Id.*

³¹ *Id.*