Workplace Sexual Harassment: Are laws really the savior?

Background

With more and more women joining the workforce, ensuring an enabling working environment for women that is safe and secure has become a key concern, not only for their employers but also for the government. This is essential given the rise of sexual harassment at work incidents being reported. The landmark judgment of *Vishakha and Ors v. State of Rajasthan*¹ lead to the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“Act”), mandating every employer to provide a mechanism to redress grievances pertaining to workplace sexual harassment and enforce the right to gender equality of working women. The recent case, where a former employee of Uber wrote in her blog about the experiences of sexual harassment and gender bias during her year-long employment has, once again, brought the inadequacy of sexual harassment mechanism in place to the forefront.

This bulletin analyzes the legal framework on workplace sexual harassment, practical issues in implementation and the recent developments therein.

1. Some key definitions

The objective of the Act is that no woman shall be subjected to sexual harassment at any workplace.² Section 2 (a) defines an “aggrieved woman” to be of any age, whether employed or not, who alleges to have been subjected to any act of sexual harassment. According to section 2 (n), “sexual harassment” includes direct or implicated unwelcome sexually unwavering behavior such as physical contact and advances, demand or request for sexual favors, sexually colored remarks, showing pornography, or any other physical, verbal or non-verbal conduct of sexual nature. Section 3 expressly stipulates no woman shall be harassed at workplace. The harassment may include direct or indirect promises of preferential treatment or threats of unfavorable treatment in employment or creating an intimidating or hostile work environment or humiliating treatment likely to affect a woman’s health or safety.

The Act applies to the organized and unorganized sectors and covers places visited by employees during the employment or for reasons arising out of employment and includes transportation provided by the employer. In the event any incident takes place outside the purview of “workplace” provided under the Act, no recourse can be provided. The definition of “employee” under Section 2 (f) is fairly wide and covers regular, temporary, ad hoc employees, individuals engaged on daily wage basis, directly or through an agent, contract labor, probationers, trainees and apprentices.

2. Redressal Mechanism

Usually, sexual harassment smacks stigma and the fear of reprisal. According to a recent survey conducted by the Indian National Bar Association, 68% victims do not report incidents.

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¹ 1997 (7) SCC 323
² Section 3 of the Act provides for prevention of sexual harassment
due to fear of retaliation and discrimination. The Act mandates an employer to set up an “Internal Complaints Committee” ("ICC") at each office or branch of an organization, employing at least ten employees. The ICC should consist of four members i.e., (i) woman presiding officer, who shall be a senior level employee; (ii) two employees dedicated to women’s causes and having pre-requisite experience in social or legal work; (iii) one member from a non-governmental organization working for women’s causes or a person familiar with issues of sexual harassment.

When an incident takes place, an aggrieved woman can file a written complaint with the ICC or LCC within 3 months of the incident along with supporting documents. The 3 months can be extended provided the ICC or LCC is convinced. The law does not vest any power in ICC or LCC to suo moto file a complaint. However, where the aggrieved employee is unable to make the complaint on account of physical or mental incapacity or death, the law also makes provisions for friends, relatives, co-workers, psychologists, psychiatrists, etc. to file the complaint. Before initiation of the inquiry, the ICC or LCC, at the request of the aggrieved woman can take steps to settle the matter through conciliation. If no conciliation takes place, a copy of the complaint is sent to the alleged accused that has to file a written reply within 10 working days. The inquiry must be completed within 90 days of the receipt of the complaint and the report must be issued within 10 days from completion of inquiry.

The employer has to act on the recommendations of the ICC/LCC within 60 days of the report. If allegations are proved, the employer has to act in line with the applicable service rules and/or pay monetary compensation to the woman, to be deducted from the salary of the accused. Appeal against the decision of the committee is allowed within 90 days from the date of the recommendations. The Act also empowers the ICC and the LCC to recommend interim measures such as transferring the aggrieved woman to any other workplace or grant leave up to 3 months in addition to her regular leave entitlement.

3. Act vs. Reality

Constituting ICC at every administrative unit of the organization, training and replacing its members every 3 years would require human and financial resources, which may not necessarily be possible for every organization. Further, the law requires every employer to bring a person from a non-governmental organization, committed to the cause of women or familiar with the issues relating to sexual harassment, to be on the board of ICC. However, in reality organizations find it difficult to find such outside experts and fulfill the constituency criteria. This, in turn, makes the ICC inadequate in adjudicating the matters present before it.

The Act provides for an aggrieved woman who is not satisfied with the recommendations of the ICC/LCC, to prefer an appeal to the court or tribunal within 90 days of the recommendations. However, there is no statutory appeal mechanism to the person found guilty. It is unclear whether the accused should appeal to the court or tribunal in accordance with the applicable provisions of service rules or any other law. Whether the Act covers women only at workplace or a woman employee, during the course of her employment, falls under a grey area. There is ambiguity too on the issue if the law covers women who may be terminated.

before they could file a complaint. These inadequacies question the success of the purported legislation and the extent to which it provides protection to the aggrieved woman.

4. Recent Developments

Department of Personnel and Training has recently issued guidelines regarding sexual harassment at workplace. These guidelines are only applicable to government ministries, departments and authorities thereunder. There is an obligation to provide brief details of the implementation of the Act, including cases received and disposed in the annual report of all such ministries. The enquiry must be completed within 30 days or, maximum 90 days from the complaint. All ministries are now required to submit a monthly report to the Ministry of Women and Child Development for monitoring the progress.

In addition to the Act and keeping pace with developments, Criminal Law (Amendment) Act, 2013 inserted a new provision in the Indian Penal Code, 1860 by way of Section 354A. The new provision enlists the acts which constitute the offence of sexual harassment, which shall be punishable with imprisonment ranging from 1-3 years or with fine or both.

Further, the educational institutions too have been brought within the purview of workplace. On May 2, 2016, the University Grants Commission (“UGC”) notified the UGC (Prevention, prohibition and Redressal of Sexual Harassment of Women Employees and Students in Higher Educational Institutions) Regulations, 2015. It is India’s first gender-neutral regulation relating to sexual harassment where male as well as third gender students can make complaints against sexual harassment.

Conclusion

The Act is a landmark step for protecting rights of women and providing safe working environment. Perhaps, in times to come, it will be necessary to plug the gaps and make it more victim friendly at the redressal level so that the law really steps in as the savior in an effective and efficient manner. The legislative intent can only be achieved when the victims and the employers proactively address the issues effectively. Employers should have in place a robust framework and policies along with promotion of gender equality, diversity and inclusive culture in order to combat any potential harassment in the workspace.

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4 By an Office Memorandum dated December 22, 2016
5 Section 354A provides for sexual harassment by a man and includes making physical contact and advances involving unwelcome and explicit sexual gestures, demanding or requesting sexual favors, showing pornography to a woman against her will and making sexually colored remarks.