

BOOK REVIEW

LAW RELATING TO SEXUAL HARASSMENT AT WORK (2015). By Alok Bhasin, Eastern Book Company, Lucknow. Pp 998, Price : Rs. 1250.

WOMEN AT a work place is not a new event in India. In rural areas female have assisted in agriculture sector since long. Wealth creation by female, therefore, has been an ancient phenomenon. In rural areas their contribution in field and farms has proved their endeavour to support their family. Women could be found working in organised as well as unorganised sector. Globalisation, however, has enhanced the opportunities at work place for women and LPG (liberalisation, privatisation and globalisation) has generated new jobs. They are new both in nature and form. Apart from traditional needle and watch sector working women may be easily found in information technology, and media industries. Various channels of television have been harbinger to the silent revolution inside and outside home. New economic policy of 1990's section, therefore, has opened new vistas especially for women. It has made her financially more independent. The male monopoly on money earning has been diluted to a considerable extent. Several professional courses have led to jobs in professional sectors (like engineering, marketing, law *etc*) which are obvious. Some new sector *viz.*, call centers, business process outsourcing (BPO) *etc.*, have fair number of women. In these sectors female have to work late night or whole night. Errant and irresponsible persons are everywhere. Patriarchal system, conservative attitude of society and lack of employment opportunities makes female at work place more vulnerable. These are the facts which create occasion for an insensitive work place. They afford an opportunity for the occurrence of exploitation, mischief, misbehaviour and misconduct leading to sexual harassment. Most of the time it is legally difficult to prove sexual harassment in the traditional jurisprudence. Several incidents at work place have corroborated these apprehensions. The Supreme Court of India, however, in 1997 in *Vishaka v. State of Rajasthan*¹ has issued mandatory guidelines to fill the legal gap so that the menace of sexual harassment could be addressed in effective manner till a legislation is passed. The parliament of India took fourteen years to bring the enactment called Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, [SHW(PPR) Act.]

The book under review is *Law Relating to Sexual Harassment at Work* (2015) written by Advocate Alok Bhasin and published by Eastern Book Company. First edition of this book was published in 2007. As the *Vishaka* enactment came in 2013 it was timely to bring another edition. This second edition is divided into four parts, attached with two annexure, list of a good number of selected cases, statutes and a subject index. Part I is "What is Sexual Harassment?" Part II is "Why Sexual Harassment Needs to be Combated". Part III is "Combating Sexual Harassment at Work" and Part IV covers "Liability and Remedies". Each part begins with an introduction and then divided into various chapters and chapter further contain various sub heads which indicate the threadbare analysis done by the author.

¹ AIR 1997SC 3011; 1997(3) Suppl.SCR 404; 1997(6) SCC 241; 1997(5) SCALE453; 1997(7)JT 384, decided on Aug.13, 1997. The three judge bench consisted of JS Verma CJI, Sujata V. Manohar, and B. N. Kirpal JJ. The judgement was unanimous.

Part I contains five chapters *viz.*, chapter one is “Quid Pro Quo” and “Hostile Environment” Sexual Harassment, chapter two is Defining Sexual Harassment, chapter three is Legal Test for Sexual Harassment, chapter four is Sexual Harassment: A Species of Sex Discrimination, and chapter five is Reasonable Perception: Reasonable “Person” or Reasonable “Victim”? Introduction reveals that the use of the word sexual harassment in media was made in 1975 and proceeds with its gradual recognition in various countries with a few definitions of sexual harassment. Chapter one begins with two forms of sexual harassment, ‘blackmail and hostile environment’ and the response of various courts including US, Canada and Madras High Court. Chapter two explores the possibilities of definition of sexual harassment which is always a formidable task. In this chapter definition suggested by Canadian Court and International Labour Organisation is focused. The statutory definition or description regarding sexual harassment under various countries like US Equal Employment Opportunity Commission, California Administrative Code, UK Sex Determination Act 1975, Australia and the UN CEDAW definition etc is discussed. Indian definition from the case of *Vishaka* (1997) to statutory definition under SHW(PPR)Act, 2013 finds place with comments that the statutory definition recognises the ‘two forms of sexual harassment’ as mentioned above. The chapter also discusses certain high court rulings. Chapter three deals with ‘Legal Test for Sexual Harassment’ and observes that the controlling word is ‘unwelcome’. The difficulties with the word welcome or unwelcome is very well analysed with illustrations from ILO and Israel. The extremely difficult situation is the silence on the part of victim which may be yes or no. The word ‘sexual’ is wide enough to include a range of conduct and a single incident may be enough to constitute sexual harassment. With the help of various cases (mostly from other jurisdictions) the author analyses the conduct sufficient or not sufficient to prove sexual harassment which could act as guideline for sexual harassment committees and courts in India. The title of chapter four is ‘Sexual Harassment: A Species of Sex Discrimination’ which produces the relevant provisions in international instruments and the Constitution of India. The initial difficulties in appreciating sexual harassment as one of the part of sexual discrimination is illustrated through case laws. The status of this interrelation in various countries is examined with laws and judicial observations. The possibilities of same sex harassment and the US Supreme Court affirmative judgement in *Oncale* (1998), the status of homophobic harassment in various countries with critical comments regarding sex and sexual orientation may be found. Chapter five is on reasonable perception where inquiry into a general complaint and a hyper sensitive complaint has been made with the help of various situations found in sexual harassment hearings at various levels. Reference to *Nisha Priya Bhatiya* case of Delhi High Court and four phrases used by Pradeep Nandrajog J in context of behaviorally affected persons provide emerging Indian jurisprudence. The author recalls that the definition of sexual harassment under section 2(n) of the SHW(PPR) Act, 2013 has no reference to test of reasonableness. However the author observes that JS Verma Committee J suggested both objective and subjective criteria. The chapter covers position in various jurisdictions as in previous chapters which indicate the comprehensive research the author has done.

Part two is a very small part on ‘Why Sexual Harassment Needs to be Combated’ which has Introduction and four chapters. In chapter one (a serious and a real problem) and two (most vulnerable) the author presents survey of women of various countries to find the gravity of the problem. Chapter three is ‘Violation of Dignity and Human Rights’ and four (fall out) presents the consequences of sexual harassment.

Part three is 'Combating Sexual Harassment at Work' which is in two parts. Preventative and Procedural Action is first part while SHW(PPR) Act, 2013 is second part. Like every part it has an introduction and three chapters. Chapter one is Preventative and Procedural Action by Employers, chapter two is 'Sexual Harassment of Students' and chapter three is 'Role of Employees, Trade Unions and Collective Bargaining'.

In chapter one the author inaugurates with duty of employer through *Vishaka* case and guidelines of European Code of Practice. It provides policy statement with the assistance of ILO report of 2005. The author is well-read on US Supreme Court (USSC) opinion. *Vinson* case deserve mention where the USSC held that the employer bank was not vicariously liable for his harasser supervisor. The court however made interesting finding that "mere existence of grievance procedure and policy against discrimination, coupled with the complainants failure to invoke that procedure" cannot insulate bank from liability because inter alia it does not encourage the victim employer to approach the grievance mechanism. *Indu Singh* (Delhi, 2011) is rightly discussed in detail to indicate how the interpretation of facts may be made in order to serve the objective of the sexual harassment jurisprudence. The wide interpretation of 'work place' given in *Saurabh K Malik* (Delhi, 2008) and interesting developments in foreign countries like love contracts or dating policies may be found. The cases like *S Srikantha Joshi* (2006, Kat) where the complaint committee also recommended 10000/ as damages, *BN Ray* (2012 Delhi) where hostile discrimination was argued due to presence of a member inferior in rank to accused petitioner, change of inquiry officer does not need an enquiry *de novo* (*G V Vishwanth* case, 2006, Karnataka) and whether a male student can complain sexual harassment, demand of mandatory presence of outside member (*Malvika Desai*, 2011, Gauhati) etc., are very helpful in understanding the procedural aspect of sexual harassment cases. The non application of *Vishaka* has been addressed in *Medha Kotwal* (2013). It was understood post *Vishaka* that complaints committee's report was only recommendatory and such inquiry was conducted only to find out a *prima facie* case which would initiate disciplinary action under separate service rules. The victim had to appear before two committees, special committee and other committee as required by department rules. The Supreme Court in a previous order (26.4.2004) in *Medha Kotwal* directed that report of complaints committee will be deemed to be the report of inquiry committee under CCS rules. The author refers 2013 judgement also where fresh directions have been given. Chapter 2 is novel in the sense that *Vishaka* discusses the sexual harassment at work place which obviously means one ought to be an employee or like. Can student take the protection under present legal regime is subject matter of this chapter *ie.*, Sexual Harassment of Students. The author refers and discusses case laws (*Pushkar Saksena*, Delhi 2012; *Shashikant B Kulkarni*, Bomb, 2008; *Aureliano Fernandes*, Goa, 2012) etc to establish that there are 'precedential guides' and 'constitutional precepts those serve as light posts' for protection of students from sexual harassment. Ragging and secondary victimization (counter response of institutions and individuals to allege victim at fault) finds separate place in the end of this chapter. Chapter three makes short mention of responsibilities of employees because this is elaborately discussed at various places. It also discusses role of trade union and collective bargaining referring European Communities Commission and ILO. Second segment of part three is on exclusive enactment *ie.*, SHW(PPR) Act, 2013 which contains seven chapters besides introduction. The chapters are Preliminary, Constitution of Internal Complaints Committee, Constitution of Local Complaints Committee, Complaint, Inquiry into Complaint, Duties of Employer, Duties and Powers of District Officer and Miscellaneous. In the first chapter *ie.*, Preliminary the footnote refers a case

dealing with prospective (and not retrospective) nature of enactment though the act is for the benefit of female victims. Definition part analyses various case law, viz., *Jaya Kodate* (Bomb 2014) to point out the word “aggrieved women” which is restrictive in the sense that ‘means’ is used and broad in the sense that it does not require master servant relationship. *Gaurv Jain* (Delhi, 2015) discusses broad meaning of employer while in the case of *Mohd. Azimur Rahman* (Delhi, 2013) it was observed that SMS containing ‘kulfi’ and other words which are otherwise innocent coupled with gestures may amount to ‘sexual harassment.’ *Saurabh k Malik* (Delhi, 2008) made clear that a female employee who is senior to the wrong doer can be victim. *M Kavya* (Madras, 2014) discusses ‘work place’. Whether the test in sexual harassment should be subjective or objective is always a debatable issue. The author suggests that it could be traced from the report of the committee on amendments to criminal law which proposed a hybrid test.

Chapter two and three deal with the Complaints Committee. In chapter two section 4 (internal committee) has been discussed with *Jaya Kodate* (Bomb, 2014) and *Manisha Sharma* (Delhi, 2014). Chapter three examines section 5,6,7 and 8 without any resort to case law, probably to avoid repetitions. Chapter four critically elaborate ‘complaints’ through section 9,10,11 of the SHW(PPR)Act 2013 and rule 6, 7 etc., of SHW(PPR)Rules 2013. It contains criticism on the mandatory ‘written’ complaint, limitation of ‘three months’ with possible solution, provision of conciliation etc with comments and suggestions made by JS Verma Committee J. The author refers *VK Matta* (Delhi, 2011) where the court held that even anonymous complaint followed by evidences against harasser can be the basis for action. He finds section 11 second proviso as ambiguous because opportunity of hearing is given only when both parties are employees. Sexual harassment complaints between patient and doctor (*Varun Tyagi*, CAT-Delhi, 2014), Presumption of Innocence in favour of alleged delinquent (*Ashish K Das*, Meghalaya, 2014), good reputation no ground for non indulgence (*Manisha Sharma* Delhi, 2014), standard of proof being preponderance of probability, role of hearsay evidence etc are discussed. Chapter five is ‘Inquiry into Complaint’ which examines section 12-16. A comparison of section 11(1), second proviso and section 13(1) has been made. Disciplinary action with a number of case law finds sufficient space for consequence proceedings. Misuse of law is necessary and unavoidable outcome of this type of legislations. The author has discussed it through the interpretation of section 14(false or malicious complaint) and rule 10 coupled with various high court cases. He tries to connect section 14(1) with section 4 of Indian Evidence Act,1872. The work also refers JS Verma Committee J report which criticises this provision as *red rag* (something that incites to anger or vexation). In *Manisha Sharma* the court found that initially the committee was not made as per *Vishaka*. After National Commission for Women (NWC) intervention when committee was made, it did not follow procedure. The alleged harasser could not be found guilty due to various procedural lapses and delay. The high court, however, directed compensation to victim because she suffered mental agony, pain and loss of money due to proceedings. The reputations of parties are under stake in sexual harassment cases. Therefore secrecy to some extent is need of the proceeding which is provided and punished under section 16 and 17 and rule 12 but the author has not made any observation on it in this chapter. The appeal (section 18 and rule 11) finds discussion with judicial decisions. Chapter six is ‘Duties of Employer’ and chapter seven is regarding district officer. Last chapter of part IIIB is ‘Miscellaneous’ where the author appraises obligation of committee regarding annual report under section 21 and rule 14 followed by brief discussion on section 26 (penalty on non compliance with Act) etc.

Part IV “Liability and Remedies” is divided into five chapters apart from Introduction. Chapter one is ‘Constitution of India’ which discusses writs, State under article 12 *etc.* Chapter two is ‘Criminal Law’ and presents relevant provisions under various penal laws (Indian Penal Code 1860, Information Technology Act, 2000) and procedures under Cr PC 1973. Chapter three is ‘National Commission for Women Act, 1990 and Protection of Human Rights Act, 1993’ while chapter four is ‘Torts.’ In chapter four the work begins with referring ILO publication regarding victims of sexual harassment. It observes that certain countries have enacted comprehensive sexual harassment protection laws (a list of few of those countries in footnotes was desirable) though traditional civil law remedy is always available.

Fifth chapter is “Vicarious liability of “State” for Sexual Tort Committed by its Employees”. After a conceptual discussion on tort the position of vicarious liability and course of employment under various foreign jurisdiction may be found. Judicial approach with majority and minority opinion (For example *Jacobi v Griffith*² has been highlighted. The author mentions that the tort committed due to various fundamental rights violations is a remedy under article 32 or 226 of the constitution of India and this is independent of other remedy in criminal and civil cases. Like tort contractual obligations are also subject matter of article 226 which initially was not a jurisdiction of writ. The author, however, did not mention *Rajasthan State Industrial Development v. Jai Industries*³ which reiterates the position as held in *Kerala State Electricity Board v. Kurien E. Kalathil*.⁴ There are discussions of various cases on nature of article 32, but more references are expected regarding work place jurisprudence in this chapter. While discussing *Chandrima Das* the work does mention the change in the principle of *locus standi* with constitution bench judgement of *SP Gupta* case (1981). However, it did not acknowledge another constitution bench judgement *Mohd. Aslam alias Bhure v. Union of India*⁵ probably the comment took support only from the observations of S. Sagir Ahmad J in *Chandrima Das* case.⁶ The author points out high court cases of Gauhati, Delhi and Rajasthan where rape was committed at work place of accused, or during work hours or the accused was present in professional capacity. In all these cases victims were granted compensation. This chapter (five), however, ends without concluding remarks. Indeed most of the chapters do not have concluding remarks and they end as if something is missing which is a weak area of this good work.

² (1999) 2 SCR 570).

³ MANU/SC/0116/2013. See Anurag Deep, “Interpretation of Statutes” XLIX *ASIL* 751-826 (2013).

⁴ AIR 2000 SC 2573.

⁵ (2003)4 SCC 1.

⁶ On Dec. 2, 2015 there is another constitution bench unanimous judgement in *Union of India v. Sriharan @ Murugan* (2016) 7 SCC 1, endorsing the precedents that art. 32 cannot be given a narrow interpretation and allowed the Union of India to file a case under art. 32. The reference of 2015 judgement is just for new developments for readers. The book was published prior to this judgement.

Foundation of any high-quality work is on the state of knowledge on the subject as it currently exists, its proper analysis and evaluation. A good work must identify the grey areas in which there has been conflict of laws and difference of opinion. It must consider the various sociological, political, legal and philosophical aspects involved. Most important, is the utility of the research work for the society –national and international with original contribution. This work fulfils all these norms. The broad areas of controversies generate intellectual interest to study next chapters. The chapters are pleasant in reading and realises the requirement of the theme.

The work is bulky (runs into more than nine hundred pages) and has discussed fundamentals of law in details in various chapters which some time gives a feeling that are we reading a book on constitutional law or criminal law or law of tort. For someone who needs all information at one place this book is very good. Those who are looking for specific information this work is helpful because of the wide content it has provided in the beginning. The book addresses the interest of a beginner as well as an expert. It provides a satisfactory, comprehensive and critical understanding of various issues raised and discussed. Most of the footnotes and citation of cases pursue the usual pattern followed in Indian legal writings. As a big work of this nature can never be flawless there are printing mistakes which are unavoidable (*ibd* instead of *ibid*-page 807). If the next edition of the work contains concluding remarks after each part or chapter it would add to the beauty of the chapter.

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