Sex-Based Harassment in the World of Work

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Examining Evolving Jurisprudence under India's PoSH Law

By

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I would like to dedicate this book to my parents and my husband, as they have been not only an amazing support, but also the ones who suggested me to write this book.

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FOREWORD

On 9 December 2023, India completed 10 years since the enforcement of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013. The law has been pathbreaking in more ways than one – it for the first time recognised that employers have a statutory duty to ensure safety for women at the workplace, and it gave the women workforce a specialised forum that has the necessary sensitivity and understanding to deal with issues of workplace sexual harassment. Two of the most powerful provisions under the law are that the internal committee is required to have an external member to bring in an element of transparency and minimise instances of management influence, and that the committee has been conferred with the powers of a civil court for conducting inquiries (without being bound by court procedures including rules of evidence). Looking back at these years, I believe that there is indeed a scope for improvement including in terms of defining how an internal committee can assume a wider role in the organisation than merely serving as an inquiring authority, to oversee compliance by the employer with the law, and how it can enforce the powers of a civil court that have been made available to it. Having said that, I also believe that with interactions with and assistance from the legal community, the government has the potential of taking care of these and several other challenges.

In these 10 years, while there have been limited legislative amendments to the statutory framework, the judiciary has remarkably risen to the occasion to address several facets of redressal of complaints of sexual harassment by the female workforce. These facets include the manner of dealing with anonymous complaints, the necessity for the internal committee to ascertain the existence of a *prima facie* case of sexual harassment before undertaking a detailed inquiry, the emphasis on verbal cross-examination as opposed to cross-examination via interrogatories / questionnaire, and the concerted efforts to be made by the internal committee to come up with a joint report highlighting individual views and yet demonstrating an element of deliberation among members. What is noteworthy in the judicial precedents is that courts have consistently made attempts to strike a balance between

the interests of an aggrieved woman and the need to inquire into her complaint without any assumption of guilt on the part of the respondent. The common thread in these decisions is the strong focus on the principles of natural justice, which require the inquiring authority to give a fair opportunity to both parties to put forth their case and the evidence associated with their stance and confront each other to help the authority in arriving at a finding on the charges based on preponderance of probabilities.

With the jurisprudence becoming richer and reaching greater sections of the working community through discussions on public forums including via social media, more women are aware of their rights under this law than was the case just few years back. At the same time, unfortunately, there is an increasing number of malicious complaints where, for instance, the evidence has been found to be tampered or where the complaint has been determined to have been motivated by the need to preserve the job against the backdrop of poor performance ratings at work. Organizations and internal committees both have an important responsibility to ensure that employees are sensitised to be able to understand their rights under the law and make judicious use of the same while being cognizant of the gravity of the allegations that internal committees must address.

As an employment lawyer, I have had the privilege of interacting with multiple stakeholders as they navigate through the process of inquiring into complaints of sexual harassment. Over the years, I have realised that while organisations and internal committees are generally aware of their obligations under the law, there are many misconceptions and equally a lack of understanding around not only the inquiry process itself, but also in relation to the fundamental concepts of "workplace", "sexual harassment", etc. For instance, there have been several occasions where internal committees have taken cognizance of complaints that do not give any description of the alleged acts of sexual harassment but only use expressions such as "I was harassed", without trying to gather more details on the complaint before forwarding it to the respondent. Such inadequate measures have the tendency of preventing the respondent from comprehensively responding to the allegations against him/ her/them. Similarly, in a few cases, the internal committee has fallen short of presenting its majority view on whether the charge of sexual harassment is established and the rationale behind such view – often, in such kind of reports, all that the management can see are the individual findings of the members of the committee, leaving

it to their wisdom to understand and ascertain the majority view of the committee and take appropriate action accordingly.

In this book, I endeavour to help internal committees, the human resource community, and the management in understanding the jurisprudence that has developed thus far around the key concepts and provisions of the law. My objective here is to not merely reiterate the statutory provisions – which I believe have been discussed enough and more in the literature already available on the subject – but to the contrary, the intent here is to make this book a reference point for the stakeholders whenever they are confronted with complex situations as part of taking cognizance of complaints of sexual harassment and inquiring into the same. In the ultimate sense, the book is meant to empower those who have been tasked with the responsibility of ensuring safety at the workplace, so that they are better able to fulfil such responsibility and consequently enable women to build confidence in the internal processes when they unfortunately meet with unpleasant situations at the workplace.

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CHAPTER I

PRE-POSH LEGISLATION ERA AND VISHAKA JUDGMENT

Regulation of conduct under organisational policy

Before the pronouncement of the judgment of the Supreme Court of India in the case of Vishaka and Others v. State of Rajasthan and Others [(1997) SCC 6 241] (*Vishaka*), instances of sexual harassment at workplace, even if reported by some women, would largely be left to the organisational policies condemning such act as a misconduct. Even if such complaints would be inquired into, the inquiry officer or panel would most likely comprise male officials who may not have the necessary sensitivity in dealing with the complaint or the ability to provide necessary comfort to the aggrieved woman to enable her to speak openly about her grievances. Further, in the absence of an external person partaking in the inquiry process and given the lack of legal protection against retaliation or breach of confidentiality, women would often prefer not to raise a formal complaint and either ignore the occurrence of unwelcome acts bearing sexual connotations or leave the services of the organisation without any redressal. Notably, several organisations would often not define misconduct in their code of conduct in a manner that specifically covers sexual harassment in its ambit. Given the absence of a law relating to safety of working women, the female workforce would often not have any recourse in cases where their employer has not taken definitive steps to prevent and prohibit workplace sexual harassment. This was particularly the case with private sector women employees who could not have reached out to writ courts considering that the jurisdiction of such courts is often limited to actions against the state and actions against other entities where there is a breach of a statutory duty.

Vishaka Judgment

In the above context, *Vishaka* is one of the most landmark and path-breaking judgments in India, not only because it became the foundation of a special law on prevention of workplace harassment of women workforce, but also because it shaped the jurisprudence on this subject when there was no statutory framework (thus moving away from the traditional role of the apex court of interpreting the already legal regime to address a specific question of fact or law). In this case, the Supreme Court of India recalled India's commitment to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW Convention) (which it ratified in 1993) while responding to a public interest litigation initiated by Vishaka Mahila Shiksha Avam Shodh Samiti (Registered) and other organisations, in the context of an incident involving an alleged brutal gang rape of a social worker in Rajasthan. In a very significant move, the court recognise that all employers, whether operating in the public sector or in the private sector, must take appropriate steps to prevent sexual harassment at the workplace. Despite the absence of a specific legislation in this regard, the court directed employers to set up a complaints committee that should be headed by a woman and where at least half of the members should be women, to address any complaints relating to workplace sexual harassment. The court also required employers to onboard a third party, who could be an individual from a non-governmental organization or a body familiar with the issues of sexual harassment, as part of the committee to ensure that there is no internal pressure or influence from the senior officials in the organization. Notably, to hold employers accountable towards their responsibility to ensure workplace safety, the court also directed that employees be allowed to raise issues of sexual harassment at meetings and in other forums before their employers.

In the process of redefining workplace safety for women, the court, in a rare instance, defined "sexual harassment" to mean an unwelcome sexually determined behaviour that would include not just physical advances but also sexually coloured remarks and other actions having sexual undertones or overtones. The court also mandated employers to expressly prohibit sexual harassment as part of the organizational rules and regulations. Where an act also amounted to an offence under the criminal law, the employer must initiate appropriate action including filing a complaint with the appropriate authority. Within the organisation, the complaints committee should work

in a time-bound manner to inquire into a complaint of sexual harassment. To ensure that employees are aware of their rights pursuant to this judgement and the law that would be enacted in the future, the court mandated awareness and sensitization to be generated by the employer among its employees by promptly notifying the above guidelines of the court. While the court use the term "guidelines" at multiple places in the judgment to refer to the above stipulations, it also made it clear that these should be strictly observed in all workplaces and should be deemed to be binding till the time a suitable legislation is enacted by Parliament to address the menace of workplace sexual harassment.

Implementation of *Vishaka* Judgment

As much as *Vishaka* was widely praised by many organisations and employees alike, it also met with a lot of resistance for several years after the judgment was widely disseminated and discussed. For instance, in the case of DS Grewal v. Vimmi Joshi and Others [(2009) SCC 2 210], the respondent was working as the principal of a school when she was allegedly subjected to unwelcome sexual advances by the Chairman of the School Managing Committee. Her services were later terminated which, as per her, was a direct consequence of her objection to these advances. The Supreme Court of India expressed its shock and dismay over lack of implementation of *Vishaka*, reprimanded the organisation for its neglect, and directed the management to pay and bear all the costs of the first respondent (the aggrieved woman) in the appeal.

Following the above, the Supreme Court of India made some poignant observations in its judgment in Medha Kotwal Lele and Others v. Union of India and Others [(2013) SCC 1 297], noting how the government as an employer and the legislature as the law-making body both had failed in honouring the mandate of *Vishaka*. Following are few remarks worth making note of:

> "Yet, 15 years after the guidelines were laid down by this court for the prevention and redressal of sexual harassment and their due compliance under Article 141 of the Constitution of India until such time appropriate legislation was enacted by Parliament, many women still struggle to have their most basic rights protected at workplaces. The statutory law is not in place…This group of four matters - in the nature of public interest litigation - raises principally the grievance that women continue to be victims of

> sexual harassment at workplaces…It is stated that the attitude of neglect in establishing effective and comprehensive mechanism in letter and spirit of Vishaka guidelines by the states as well as the employers in private and public sector[s] has defeated the very objective and purpose of the guidelines…After all they have limitless potential. Lip service, hollow statements and inert and inadequate laws with sloppy enforcement are not enough for true and genuine upliftment of our half most precious population - the women."

Having expressed its disappointment through the above statements, the court reiterated its direction that both the public sector and the private sector organisations must implement adequate mechanisms to ensure a complete implementation of *Vishaka* in letter and spirit. It was also instructed that if the perpetrator is found guilty of the charge of sexual harassment pursuant to the inquiry process, the complainant should not be forced to work with or under such individual who, in turn, should be subjected to appropriate disciplinary action. Importantly, re-affirming its own commitment to strongly enforce *Vishaka*, the court also held that "*if there is any non-compliance or non-adherence to Vishaka guidelines, orders of this court following Vishaka and the above directions, it will be open to the aggrieved persons to approach the respective High Courts. The High Court of such State would be in a better position to effectively consider the grievances raised in that regard*."

Onset of the Statutory Framework

With organisations only gradually realising their obligations under *Vishaka*, it became clear that a legislative framework had to be effectuated to give a boost to *Vishaka* principles. On 9 December 2013, the Government of India finally brought into force, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (PoSH Act). The law draws heavy inspiration from *Vishaka* on all major aspects ranging from the ambit of "sexual harassment" to the obligations of the employer and constitution and composition of the internal committee to inquire into complaints of workplace sexual harassment. In the coming chapters, the author focuses on the statutory framework and examines in various sections how the judiciary played a pivotal role in shaping the jurisprudence under this framework.

CHAPTER II

AGGRIEVED WOMAN, EMPLOYER, RESPONDENT, SEXUAL HARASSMENT, AND WORKPLACE UNDER POSH LAW

Part A: Aggrieved Woman

Statutory Definition

In the context of a "workplace", the term "aggrieved woman" refers to a woman of any age who alleges the commission of sexual harassment by an individual against her. The definition also clarifies that such aggrieved woman need not be employed at the workplace where the sexual harassment has been alleged to have been committed. The concept therefore makes a significant change in the legal landscape in the country by recognising that interactions at the workplace could take several forms beyond / outside the employer-employee relationship. Therefore, a female visitor at an office can file a complaint alleging sexual harassment with the internal committee of the concerned organisation if she has been unfortunately subjected to such conduct by an employee at the office. Other kinds of female workers who may be able to similarly make a complaint are consultants, contract workers, and trainees, despite the absence of employer-employee relationship between them and the concerned organisation.

Coverage of Transgenders

One question that has lately garnered some attention is whether the concept of "aggrieved woman" under the PoSH Act covers transgender persons. The question does not have straightforward answer at this point. If one focuses on the preamble to the statute, the same clarifies that the foundation of the law lies in the CEDAW Convention, which was adopted by the United Nations General Assembly on 18 December 1979. Notably, this convention predominantly focuses on "sex" based discrimination. The expression "sex"

has itself been interpreted differently across jurisdictions and across courts within a single jurisdiction. Let us take the example of India. In the case of Ganga Kumari v. State of Rajasthan [Civil Writ Petition Number 14006 of 2016], the Rajasthan High Court, for instance, noted that "sex" pertains to:

> "biological status as male or female. It includes physical attributes such as sex chromosomes, gonads, sex hormones, internal reproductive structures, and external genitalia. Gender is a term that is often used to refer to the ways that people act, interact, or feel about themselves."

In the case of Supriyo @ Supriya Chakraborty and Another v. Union of India [Writ Petition (Civil) Number 1011 of 2022], the Supreme Court of India noted the following to explain the difference between "sex" and "gender":

> "The term 'sex' refers to the reproductive organs and structures that people are born with…Sex and gender are not the same…A transgender person is one whose gender identity does not conform with their sex... The sex of a person is determined by their reproductive organs and structure, their gender identity depends on their internal experience of gender."

In a more recent case of Binu Tamta v. High Court of Delhi [Miscellaneous Application Number Miscellaneous 2308/2023], the Supreme Court of India addressed this issue in a more direct manner. When asked whether LGBTQIA+ individuals could be deemed to be covered under the definition of 'aggrieved woman', the apex court observed that the existing legal regime is created to "*protect an 'aggrieved woman' in the workplace. These regulations were formulated having regard to clause 3 of Article 15 of the Constitution of India and in order to extend the constitutional right of equality and equal protection of the laws as enshrined in Article 14 of the Constitution…we find that the definition of 'aggrieved woman' as it exists would not cover a person who is belonging to the LGBTQIA+ umbrella*."

The debate around such coverage has also engulfed the CEDAW Convention, where some experts have argued that the inclusion of transgenders may result in a confusing jurisprudence in that an individual born as a man but identifying themselves as a woman would be covered

within the protection accorded under the CEDAW Convention while a trans-man may not be deemed as enjoying similar rights.[1]

Fortunately, in India, there is already a separate legislation that prohibits an action that "*harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person… including… sexual abuse*". The Transgender Persons (Protection of Rights) Act 2019 requires employers to designate a complaints officer to inquire into complaints of transgender persons in relation to non-compliance with the statute. The information regarding appointment of such complaints officer is required to be notified by the employer as part of its equal opportunity policy. Considering the presence of such legal framework, employers have been formulating two separate policy frameworks for (biological) women and transgender employees respectively.

Part B: Employer

Statutory Definition

While the definition of "employer" under the PoSH Act is extensive, the part of the definition that is most relevant to private sector employment is the one which clarifies that employer is the person that is responsible for the management, supervision, and control of the workplace. The term "management", in turn, has been defined in an inclusive manner to cover a person or a board / committee that is responsible for formulation and administration of policies for the concerned organisation. The definition of "employer" assumes relevance because few aspects of the PoSH Act relate back to this concept, key ones being as follows:

(a) Employer is the one that has the power and the obligation to constitute an internal committee;

[1] Gallagher, Robina. 2020. *Redefining "CEDAW" To Include LGBT Rights: Incorporating Prohibitions Against the Discrimination of Sexual Orientation and Gender Identity*. Southern California Interdisciplinary Law Journal, No. 4: 650. https://gould.usc.edu/why/students/orgs/ilj/assets/docs/29-4-Gallagher.pdf.

(b) The internal committee cannot inquire into complaints of sexual harassment that are filed against the employer himself / herself / themselves;

(c) Employer is the one that is required to act upon the recommendation of the internal committee upon conclusion of the inquiry; and

(d) Employer is statutorily required to *inter alia* provide a safe working environment, organise awareness sessions for employees and members of the internal committee, monitor the timely submission of reports by the internal committee to the jurisdictional District Officer.

While the definition offers some guidance as to the person who could be deemed as an "employer", it poses some challenge in situations involving a hierarchical organisation structure where supervisory functions are delegated across various levels and functions (which is quite commonly the case).

Subjective Assessment

Few judicial precedents examining the concept in greater detail are discussed below, although it is imperative to note that so far, no comprehensive set of tests has been developed by the judiciary for determination of "employer" for the purpose of the PoSH Act.

In the case of Sneha Choudhaury v. Sahitya Akademi and Others [2021 SCC Online Delhi 4790], the Delhi High Court noted that when determining whether a particular individual could fall in the category of "employer", what assumes relevance is not only whether such individual has the power to appoint or discipline individuals but also whether such individual has day-to-day supervision and control over the workplace where the woman was ordinarily employed (even though another individual may have general control and supervision across all offices of an organisation). The court observed as follows:

> "When the definition of 'employer' is so wide…it [must be] held that the Secretary, who is the Principal Executive Officer of the Akademi; incharge of the day-to-day affairs of the Akademi; custodian of all records and

> manages the properties and funds of the Akademi, would also be included in the definition of an 'employer'."

In certain cases, courts have seen the concept of "employer" under the PoSH Act to be limited to an individual who has the ability to control the constitution of the internal committee. In the case of Union of India and Others v Rema Srinivasan Iyengar and Others [Writ Petition Numbers 10689, 24290 and 4339 of 2019], the Madras High Court noted that when the individual in question does not have the power to decide the constitution of the internal committee, terming such individual as the 'employer' of the workplace "*does not have any logic*".

The principles discussed above were both recognised in the judgment of the Calcutta High Court in Sumana Bhowmick v. Union of India and Others [2023 SCC Online Calcutta 245], in the following words:

> "Whether or not the respondent number 8 was an 'employer' within the meaning of the Act, would require a fact-finding exercise in terms of the victim and the accused's nature of duty, the accused's role in the management of the company and control over the members of the ICC."

In few cases, courts have given a very narrow meaning to "employer". In the case of Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University and Others [2014 SCC Online Bom 814], the Bombay High Court took the view that the concept of "employer" would occupy a very narrow field and only those respondents who do not fit in the definition of "employee". Similarly, in the case of David G Samuel v. Collector / District Magistrate, Pune and Others [2021 SCC Online Bombay 11673], the Bombay High Court observed as follows:

> "It is the Board that is responsible for the governance of its institution. That is to say, it is no individual who is solely responsible for the governance of the institution… The complaints in question are not against the Board or the Committee. It is the Board and Committee that are in charge of the management, supervision and control of the workplace, not the individual president in his capacity as such…The ICC has been mindful of its task and responsibilities and has discharged its burden as required by law."

Arguably, if this view is adopted as such, it would mean that in companies which are run by a board of directors, an individual can never be seen as the

"employer" of the workplace, rendering it impossible that a complaint can be filed by an individual "employer" by an aggrieved woman.

Part C: Respondent

Statutory Definition

The PoSH Act defines a "respondent" to mean a person against whom a complaint of sexual harassment has been made by an aggrieved woman. This definition assumes significance from the standpoint of the inquiry that the internal committee / local committee undertakes upon receipt of a complaint of sexual harassment, although for all inquiries to be conducted by an internal committee, the definition ought to be read with the definition of "employee" given that a non-employee respondent cannot be proceeded against by such committee as explained below.

Gender-Agnostic Connotation of "Respondent"

As noted above, the definition of "respondent" is defined under the PoSH Act to refer to the "person" against whom a complaint of sexual harassment has been made by an aggrieved woman. Given the use of the word "person", it becomes evident that the term "respondent" is gender agnostic. In fact, the judgment of the Calcutta High Court in Malabika Bhattacharjee v. Internal Complaints Committee [WPA 9141 of 2020] reiterates the provisions of the PoSH Act when it examines same-gender complaints. The petitioner's contention in the case was that the internal committee acted without jurisdiction by taking cognizance of a complaint of sexual harassment against her. The court, however, did not accept the contention, observing that while the complainant can only be a woman (as the statute uses the term "aggrieved woman"), the respondent can be either a male or a female.

Inquiry into Complaints where Respondent is not Directly Employed at the Workplace

For an internal committee to take cognizance of a complaint of sexual harassment, the respondent must be an employee (reference Section 11(1) of the PoSH Act). The term "employee" in turn has been defined under the statute to mean a person who is not necessarily employed directly in the

workplace where the purported act of sexual harassment has been committed but has a working relationship in the said workplace including in the capacity of a contract worker (person engaged by an entity through a manpower services provider which is the employer of the worker), a trainee, or an apprentice. While this may appear to suggest that an internal committee can inquire into complaints raised against, say, a contract worker, such understanding may not be completely aligned with the remaining provisions of the law. For instance, the law states that when the internal committee concludes that the charges of sexual harassment against the respondent are substantiated, it is required to make a recommendation to the employer to "***take action*** *for sexual harassment as a* ***misconduct*** *in accordance with the provisions of the* ***service rules applicable to the respondent***" or to "***deduct****…from the* ***salary or wages*** *of the respondent such sum as it may consider appropriate to be paid to the aggrieved woman*". If the respondent is not a direct employee, the above-referenced actions cannot be taken against him / her / them by the entity at the workplace of which sexual harassment was found to have been committed, because the ability to take disciplinary action against an individual emanates from an employer-employee relationship.

The judicial view on this point does not appear to be conclusive, but one may refer to the judgment of the Bombay High Court in Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University [2018 (158) FLR 35], where the court *inter alia* remarked that the concept of "employee", although not gender specific as is the case with 'aggrieved woman', "*shows that there must exist a contract of employment with the workplace*". In fact, even the Supreme Court of India has noted that when sexual harassment purportedly occurs because of an act or omission "*by any third party or outsider"*, the assistance of the employer is limited to providing assistance to the aggrieved woman as may be deemed "*necessary and reasonable*" as opposed to inquiring into the complaint (reference Medha Kotwal Lele and Others v. Union of India [AIR 2013 SC 93]).

From an academic standpoint, therefore, the definition of "employee" requires a revisit, considering that the said term is intricately connected with the term "respondent" under the PoSH Act, at least as far as the internal committee is concerned. Until appropriate amendments to the definition are effectuated, from a practical standpoint, it is advisable that in the event an entity receives a complaint of sexual harassment against an individual who

is not a direct employee, the following alternative actions be taken by the entity:

(a) In case the respondent is a contract worker, the complaint may be forwarded to the manpower services provider on the payroll of which the respondent is employed.

(b) In case the respondent is any other individual with whom the entity has a working relationship outside of employer-employee relationship, the complainant may be encouraged to reach out to the local committee constituted by the relevant district.

Inquiry into Complaints where Respondent belongs to a Different Workplace of the Same Employer

The essential criterion to be met for a complaint to be taken cognizance of by an internal committee is whether the respondent is an employee of the organization that has set up the internal committee (reference Section 11(1) of the PoSH Act). However, once this criterion is met, the law does not further mandate that the respondent should belong to the same office as the office to which the internal committee relates. In the case of Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University [2014 SCC Online Bom 814], the Bombay High Court, while dealing with a case where both complainant and respondent were employees of the same organization, explained that what matters is that the sexual harassment must have been committed at a workplace where either the aggrieved woman employee or the respondent employee report to. It further observed that:

> "The staff of otherwise distinct establishments must be frequently coming in contact with each other. A situation where Aggrieved Woman is from Junior College and Respondent is from a Senior College or vice-versa, therefore, may also emerge. It is workplace for all of them."

Therefore, in a situation where the woman employee reaches out to the internal committee set up at the office she reports to, such internal committee should not refuse to take cognizance of the complaint on the basis that the respondent is based out of another office location. Ultimately, the objective of the employer should be to provide as much comfort to the woman as is reasonably possible while she files the complaint. In the above-mentioned case before the Bombay High Court, the court emphasized that

the mandate of the law to have separate internal committees is intended "*for the convenience of aggrieved woman*." Therefore, if the woman draws comfort in filing the complaint with her workplace's internal committee, the matter should be taken forward accordingly unless there is any compelling reason for deviating from this approach.

Part D: Sexual Harassment

Statutory Definition

The term "sexual harassment" has been given an inclusive definition, but even illustratively, it covers a wide range of improper and welcome acts whether express or implied, such as physical contact and advances, a demand or request for sexual favours, and sexually coloured remarks. The definition also ends with a broad expression "*any other unwelcome physical, verbal or non-verbal conduct of sexual nature*" thus leaving no stone unturned to prohibit an invasion of the dignity and privacy of a woman at work.

As noted above, the definition uses the term "includes" while enumerating the actions that can amount of "sexual harassment". As such, the definition has been treated as an inclusive one as opposed to an exhaustive one (reference Vinay Kumar Rai v. Union of India and Others [Writ Petition (Civil) Number 596 of 2019 (Tripura High Court]).

From the above definition, it is also clear that for an act to constitute "sexual harassment" under the PoSH Act, such act must necessarily be of a "sexual nature". Any other act or behaviour that is devoid of any sexual undertones, however unwelcome such behaviour may be, would not come within the purview of the PoSH Act.

This distinction between sexual harassment and harassment of any other nature was also brought out in the Report on the Protection of Women against Sexual Harassment at Workplace Bill 2010, wherein the Standing Committee, analysing the draft bill for the POSH Act, noted that the bill:

> "has a very specific purpose, to prevent sexual harassment at the workplace. As such, it is essential that 'harassment' is qualified to be of a sexual nature. Unless 'sexual harassment' is so defined, it would fall within the realm of 'harassment' per se, which is already addressed under the IPC."

In the case of Mohanan Pallath v. Bharath Sanchar Nigam Limited [2014 SCC Online Central Administrative Tribunal 2296], the tribunal opined that allegations of the respondent such as calling the complainant late in the night, making unnecessary comments at workplace, questioning her when other colleagues and relatives called her, etc. "*[could not] be treated as having sexual overtones unless they carry a definite nexus with sexual behaviour or sexual intention*." In another case, the High Court of Chhattisgarh noted that when the complaint alleged that the respondent said in Hindi, "*Madam, yadi aap chutti chahti hain toh mujhe akele mein aakar milein*" ("*Madam, if you wish to avail leave, you may come meet me alone*"), it cannot, in the absence of any other circumstances, be inferred that there was any sexually coloured remark and that the conversation fell within the purview of "sexual harassment" (reference Dr Manish Tiwari v. State of Chhattisgarh and Others [WPCR Number 363 of 2018]).

Intemperate / Abusive Language

In view of the above, mere use of intemperate language, although having the potential to be categorised as misconduct under an organisation's code of conduct or disciplinary policy, would not constitute sexual harassment. In a case, a woman, serving as a Clinical Psychologist at an observation home, filed a petition before the Delhi High Court claiming that she was sexually harassed at the hands of the Superintendent at the said observation home. As part of the petition, she *inter alia* alleged that the respondent rebuked the petitioner in front of 15 other persons, and that he used to change his clothes in front of the petitioner / female staff. Interestingly, before the internal committee, the petitioner had not made these allegations, and the only grievance put forth therein was that the respondent would shout at the petitioner in anger. On this basis, the Delhi High Court did not acknowledge the above-mentioned allegations, and as regards the act of shouting, the court held that the same by itself cannot be considered as "sexual harassment" within the meaning of the PoSH Act (reference Abhilasha Dwivedi v. Department of Women and Child Development, NCT of Delhi [Writ Petition (Criminal) Number 1639 of 2019]). Similarly, gender-based bias or favouritism not bearing sexual undertones would not qualify to be sexual harassment (reference Union of India v. Rema Srinivasan Iyengar [Writ Petition Numbers 10689, 24290 and 4339 of 2019 - Madras High Court]).

It is equally important to note that when dealing with cases where the alleged sexual harassment takes the shape of abusive words, courts examine the context too in which the words were spoken, to understand where the words could have sexual undertones. In an interesting case before a local court in Delhi (reference Tausif-ul-Hassan v. The State (NCT of Delhi) [Criminal Revision Number 545 of 2022]), the words "f**k off" became the subject matter of a complaint of sexual harassment. The accused contended that he merely asked the complainant to leave the premises by using the contentious words, but the complainant argued that alongside the said words, the accused also uttered "*bazaru aurat*" (which translates to prostitute). The court accordingly observed that:

> "given the facts and circumstances of the incident, it cannot be said that the petitioner was merely intending to ask the complainant to leave or go away."

Sexual Innuendos

Considering that the definition of "sexual harassment" covers unwelcome acts or behaviour whether committed directly or by implication, sexual innuendos would also fall within the purview of 'sexual harassment'. In the case of Jishu Sengupta and Others v. State of West Bengal and Others [CRRs 1204, 1205, 1212 and 1213 of 2016], one of the petitioners was making conversation with the other petitioners in a television programme. After addressing one mannequin by the name of the complainant, the said petitioner ascertained from the other two petitioners that they were in love with the complainant for which she would be immortalised in history. Notably, during this conversation, the petitioners metaphorically discussed how they enjoyed playing cricket in the playground of Eden but because the playground did not allow the petitioners to play at the same time, one of the petitioners played in the morning while another played in the evening. The court deemed this to be a case of sexual innuendos and held the same to be qualifying to be "sexual harassment".

Touching in a Fit of Rage

Courts have been inclined to hold that unless a physical touch is sexually determined, it cannot amount to "sexual harassment". In the case of Shanta Kumar v. Council of Scientific and Industrial Research [2017 SCC Online Delhi 11327], the aggrieved woman alleged that while she was working at

the laboratory, the respondent entered the laboratory, stopped the machine, snatched the samples from the petitioner and threw the materials, and in this process, he also pushed the woman out of the laboratory and locked the laboratory. The Delhi High Court observed as follows:

> "Plainly, a mere accidental physical contact, even though unwelcome, would not amount to sexual harassment. Similarly, a physical contact which has no undertone of a sexual nature and is not occasioned by the gender of the complainant may not necessarily amount to sexual harassment."

Unwelcome Conduct

One of the most difficult aspects of inquiring into a complaint of sexual harassment is to ascertain whether the act in question was unwelcome or whether it was consensual. After all, no jurisprudence is capable of defining how a woman may react when her safety at the workplace is compromised. Internal committees must, therefore, deal with this aspect very sensitively. For instance, recording in the report that the complainant possibly consented to the alleged acts because she continues to work with the respondent seamlessly and participates in all work events may not only be an improper finding but also turn out to be damaging for the complainant. The PoSH Act itself recognises that sexual harassment also encompasses instances where an aggrieved woman submits herself to the sexual conduct of another individual on the promise of preferential treatment at the workplace. Even if consent is given to the sexual conduct in such cases, there is likely to be an underlying duress, and therefore, the respondent cannot be exonerated on this basis alone.

Ultimately, the standard that should be adopted while evaluating a complaint is that of a "reasonable woman". In the case of US Verma, Principal, DPS and Another v. National Commission for Women and Others [2009 SCC Online Delhi 3200], the Delhi High Court quite interestingly referred to international jurisprudence and relied on the following observations of the United States Court of Appeals, Ninth Circuit, in the case of Ellison v. Brady [924 F.2d 872, 878-79 (9th Cir. 1991)]:

> "We therefore prefer to analyse harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. See, e.g.,