

LEGAL ALERT

Challenges For Aggrieved Women Employees And Internal Complaints Committee In Proceedings Under Sexual Harassment Act- a test of legal rigor

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They say nothing comes easy and there is a tag to everything. The same holds true for seeking the protection of the Sexual Harassment of Women at Workplace Act, 2013 (SHWA). There can be no two opinions that the legislations passed by the Parliament in December, 2013 are a landmark law in gender protection. Together with the Criminal Law Amendments to Sections 354A, 354B, 354C & 354D of the Indian Penal Code, (treating harassment as criminal offences) SHWA constitute a determined response to meet the challenge of Sexual Harassment of women at the workplace.

And yet the task of achieving the object of the law is a long and winding road on which the complainant must persevere through successive legal forums of the legal system with all its uncertainties and delays. The experience with this legislation is proving to be no different. The Internal Complaints Committees (ICC) of corporates must grapple with rival claims, and the dictates of legal processes, for relief the victims of sexual harassment must meet the formidable challenge of adducing evidence, for the accused the right to proclaim his innocence till proven otherwise, for the management the dilemma of compliance and the compulsions of containing the damage to the corporate brand. These are early days but the new legislation is already a battle ground rife with allegations of non-compliance, prejudice of ICC members, violations of procedure, evidence not considered, biased conduct of proceedings, and wrongful reprieve of the accused by the management.

Contrary to popular impression, the guidelines for conduct of inquiries originated with the Supreme Court judgement in 1996 in the Vishaka Vs State of Rajasthan, and thereafter several decisions of the High Courts reinforced and clarified the jurisprudence on which the inquiries were to be conducted including principles of natural justice and fair play. By the time the Act was passed and notified for implementation, the legal world was acutely conscious of the pitfalls that would have to be navigated in inquiry proceedings to deal with complaints of sexual harassment. Unfortunately though understandably, the ICC's constituted by employers comprise members who are not trained or qualified to grapple with legal requirements, which they find both cumbersome and time consuming. This makes ICC decisions easy for lawyers on both sides to pick holes in, leading to appeals in state-level industrial tribunals or through Writs in High Courts.

Among the most common and recurrent issues of challenge are the following though not the only:-

- I. Exact nature of the alleged sexual harassment -despite a comprehensive list of categories of acts defined as sexual harassment, women employees often fail to distinguish between whether the unwelcome contact was sexual in nature, or more in the nature of misbehaviour bordering on exist remark or rude behaviour by an uncouth male colleague. The misbehaviour may be an act of whispering something offensive in a barely audible tone, or perhaps in a taunting manner. Or the conduct of a male superior who is inclined to

be over-familiar and tactile, or worse where the over familiarity extends to a physical touch by the boss in his room. The male may plead lack of intent, or a harmless touch, and one female colleague may equally dismiss it as harmless, and yet another female colleague may take serious exception and allege sexual harassment. People from different social and cultural backgrounds would perceive the same act differently and react differently. Ultimately, the ICC and its members would have to take into consideration the perception of the aggrieved women. There are cases where even uncouth physical contact or misbehaviour has been alleged to be sexual harassment and the accused male colleague has ended up facing action both under the SHWA and criminal proceedings by the police under the newly amended sections of the IPC.

II. Failure to support the charge-there is currently a complete lack of understanding among female employees that any charge of sexual harassment is based on the following elements:-

a. In which category of (i) to (v) does the act or behaviour fall as defined in the SHWA. The employee must explain in the complaint how the *physical contact and advance was unwelcome in category (i); or in category (iii) explain how the remarks which she found unwelcome were sexually coloured remarks with supporting detail as to what words or language was used by the accused*; in addition it has to be reported how the complainant conveyed her displeasure to the accused so as to convey to the accused that the said remark or advance was rejected or not acceptable to the employee. Complaints have often been rejected by ICC's because the aggrieved women have failed to appreciate that the onus lies on them to substantiate the charge with relevant descriptive details.

This could be due to inhibition, a sense of modesty, or other social restraints. But the law can only help the victim who has the courage to speak up and support the charge.

The last category in sub-clause (v) of S.3 has a much wider scope and includes *any other unwelcome physical, verbal or non-verbal conduct of sexual nature*. Quite often complainants do not think carefully or seek appropriate advice to bring out the exact nature of their experience as also of the conduct which they faced. It is extremely important to fit it into the language used in each category of prohibited conduct. Describing non-verbal conduct of sexual nature or even of verbal nature would need some memory of details so that the accusation does not sound vague under cross examination, and the complainant does not simply wilt under pressure. The best possible advice would be to keep some record of the incident and seek advice at the earliest. That is why delay in reporting such incidents in writing to HR can prove costly to the interest of the accused.

b. How the act or conduct was unwelcome to the aggrieved employee amounted to sexual harassment. The fact that the act or behaviour was unwelcome must be signified to the accused by some words of protest or rejection though in cases where the circumstances are clear and show unmistakably the sexual nature of the act, even rejection or disapproval may not be necessary to construe that the conduct was *unwelcome*. Of course there will be cases where the accused will counter the charge by claiming that the conduct was invited, consensual or mutual and even

reciprocated. The accused will try every trick in the trade to rebut the charge that his conduct was unwelcome. The legal test of burden of proof would keep shifting, and to prove his innocence the accused will refer to direct evidence or circumstantial evidence to establish his claim that his conduct was welcome.

III. Quite apart from the above, the complainant must gather evidence of the conduct of the accused, and of the incident, its time and place, whether it was repeated or frequent. All occasions or situations in which the acts occurred, which will all lend credibility to the charge. The victim would be well advised to speak to their friends or colleagues immediately after the incident or unwelcome act even if there is still some doubt or ambiguity regarding the intention of the accused. It does not matter that no clear pattern of behaviour is discernible, or as to whether it is sexually oriented or intended. All these bits of information would come in useful as evidence when the case demands. However, lack of evidence does not always render the complaint impossible to prove. There will be cases where the complainant's version have been regarded as the sole testimony and acted upon by the courts, and if the ICC or the court does not doubt the complainant's version of the conduct and is convinced about the truth of the charge or its probability, then the charge of sexual harassment may be upheld. Lack of direct evidence or witnesses must not deter or discourage the aggrieved employee from filing a complaint to the ICC or even reporting the incident orally in the first instance but as soon as possible after the occurrence. With the advent of SHWA and the spurt in complaints, there is a realisation that the law against sexual harassment has to be

enforced with judicial sympathy and activism to protect women at the workplace.

IV. False Accusations by Women Employees

Equally important is the need to caution the women employees that the SHWA contains a provision for punishment for false accusations or frivolous complaints by women employees. If the ICC arrives at a conclusion that the allegations were malicious or the aggrieved woman made the complaint knowing it to be false, it may recommend to the employer to take action against such employee. Further, if the person making the complaint has produced any forged or misleading document, such person may also be similarly proceeded against by the employer. Undoubtedly, this makes it imperative for the complainant to make out a strong case based on evidence and under proper professional advice to avoid inviting the charge of making a malicious complaint. However, the Act also states that *a mere inability to substantiate a complaint or provide adequate proof need not attract action against the complainant under this section*. This is a clear proof that the law makers wished to secure the complainant against any adverse consequences simply due to inability to substantiate a complaint or adequate evidence to support the charge. Further, as an additional safeguard to ensure that complainants are not simply harassed for frivolous complaints or acted against lightly, the Act provides that the *malicious intent* of the complainant shall be established after an inquiry in accordance with the procedure prescribed before any action is recommended. The procedure for such an inquiry would always ensure that the complainant is given fair chance to defend herself and to take legal recourse against vindictive proceedings or prejudicial action against her. The Act strikes a fine balance between discouraging malicious complaints by women so that male employees

do not face false accusations of sexual harassment, but also recognises the difficulty of collecting evidence by women facing sexual misconduct. The Act is still to be seriously tested on this count but some cases of action against women under this provision have emerged.

- V. *Legal Rigour- Duty to Act Judicially* Finally, corporates have to recognise that complaints of sexual harassment cannot be treated as an empty formality. Once a complaint is filed, the proceedings have to be conducted by following the guidelines laid down in the Act and the Vishaka judgement by the Supreme Court. The inquiry into the complaint must proceed from the existence of a prima facie case of violation of the law and preliminary determination as to the existence of a case of sexual harassment, and then a more detailed investigation of the facts and the evidence adduced before the ICC. The ICC must bear in mind that they are vested with the duty to adjudicate upon the complaint, to indict the accused and to grant specific reliefs to the complainant. It has to decide the rights of the parties and therefore has a duty to act judicially. A whole body of case law exists which has crystalized the judicial principles that have to be observed by a committee which is investigating cases of complaints which may end in removal of the accused from service. The ICC must anticipate that the accused may if acquitted of the charge, could lead to the complainant appealing against their decision or even filed a criminal complaint as has happened in several cases. In either case, the taking and recording of evidence, giving opportunity to both sides to examine and cross examine witnesses, provide documents to the parties, and arrive at a finding of facts based on evidence, and eventually pronounce a reasoned verdict, are all mandated under the duty to act judicially.

The decision is appealable and could also be challenged in writ proceedings before the High Court. A number of cases have already wound up before the High Courts, alleging glaring omissions in the ICC proceedings and consequently been quashed. Corporates must realise that the ICC is ultimately vested with the duty to act like a judicial authority and its decisions must meet the test of judicial scrutiny in appellate proceedings.



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