



A Critical Review Of The Conciliation Provision Under Sexual Harassment Of Women At Workplace Act

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<i>Article History</i>	<i>Abstract</i>
Received: Revised: Accepted:	The Sexual Harassment of Women at Workplace Act was passed in order to prevent and provide safeguard to working women against sexual harassment and to provide effective remedies against complaints of sexual harassment. However, the law also provides the aggrieved woman the choice to opt for conciliation after she has filed a complaint of sexual harassment against the respondent. Thus, the paper examines that the conciliation provision should be removed from the statute as it contradicts the purpose of the 2013 Act. The method used in the research study is doctrinal which involves descriptive and analytical study.
CC License CC-BY-NC-SA 4.0	Keywords: Sexual Harassment, Workplace, Women, Conciliation.

Introduction

Since many decades women across the globe have experienced sexual harassment at workplace. Although sexual harassment is very common in prevalence it is still without a universally accepted definition. According to Barr, the behaviour with sexual connotations that is unwelcome or uncalled for is sexual harassment. Mackinnon defines sexual harassment as an imposition of sexual requirements, unwanted in the context of relationship of unequal power. According to Uggen and Blackstone explains sexual harassment in the context of age, gender, race, class and caste of the affected person. (Jiloha, 2021).

The International Labour Organisation defines sexual harassment as “any behaviour of sexual nature that affects the dignity of women and men, which is considered as unwanted, unacceptable, inappropriate and offensive to the recipient and that creates an intimidating, hostile, unstable or offensive work environment.

Thus, the objective of the study is to examine whether the provision of Conciliation under the Sexual Harassment of Workplace Act contradicts the very purpose of the said Act and whether it should be removed from the statute.

Vishaka Guidelines

Although India had signed and ratified the Convention on Elimination of All Forms of Discrimination against Women (CEDAW). However, there was no domestic laws to check the evils of sexual harassment for working women. It was in the case of Vishaka & Ors v. State of Rajasthan & Ors, 1997 that the Apex Court had declared sexual harassment at workplace to be unconstitutional. It was in this case, for the first-time sexual harassment at workplace was recognized as a violation of human rights. (Bothra, 2014). It was observed by the court that there is no domestic law to check the evil of sexual harassment of working women at work places and therefore the contents of International Conventions and norms are significant for

providing guarantee of gender equality and right to work with human dignity. International Conventions and norms are to be taken into consideration in the absence of enacted domestic law and when there is no inconsistency between them. The court stated that

“it is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in domestic law.”¹

The court observed that sexual harassment infringes women's fundamental rights to live with dignity, to personal liberty, and to engage in any occupation as well as the constitutional guarantee of gender equality. The court also made reference to fundamental duties imposed on all Indian citizens to reject practices that are demeaning to women's dignity as well as directive principles for guaranteeing reasonable and humane working conditions. (Sarpotdar, 2020). Since neither civil nor penal laws in India provide specific protection to women from sexual harassment in workplaces. The court relied heavily on the recommendation of the Convention on Elimination of All Forms of Racial Discrimination (CEDAW) and laid down the guidelines against sexual harassment which must be followed in all workplaces until the legislation is enacted in regard to the same. (Agrawal, 2006).

JUSTICE VERMA COMMITTEE'S REPORT ON SEXUAL HARASSMENT OF WOMEN AT WORKPLACE

In the aftermath of Nirbhaya Gang Rape, on December 22, 2012, the Government of India appointed a three-member judicial committee headed by the former Chief Justice of India, Justice J.S. Verma, Justice Leila Seth and Gopal Subramaniam requesting them to submit a report within thirty days. The key objective of the Commission was to ‘look into the possible amendments of the Criminal law to provide quicker and enhanced punishment for criminals committing sexual assault of extreme nature against women’. The Committee had recommended amendment to India's sexual assault laws and had also made recommendations on the bill pending in the Parliament in regard to Sexual Harassment of Women at Workplace, 2012. In its report the committee had stated that while the Sexual Harassment Bill purports to be in effectuation of the Hon'ble Supreme Court's dictum in Vishakha v. State of Rajasthan, it is clear from a reading of the said Bill that the spirit of the judgment in Vishakha is not adequately reflected and had made following suggestions to make the legislation more effective.

The committee broadened the definition of sexual harassment and had stated that due consideration must be given to both objective and subjective factors when interpreting the term "unwelcome" in the definition in order to ensure that women with different perceptions and comfort levels are given the necessary protection.

The committee recommended that the Internal Complaints Committee should not function as a civil court since domestic committees cannot simply be granted the authority of courts, especially when the internal committee is composed up of people without any expertise in law.

Further, an internal complaints committee, might be ineffective because handling complaints of sexual harassment might deter women from approaching the committee. Thus, the Verma Committee had recommended for establishment of Employment Tribunal in order to receive and adjudicate such complaints.

The Verma Committee had suggested that the definition of “workplace” in the proposed Bill under Section 2(o) is of wide amplitude and in that sense is acceptable. However, it was suggested to bring within the ambit of the definition unorganized sector, the women in the armed forces and police and agricultural workers. It was also suggested to include within the definition, the women students and staff of all schools and educational institutions as the present definition appears to exclude government and other educational institutions.

The Verma Committee also recommended that the three-month window for submitting a complaint be removed and that the complainant should not be transferred without her consent. The Bill should be amended to include suitable clauses for the payment of compensation to a woman who has experienced sexual harassment. A tribunal will decide on the compensation and the company will make the payments.

Further, it was suggested that a company should be held responsible, if it facilitated sexual harassment and permitted an environment where sexual misconduct became widespread. The company can be held accountable for failure to disclose the company's policy on sexual harassment and the ways to file a complaint and if it had failed to forward a complaint to the Tribunal. The committee was against punishing

¹ A.I.R 1977, S.C, p. 3015.

women for filing false complaints as it will undermine the very objective behind enactment of the said legislation.

Although the Verma Committee had made several recommendations however, very few recommendations were incorporated when the act on sexual harassment of women at workplace act was enacted in 2013.

Overview of Sexual Harassment of Women at Workplace Act, 2013

As stated in the preceding paragraph until the landmark case of *Vishaka & Ors v. State of Rajasthan & Ors*, 1997 there was no law that specifically dealt with the issue of sexual harassment faced by working women. It was only in the year 2013 that Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act was enacted with the purpose to prevent and protect women from workplace sexual harassment and provide effective redressal towards complaints of sexual harassment. The 2013 Act elucidates which types of acts come within the purview of sexual harassment and the organizations are required to take preventive measure in order to ensure safe working environment for women. (Kundu & Bansal, 2018). Further the Act provides for constitution of Internal Complaints Committee in every workplace where the number of workers employed is ten or more than ten. (Chavan & Amiri, 2016).

Sexual harassment is defined as "unwelcome" acts under Section 2(n)². These acts may include any physical contact and advances, a demand or request for sexual favours, remarks with sexual overtones, the display of pornography, or any other verbal or non-verbal behaviour that is sexual in nature. Section 2(o) does not define 'workplace'³ but gives an illustrative list of places that will fall within the ambit of the definition. It is also not an exhaustive list. As per the Act, 'workplace' includes any place that an employee visits as a part of their employment and it includes any transportation that the employer provides. (Chaturvedi, 2019).

As per the statute, an aggrieved woman whether employed or not can make a claim for protection against sexual harassment at workplace. Further, the 2013 Act provides that the employers must establish an Internal Complaints Committee⁴ in order to handle cases of sexual harassment. Similar to Internal Committee (IC) in every organization there is a Local Committee (LC)⁵ in each district. In every district an LC shall be established in case IC has not been created for reasons that there are less than ten workers in the establishments or if the complaint is against the employer. According to the statute, every employer must have a system in place for accepting and handling sexual harassment claims. Sexual harassment complaints

² Section 2 (n): "sexual harassment" includes any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely:— (i) physical contact and advances; or (ii) a demand or request for sexual favours; or (iii) making sexually coloured remarks; or (iv) showing pornography; or (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

³ Section 2 (o) "workplace" includes— (i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society; (ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service; (iii) hospitals or nursing homes; (iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto; (v) any place visited by the employee arising out of or during the course of employment including transportation by the employer for undertaking such journey; (vi) a dwelling place or a house.

⁴ Section 4: Constitution of Internal Complaints Committee.— (1) Every employer of a workplace shall, by an order in writing, constitute a Committee to be known as the "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 Internal Committee shall be constituted at all administrative units or offices.

⁵ Section 6: Constitution and jurisdiction of Local Committee.—(1) Every District Officer shall constitute in the district concerned, a committee to be known as the "Local Committee" to receive complaints of sexual harassment from establishments where the Internal Committee has not been constituted due to having less than ten workers or if the complaint is against the employer himself. (2) The District Officer shall designate one nodal officer in every block, taluka and tehsil in rural or tribal area and ward or municipality in the urban area, to receive complaints and forward the same to the concerned Local Committee within a period of seven days. (3) The jurisdiction of the Local Committee shall extend to the areas of the district where it is constituted.

can be made to the IC or the LC (incase IC is not constituted) within three months from the date of incidence. (Agrawat et al. 2023).

Further under the statute there is a provision for Conciliation.⁶ The IC/LC can at the request of the aggrieved woman initiate steps towards settling the dispute between the parties. In case the aggrieved woman did not opt for conciliation or is not satisfied with the settlement reached with the respondent then the IC or the LC, as the case may be, shall proceed to make inquiry into the complaint as per the service rules applicable to the respondent, or where such rules are not applicable, in such a manner as may be prescribed.⁷

The IC and LC will have the powers of a civil court for the purpose of conducting an inquiry.⁸ The inquiry shall be concluded within a period of ninety days from the date of receipt of complaint. After completing the inquiry, the report shall be submitted in case of IC to the employer or in case of LC to the District officer within a period of ten days from the date of completion of the inquiry and such report shall be made available to the concerned parties.⁹

If the allegation against the respondent is not proved then the IC/LC shall recommend to the employer or the District Officer that no action is required to be taken.¹⁰ Incase allegation against the respondent is proven then the IC/LC shall recommend to the employer or the District Officer to take necessary action as prescribed.¹¹

CONCILIATION UNDER 2013 ACT

The Conciliation provision is mentioned under Section 10 of the 2013 statute. As per the said provision, before initiating an inquiry, the IC or as the case may be the LC may, take steps towards settling the matter at the request of the complainant for Conciliation. However, it should be noted that monetary settlement is prohibited if any settlement is reached between the parties by way of Conciliation.

In case by way of Conciliation, settlement has been reached between the parties the IC or LC, shall forward either to the employer or to the District Officer the terms of the settlement and to take action accordingly.¹² A copy of the settlement shall be submitted to both the aggrieved woman and the respondent.¹³ Under such circumstances no further inquiry shall be conducted by the IC or LC.¹⁴

However, if any terms or conditions of the settlement arrived between the parties has not been complied or have been breached by the respondent and the same is informed by the aggrieved woman to the IC or LC. Then on the basis of the information received the IC or LC shall conduct an inquiry into the complaint or may forward the complaint to the police.

The IC/LC is required to record the terms of the settlement and forward the same to the employer or the district officer. The IC/LC will deliver a report outlining the terms of the settlement and make recommendation to the employer or district officer in light of those terms. The complainant cannot ask for an inquiry after recommendations have been made via a Conciliation. (Roy, 2021).

⁶ Section 10 (1).

⁷ Section 11 (1).

⁸ Section 11 (3).

⁹ Section 13 (1).

¹⁰ Section 13 (2)

¹¹Section 13 (3): Where the Internal 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— (i) to take action for sexual harassment as a 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; (ii) to deduct, notwithstanding anything in the service rules applicable to the respondent, from the salary or wages of the respondent such sum as it may consider appropriate to be paid to the aggrieved woman or to her legal heirs, as it may determine, in accordance with the provisions of section: Provide that in case the employer is unable to make such deduction from the salary of the respondent due to his being absent from duty or cessation of employment it may direct to the respondent to pay such sum to the aggrieved woman: Provided further that in case the respondent fails to pay the sum referred to in clause (ii), the Internal Committee or as, the case may be, the Local Committee may forward the order for recovery of the sum as an arrear of land revenue to the concerned District Officer.

¹² Section 10 (2)

¹³ Section 10 (3)

¹⁴ Section 10 (4).

CONCILIATION: AN ANALYSIS

Conciliation is understood as a form of out of court settlement or to settle the disputes without litigations. (Dixit, 2019). It is a process in which the parties mutually agree to appoint an independent person or persons to resolve the dispute amicably and on mutually agreed terms. (Shinde, 2012).

First and foremost, the provision of Conciliation is problematic in the statute as it defeats the very purpose of the Act i.e., to provide protection to women against sexual harassment at workplace. The aggrieved woman may be pressurized or intimidated to opt for Conciliation owing to the unequal power dynamics between herself and the respondent (in case the respondent holds superior position). The aggrieved woman may either be pressurized to withdraw her complaint against the respondent in order to protect the reputation of the organization.

Thus, keeping these concerns into consideration, out of many recommendations made by the Justice Verma Committee the committee had suggested to remove the provision of Conciliation from the sexual harassment of women at workplace legislation. The Verma Committee had argued that the Conciliation provision contravenes the Supreme Court's decision in the Vishakha case, which had directed the state to ensure a safe workplace/educational institution for women. The committee had suggested that attempts to get justice cannot be muscled by attempts at Conciliation.

It was suggested that the complainant should not be permitted to withdraw a complaint once made so as to ensure that all cases of sexual harassment are properly dealt with under the law of the land. Further it was suggested that permitting either mandatory conciliation, even if at the instance of the complainant, or permitting the complainant to withdraw her complaint will negatively impact the ability of women to bring legitimate complaints.

Similarly in 2019 the National Commission for Women out of many recommendations that was made to the Ministry of Women and Child Development, had recommended for removal of conciliation provision from the Sexual Harassment of Women at Workplace Act, 2013. The Commission had stated that sexual harassment is not a dispute that can be resolved through Conciliation. Further the Commission had stated that Conciliation provision has received a lot of criticism from the stakeholders. Therefore, the National Commission for Women had recommended the removal of Conciliation for reasons that a woman may under duress be forced to withdraw her complaint in order to protect the reputation of the organization.

The IC/LC acts as a facilitator to initiate the Conciliation process once the complainant makes a request for the same. Section 10 of the 2013 Act only mentions about the provision of Conciliation and it stipulates that the IC/LC can initiate conciliation only after the aggrieved woman has availed the option. However, the section is silent on what shall be the exact role of the IC/LC as a Conciliator. It appears that the role of the IC/LC is that of an observer only and the Conciliator cannot persuade either of the party to participate in the Conciliation. The section also does not mention on what type of complaints the Conciliation process can be opted by the complainant.

Further, the section only mentions that after the complaint have been filed by the aggrieved woman and before the IC/LC proceeds to conduct inquiry, the IC/LC can start initiation for Conciliation on receiving request from the complainant. Thus, the provision also does not mention about whether the IC/LC can refuse for initiating Conciliation if they are of the opinion that the nature of the complaint against the respondent is severe in nature.

The IC/LC play a very significant role as per the 2013 Act thus, it is pertinent that the IC/LC is created in accordance with the requirement as laid down in the statute. (Dutta, 2023). After filing the complaint in case where the complainant opts for Conciliation, then IC/LC will act as Conciliator. However, as mentioned in the preceding paragraph that the statute is silent on what exactly should be the role of the Conciliator. Mere acting as a facilitator to settle the matter between the parties is not sufficient thus, the role and duties of the Conciliator must be clearly stated for the purpose of maintaining transparency. Further, the provision is silent on providing training to the members of the IC/LC which is pertinent component as once the complainant opts for Conciliation the Conciliators should be well aware about the measures to be undertaken towards settling the matter smoothly between the parties. Thus, the need of the hour is to amend the law and incorporate the necessary changes so that the very purpose behind the enactment of the act is achieved.

CONCLUSION

Sexual Harassment of Women at Workplace Act was enacted in order to ensure that workplaces are safe for women and that complaint of sexual harassment in the workplace can be resolved internally. However, the provision of Conciliation under Section 10 is not acceptable for reasons that the complaints of sexual harassment being resolved mutually between the complainant and the respondent defeats the very purpose of the act. Using the provision of Conciliation and attempting to reach a compromise towards complaints of harassment and other forms of humiliation of women, undermines the dignity of women. Thus, the Conciliation provision under the Sexual Harassment of Women at Workplace Act (Prevention, Prohibition and Redressal) Act, 2013 should be removed by amending the statute.

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