Chapter - VI
Analysis of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

“No man is above the law and no man is below it: nor do we ask any man’s permission when we ask him to obey it.”

Theodore Roosevelt

Sexual harassment against women is not a societal dispute but is basically a behavioral concern which has its impact on the society. Prioritizing, prevention, prohibition and establishing a redressal mechanism, with man and women, a woman presiding officer and an external third party specialist, has been India’s revolutionary model in responding to working women’s experience of sexual pestering. The idea of change is the major source which sets a global benchmark in both law and practice. When an economy promptly changes without any hurdles or social barriers, there shall be proper growth and Indian economy had been in recent times have taken effective steps to promote and progress along with these changes.

It has always been a practice and a preaching in India that the women’s human rights violations are often associated with their sexuality and reproductive function. But it was only after the guidelines issued by the Supreme Court of India, in 1997, in the Vishaka ruling, for the first time, recognized sexual harassment at the workplace as a human rights infringement. In its ruling, the Apex Court outlined the Guidelines making it obligatory for employers to give for understanding and non-retributive means to enforce the right to gender equality of working women.

There has always been an attempts made to pass a law on this subject previously, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Bill, 2012 was finally passed by the Lower House of the Parliament (Lok Sabha) on September 3, 2012, then passed by the Upper House of the Parliament (Rajya Sabha) on February 26, 2013 and received the President’s assent on April 22, 2013.

1.1 Constitution of the ICC Committee

The constitution of the Sexual Harassment Committee cannot be framed in a manner of doubt that it shall not be consistent with the requirements of the law as explained by the Supreme Court in Vishaka. Though in Dr. Punita K. Sodhi v Union of India & Ors\(^1\) it was framed under (Para 25A) issued under Rule 3-C of the CCS (Conduct) Rules, 1964, which

\(^1\)Dr. Punita K. Sodhi vs Union of India and Ors. Delhi High Court, 2009
stated that “the Committee for redressal of complaints of sexual harassment should be headed by an officer sufficiently higher in rank than the perpetrator Reference is invited to Office Memorandum of even number, vide which guidelines and norms to be observed to prevent sexual harassment of working women” as issued in pursuance of the judgment of the Supreme Court in the case of Vishaka and others v. State of Rajasthan and others2.

It has been observed that, earlier the Government of India had issued an OM dated 6th January 1971 which emphasised the need for inquiries to be conducted by an officer who is sufficiently senior to the officer whose conduct is being inquired into. Further to that by OM dated 13th February 19983, it was specifically directed that an act of sexual harassment amounts to misconduct and action prescribed under the rules must be initiated against a delinquent officer.

In Medha Kotwal Lele v. Union of India4 the Supreme Court accorded the Committee examining a complaint of sexual harassment the status of an inquiry committee under the CCS (Conduct) Rules, 1964. It held as under:

“Several petitions had been filed before this Court by Women Organisations and on the basis of the note prepared by the Registrar General that in respect of sexual harassment cases the Complaints Committees were not formed in accordance with the guidelines issued by this Court in Vishaka v. State of Rajasthan and that these petitions fell under clause (6) of the PIL Guidelines given by this Court i.e. ‘Atrocities on Women’ and in any event the Guidelines set out in Vishaka were not being followed. Thereupon, this Court treated the petitions as writ petitions filed in public interest.”

Notice had been issued to numerous parties including the Governments concerned and on getting fitting responses from them and now after hearing learned Attorney General for Union of India and Learned Counsel, we direct as follows:

“Complaints Committee as envisaged by the Supreme Court in its judgment in Vishaka’s Case will be deemed to be an inquiry authority for the purposes of Central Civil Services (Conduct) Rules, 1964 (hereinafter called CCS Rules) and the report of the Complaints Committee shall be deemed to be an inquiry report under the CCS Rules. Thereafter the disciplinary authority will act on the report in accordance with the rules.”

---

2 Vishaka and others v. State of Rajasthan and others 2 JT 1997 (7)SC384
3 G.I., Dept. of Per. & Trg., O.M. No. 11013/10/97-Estt. (A)
4 Medha Kotwal Lele v. Union of India [WP (Cr.) Nos. 173-177/1999 dated 26th April 2004]
Recently, a Division Bench of this Court, in **Dr. Salma Khatoon v. Secretary, Govt. of India, Department of AYUSH**\(^5\), directed constitution of a proper sexual harassment enquiry committee when the respondent failed to take into consideration the objections raised by the complainant to the constitution and functioning of the committee. After filing of the writ petition, the committee was reconstituted, but the Court observed, with the same members. The petitioner complained, much like the case on hand, that the president of the committee was a person low-ranking to the accused and that her statements were not being recorded properly. Notably, the petitioner was transferred out of Delhi, placed under an officer junior to her and threatened to settle the dispute and mend her ways or face action. Thus the Court was constrained to direct institution of an enquiry committee under the Secretary of the department which was to consider the complaint of the petitioner in accordance with the guidelines laid down in Vishaka.

The decision of the MHFW to refer both the complaints - the complaint made by the Petitioner against accused, and the one by accused against the Petitioner to the same Committee was obviously an erroneous one. The complaint of sexual harassment required to be dealt with strictly in accordance with the Vishaka Guidelines. The Committee constituted for that purpose could not be headed by a person not sufficiently senior to the accused.

In number of cases the Court not satisfied with the constitution of committee as the members of the Committee were though senior and experienced doctors but had no axe to grind against the Petitioner and therefore, the constitution of the Committee was not vitiated. If the law requires the Committee to be headed by a person sufficiently senior to accused, then it had to be that way.

The members of the Committee may have been HODs of government hospitals but the fact remains that the accused also held the charge of Additional DGHS which was administratively a superior post. Numerous letters were written by the NCW, the Secretary (Planning and Coordination) Cabinet Secretariat and the MoS for WCD to the MHFW emphasizing that the Petitioner’s complaint should be dealt with by a Committee constituted in terms of the Vishaka Guidelines. The MHFW was therefore conscious about the weakness of the constitution of the Committee and yet persisted with it.\(^6\)

The Petitioner objected at the very beginning that the Committee examining her complaint of sexual harassment was not properly constituted. She wrote numerous letters to the MHFW and

---

\(^{5}\) Dr. Salma Khatoon v. Secretary, Govt. of India, Department of AYUSH W.P. (C) 9144 of 2009

\(^{6}\) Ibid
to other authorities. But none of them paid any heed to her repeated requests. She had to approach this Court very often for redress. From her point of view, as a victim of sexual harassment, she was entitled to ask for a Committee that was constituted strictly in accordance with the Vishaka Guidelines. The Petitioner could not be expected to be sanguine that her complaint would be enquired into in a fair and impartial way. If she decided not to participate in the proceedings before such Committee, no adverse inference could be drawn against her on that score.

The criticism of the Petitioner that the Committee did not conduct its proceedings in a manner expected of a fact-finding body is not unjustified. No regular minutes of the proceedings appear to have been preserved. Whatever minutes have been produced does not appear to have been signed by all the members of the Committee. It is not clear whether a regular attendance register was maintained. Indeed, it is not possible to verify whether the accused did attend the meeting of the Committee on a particular date. However, the more serious problem is the manner in which the Committee proceeded with its enquiry.

The Committee appears needs not only to have go by the complaint made by the Petitioner about the undesirable physical contact alleged to have been made by accused with her as stated in her complaint. The Committee did not attempt to inquire into any of the other incidents to which the Petitioner referred in her complaint. As such it becomes very important to refer here the meaning of the term “sexual harassment” as explained by the Supreme Court in Vishaka which reads as under “Sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as Physical contact and advances; A demand or request for sexual favours; Sexually coloured remarks; Showing pornography; Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.”

“Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim’s employment or work whether she is drawing salary, or honorarium or voluntary, whether in Government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.”

It may be bear in mind that an instant cause for the above writ petition was an alleged gang rape in Rajasthan by members of the upper caste of a child welfare worker belonging to
a lower caste. In the backdrop of that event, Vishaka, a non-governmental organisation, sought the Court’s intervention to protect and enforce the fundamental rights of women at the workplace. The Supreme Court considered an act of sexual harassment to be in violation of Articles 14, 15, 19 (1) (g) and 21 of the Constitution. The Court observed that

“Each such incident results in violation of the fundamental rights of ‘Gender Equality’ and the ‘Right to Life and Liberty’. It is a clear violation of the rights under Articles 14, 15 and 21 of the Constitution. One of the logical consequences of such an incident is also the violation of the victim’s fundamental right under Article 19(1)(g) ‘to practice any profession or to carry out any occupation, trade or business’... The fundamental right to carry on any occupation, trade or profession depends on the availability of a safe working environment. Right to life means life with dignity. The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive.”

Subsequently, in Apparel Export Promotion Council v. A.K. Chopra the Supreme Court further explained the definition of sexual harassment in Vishaka as “Whereby it shows that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her.”

International law perspectives on what constitutes ‘sexual harassment’ in order to understand what constitutes sexual harassment, recourse is invariably had to the Vishaka Guidelines. Those guidelines, issued nearly thirteen years ago, have formed the basis of the definition of sexual harassment’ in the statutory rules governing government servants. However, in order to understand sexual harassment as but one form of sex based discrimination, which also stands prohibited, recourse could be had to the CEDAW to which India is a ratifying party. The General Comments brought out by the CEDAW Committee on Article 11 of the CEDAW offers a further explication: “Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing

---

pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”

The dated 5 July 2006 of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation defines harassment and sexual harassment in Article 2 as follows\(^8\): “Sexual harassment, where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment; sexual harassment: where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”

In Janzen v Platy Enterprises Ltd\(^9\) Two waitresses at a restaurant had complained of sexual harassment and the Human Rights Commission as well as the Court of Queen’s Bench in Manitoba, Canada had ruled in favour of the complainants. The Court of Appeal held that there was no discrimination on the basis of sex and that the employer could not be liable for the sexual harassment by its employee. The Supreme Court of Canada reversed the Court of Appeal. It noted that Section 19 of the Human Rights Code expressly prohibited sexual discrimination in the workplace. Section 19 of the Human Rights Code in Canada reads:

“19 (1) No person who is responsible for an activity or undertaking to which this Code applies shall

(a) Harass any person who is participating in the activity or undertaking; or

(b) Knowingly permit, or fail to take reasonable steps to terminate, harassment of one person who is participating in the activity or undertaking by another person who is participating in the activity or undertaking.

19 (2) in this section ‘harassment’ means

(a) a course of abusive or unwelcome conduct or comment undertaken or made on the basis of any characteristic referred to in subsection 9(2); or

(b) A series of objectionable and unwelcome sexual solicitations or advances; or

---

\(^8\) Directive 2006/54/EC

(c) a sexual solicitation or advance made by a person who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
(d) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance.”

1.2 Discrimination on ground of Sexual Harassment at Workplace

Discussing discrimination in the context of sexual harassment, the Supreme Court of Canada observed in Janzen: In keeping with this general definition of employment discrimination, discrimination on the basis of sex may be defined as practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender.

After undertaking a detailed discussion of the concept of sexual harassment, the Court observed as “common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands.”

Dickson, C.J. defined ‘sexual harassment’ in the following terms “Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.”

It is, as Adjudicator Shime observed in Bell v. Ladas, supra, and as has been widely accepted by other adjudicators and academic commentators, an abuse of power. “When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.”

In Ellison v. Brady, the Court of Appeals formulated the ‘reasonable woman’ standard and observed that “We believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. Courts should consider the victim’s perspective and not stereotyped notions of acceptable behaviour. If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could

---

Ellison v. Brady [U.S. Court of Appeals, Ninth Circuit 924 F. 2d 872 (1991)]
continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.”

Therefore we prefer to analyze harassment from the victim’s perspective. A comprehensive understanding of the victim’s outlook requires, among other things, an analysis of the diverse perspectives of men and women. Behaviour that many men think unobjectionable may offend many women. A male supervisor might believe, for example, that it is justifiable for him to tell a female subordinate that she has a ‘great figure’ or ‘nice legs’. The female subordinate, however, may find such comments offensive. Men have a tendency to view some forms of sexual pestering as “harmless social interactions to which only overly-sensitive women would object”. The characteristically male analysis depicts sexual harassment as comparatively harmless enjoyment.

We realize that there is a broad range of viewpoints between women as a group, but we believe that many women share general concerns which men do not necessarily share. For example, because women are excessively victims of rape and sexual assault, women have a stronger reason to be concerned with sexual conduct. Women who are victims of gentle forms of sexual pestering may reasonably worry whether a harasser’s behaviour is merely a lead up to violent sexual assault. Men, who are hardly ever victims of sexual assault, may view sexual behaviour in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may notice.

In order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee, we hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

In U. S. Verma, Principal, DPS v. National Commission for Women\(^\text{11}\) this Court, while holding that the NCW did not have the powers to take over the functions of an internal sexual harassment complaints committee suo moto, quashed the report of the sexual harassment enquiry committee appointed by the management, DPS Faridabad where three teachers and a staff member of the school had complained of sexual harassment. An internal report indicted the Principal in all the cases. However, the enquiry committee constituted subsequently by the management gave a clean chit to the Principal. All the complainants had left their jobs as a

consequence of the allegations and counter allegations. After discussing the evolution of the law against sexual harassment, the Court observed as under:

“Whenever such complaints of harassment arise, it is expected that the authority - be it employer, regulator (of private enterprise, or agency, against which such complaint is made) is alive that such are outlawed not only because they result in gender discrimination, of the individual aggrieved, but since they create and could tend to create a hostile work environment, which undermines the dignity, self-esteem and confidence of the female employees, and would tend to alienate them. The aim of Vishaka was to ensure a fair, secure and comfortable work environment, and completely eliminate possibilities where the protector could abuse his trust, and turn predator, or the protector-employee would insensitively turn a blind eye.”

The Court in U.S. Verma noted irregularities in the constitution and functioning of the enquiry committee in the case and went on to hold that there should not be any —personal knowledge or interest of the members of the enquiry committee. The Report of the committee was quashed and the Court directed the DPS Society to pay to three of the complainants Rs. 2.5 lakhs each and to the fourth a sum of Rs.1 lakh. Flawed approach of the Committee in the present case

The above decisions help in appreciating that a complaint of sexual harassment and sex based discrimination requires the body entrusted with the investigation of such complaint to undertake its task with the correct approach and sensitivity. If the entire complaint of the Petitioner is examined in the light of the above discussion, it is clear that the inquiry cannot be limited to the complaint of the Petitioner that the accused attempted to touch her at wrong places, while in the operation theatre in 2001. Incidents of sexual harassment ought not to be viewed in isolation. The other parts of the complaint are as relevant in determining whether there was any persistent conduct of the perpetrator which could be termed as sex based discrimination or harassment over a prolonged period. The humiliation faced by a victim of sexual harassment could remain with the victim. It is revisited and compounded when the victim and perpetrator have to continue to work in the same establishment. The imbalance in the power equation between the perpetrator and the victim could exacerbate the problem. The impact of such incidents on the continuing working relationship of the perpetrator and the victim will also have to be considered in examining whether the complaint made of sexual harassment, even if belated, is justified.

In a complaint of sexual harassment and sex based harassment or discrimination, which persists over a length of time, the defence of limitation or laches may not find relevance. The Committee also appears to have overlooked the numerous other instances cited by the
Petitioner in her complaint which partake of sex based harassment and discrimination. While sexual harassment would be a specie of sex based discrimination, the latter could encompass a whole range of commissions and omissions, not restricted to acts that partake of express unacceptable sexual acts or innuendoes. CEDAW too recognises that harassment can be ‘sex based’ and take various forms. The use of abusive and abrasive language and a certain imputation of the competence of a person only because such person is of a certain gender are matters that would be covered under the expression ‘sex based’ discrimination.

For instance, the specific case of the Petitioner is that the language used by the accused in the memos and letters issued by him, questioning the integrity and competence of the Petitioner is plainly abusive. This has not been considered at all by the Committee. To borrow the articulation of the Supreme Court of Canada in Janzen, —discrimination on the basis of sex may be defined as practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender. It is important for committees dealing with complaints of sexual harassment to understand the above dimensions of sex based discrimination at the workplace and not narrowly focus only on certain acts that may have been the trigger for a series of acts constituting sex based harassment or discrimination.

Also, as pointed out in Ellison v. Brady, the Committee is required to —focus on the perspective of the victim. The injunction to Courts that they “should consider the victim’s perspective and not stereotyped notions of acceptable behavior” equally applies to Committees that enquire into allegations of sexual harassment and sex based discrimination.

In the considered view of this Court, the approach of the Committee in any case cannot be limited and narrow. The Committee cannot fail to consider the context in which the complaint has been made and the incidents of continued harassment which the Petitioner has alleged to have faced at the hands of accused. The Report of the Committee is unsustainable in law and deserves to be quashed.

1.3 Duty of company to pay equal salary to men and women workers

“Employer is duty bound in case of same work or work of a similar nature;

(1) No employer shall pay to any worker, employed by him in an establishment or employment, remuneration, whether payable in cash or in kind, at rates less favourable than those at which remuneration is paid by him to the workers of the opposite sex in such establishment or employment for per- forming the same work or work of a similar nature;

(2) No employer shall, for the purpose of complying with the provisions of sub-section (1), reduce the rate of remuneration of any worker;
(3) Where, in an establishment or employment, the rates of remuneration payable before the commencement of this Act for men and women workers for the same work or work of a similar nature are different only on the ground of sex, then the higher (in cases where there are only two rates), or as the case may be, the highest (in cases where there are more than two rates), of such rates shall be the rate at which remuneration shall be payable, on and from such commencement, to such men and women workers;
Provided that the worker shall not be entitled to the revision of the rate of remuneration payable to him or her with reference to the service rendered by him or her before the commencement of this Act. "

Section 5 of the Act "prohibits any kind of discrimination being made while recruiting men and women workers."

Section 6 of the Act provides for the appointment of "an Advisory Committee to advise the appropriate Government with regard to the extent to which women may be employed in such establishments or the employments as the Central Government may, by notification, specify in that behalf."

Section 7 of the Act provides for "the appointment of the adjudicating Authority whenever a dispute arises between the management and the employees as also an Appellate Authority which can hear an appeal against the decision of the Authority."

Section 16 of the Act provides that "where the appropriate Government is, on a consideration of all the circumstances of the case satisfied that the differences in regard to the remuneration or a particular species of remuneration of men and women workers in any establishment or employment is based on a factor other than sex, it may, by notification make a declaration to that effect and any act of the employer attributable to such a difference shall not be deemed to be a contravention of any provision of the Act."

1.4 Scope of the powers of this Court to interfere

It is justified that in implementing its jurisdiction under Article 226 of the Constitution, this Court is not expected to go into the facts and details of the complaint itself, this Court can, when the Report of such Committee is challenged, examine if the basic approach of the Committee was flawed. If the approach of the Committee is erroneous as in the instant case, it is the duty of this Court to point it out and apply a corrective. It can direct a fresh enquiry by a properly constituted committee which shall follow the procedure in accordance with Supreme

12 Section 4 Equal Remuneration Act 1976
Court’s mandate in Vishaka. It is a well settled proposition, reiterated in Tata Cellular v. Union of India13 (1994) 6 SCC 651 676, that:

“Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.”

Keeping in view the above legal position, this Court refrains from expressing any opinion on the merits of the Petitioner’s complaint against accused. It is made clear that the decision of the Court is not to be construed as a reflection on the professional ability or competence of the members who constituted the Committee. A number of cases wherein the Court has taken a recourse and freshly constituted Committee which will enquire into the Petitioner’s complaint will do so uninfluenced by either the Report of the earlier Committee or any observation that may have been made by this Court touching on the merits of the Petitioner’s complaint.

1.5 The Experts Committee’s Report unsustainable in law

In case of the Experts Committee, generally due to the hostile behaviour of the petitioner it has been observed that they usually do not get the benefit of participation of the Petitioner herself in the proceedings. Her request for postponement of its hearing usually is not accepted. Though , it must be remembered that initially it was this Experts Committee that was expected to look into both the complaints, i.e., the complaint made by the Petitioner against accused and vice versa. Later, this Experts Committee’s work was restricted to examining the complaint of accused against the Petitioner. However, there is nothing to show that there was any consequential notification clarifying the position particularly after the reconstitution of the Committee that enquired into the Petitioner’s complaint against accused. Although this Court finds merit in the Petitioner’s criticism of the constitution of the Experts Committee comprising of members who were under the administrative control of the Additional, DGHS, who was the complainant, since for reasons explained hereafter, this Court finds the Report of the Experts Committee to be legally unsustainable, as in such cases when the petitioner fails to due to hesitation etc to present before the authority, Such types of expert Committee framed at later extend doesnot actually fulfil the scope as to which the same was framed.

2. Rule of Evidence: Under Criminal & Quasi Criminal Proceedings

It is the nature of law that one need to decide whether the proceedings are civil or criminal or both. Usually, the offence of sexual Harassment is a criminal offence, as the same is against an individual; it may be verbal i.e. libel or may turn out in form of a bodily injury.

13 Tata Cellular v. Union of India (1994) 6 SCC 651 @ 676,
While deciding a case, the rule of evidences, the form of evidence, the type of evidence etc i.e. in link to Evidence Act 1872.

According to Sir Blackstone, ‘Evidence’ signifies that “which demonstrates, makes clear or ascertain the truth of the facts or points in issue either on one side or the other.”

Section 3 of The Indian Evidence Act defines\(^{14}\), evidence in the following words- “Evidence means and includes-

1. All the statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry; such statements are called Oral evidence;
2. All the documents including electronic records produced for the inspection of the court; such documents are called documentary evidence.”

No such definition has been provided under the Sexual Harassment of Women at Workplace Act, 2013 yet the definition of Evidence Act which though becomes narrow because when the evidence comes before the court by two means only-First the statement of witnesses and secondly documents including electronic records.

But in them those things have not been included on which a Judge or a Penal authority depends for this position. Similar, shall be the duty of the Presiding Officer of ICC/LCC.

The Hon’ble Apex Court in Sivrajbhan v. Harchandgir\(^{15}\) held that “The word evidence in connection with Law, all valid meanings, includes all except agreement which prove disprove any fact or matter whose truthfulness is presented for Judicial Investigation. At this stage it will be proper to keep in mind that where a party and the other party don’t get the opportunity to cross-examine his statements to ascertain the truth then in such a condition this party’s statement is not Evidence.”

Different Forms of Evidence

Oral Evidence– Section 60 of the Indian Evidence Act, 1872 prescribed the conditions of recording oral evidence\(^{16}\)i.e. “All those statements which the court permits or expects the witnesses to make in his presence regarding the truth of the facts are called Oral Evidence. Oral Evidence is that evidence which the witness has personally seen or heard. Oral evidence must always be direct or positive. Evidence is direct when it goes straight to establish the main fact in issue”\(^{17}\).

---

\(^{14}\) Indian Evidence Act, Ratanlal & Dhirajlal, Lexis Nexis Butterworths Wadhwa, 21st Edition, Nagpur

\(^{15}\) Sivrajbhan v. Harchandgir (AIR 1954 SC 564)

\(^{16}\) Indian Evidence Act, Ratanlal & Dhirajlal, Lexis Nexis Butterworths Wadhwa, 21st Edition, Nagpur

\(^{17}\) Dr. J.J. Irani @ Jamshed J. Irani vs State Of Jharkhand And Anr, 2006 (4) JCR 117
Documentary Evidence— Section 3 of The Indian Evidence Act says “that all those documents which are presented in the court for inspection such documents are called documentary evidences”.\(^\text{18}\) It is the documentary evidence that would show the actual position of the parties and their awareness regarding the custom is more important than any oral evidence.\(^\text{19}\)

Primary Evidence— Section 62 of The Indian Evidence Act says “Primary Evidence is the Top-Most class of evidences. It is that proof which in any possible condition gives the vital hint in a disputed fact and establishes through documentary evidence on the production of an original document for inspection by the court.” It means the document itself produced for the inspection of the court. In Lucas v. Williams\(^\text{20}\) Privy Council held “Primary Evidence is evidence which the law requires to be given first and secondary evidence is the evidence which may be given in the absence of that better evidence when a proper explanation of its absence has been given.”\(^\text{21}\)

Secondary Evidence— Section 63 says “Secondary Evidence is the inferior evidence. It is evidence that occupies a secondary position. It is such evidence that on the presentation of which it is felt that superior evidence yet remains to be produced. It is the evidence which is produced in the absence of the primary evidence therefore it is known as secondary evidence.” If in place of primary evidence secondary evidence is acknowledged without any opposition at the proper time then the parties are not allowed from raising the question that the document has not been proved by primary evidence but by secondary evidence. But where there is no secondary evidence as considered by Section 66 of the Evidence Act then the document cannot be said to have been proved either by primary evidence or by secondary evidence.”\(^\text{22}\)

Real Evidence— Real Evidence means real or material evidence. Real evidence of a fact is bring to the awareness of the court by scrutiny of a physical object and not by information derived from a witness or a document. Personal evidence is that which is given by human agents, either in way of disclosure or by voluntary sign. It can also be called as the most satisfactory witness.

Hearsay Evidence— Hearsay Evidence means “the reported evidence of a witness which he has not seen either heard. Sometime it implies the saying of something which a person

\(^{18}\) Ibid
\(^{19}\) Harihar Prasad Singh And Ors vs Balmiki Prasad Singh And Ors, 1975 SCR (2) 932
\(^{20}\) Lucas v. Williams (1892 Q.B 116)
\(^{21}\) Ibid
\(^{22}\) Kalyan Singh, London Trained v. Smt. Chhoti and Ors, AIR 1990 SC 396,
has heard others say.” In *Lim Yam Yong v. Lam Choon & Co*\(^23\) The Hon’ble Bombay High Court held that “Hearsay Evidence which ought to have been rejected as irrelevant does not become admissible as against a party merely because his council fails to take objection when the evidence is tendered.” As held in *Hasmukhlal V. Shah v. Bank Of India And Ors*\(^24\) that “Hearsay Evidence is that evidence which the witness has neither personally seen or heard, nor has he perceived through his senses and has come to know about it through some third person. There is no bar to receive hearsay evidence provided it has reasonable nexus and credibility. When a piece of evidence is such that there is no prima facie assurance of its credibility, it would be most dangerous to act upon it. Hearsay evidence being evidence of that type has therefore, to be excluded whether or not the case in which its use comes in for question is governed by the Evidence Act.”\(^25\)

**Judicial Evidence** means “evidence received by court of justice in proof or disproof of facts before them is called judicial evidence. The confession made by the accused in the court is also included in judicial evidence. Statements of witnesses and documentary evidence and facts for the examination by the court are also Judicial Evidence.”

**Non-Judicial Evidence** means “any confession made by the accused outside the court in the presence of any person or the admission of a party are called Non-Judicial Evidence, if proved in the court in the form of Judicial Evidence.”

**Direct Evidence or Indirect Evidence** – Evidence is either direct or indirect. Direct Evidence is that evidence which is very significant for the result of the subject matter in issue. The main piece of information when it is presented by witnesses, things and witnesses is direct, evidence whereby main facts may be proved or established i.e. the evidence of person who had in fact seen the crime being committed and has described the crime. We barely point out that in the illustration given by us; the evidence of the witness in Court is direct evidence as opposed to evidence to a fact suggesting guilt. The declaration before the police authority only is called circumstantial evidence of, complicity and not direct evidence in the firm sense.\(^26\) There is no distinction between circumstantial evidence and indirect evidence. Circumstantial Evidence tries to prove the facts in subject matter by providing other facts and affords a case as to its existence. It is that which relates to a sequence of other facts than the fact in subject but by

---

\(^23\) *Lim Yang Yong v. Lam Choon & Co.* (6 All 509 Fb)

\(^24\) *Hasmukhlal V. Shah v. Bank Of India And Ors,* (1997) 3 GLR 1891

\(^25\) *K.P. Abdul Kareem Hajee and Anr. v. Director, Enforcement,* 1977 (2) MLJ 47

\(^26\) *Tahsildar Singh and another v. The State Of Uttar Pradesh,* AIR 1959 SC 1012
experience have been created so associated with the fact in issue in relation of grounds and
effect that it leads to a satisfactory finish.

In Hanumant v. State of Madhya Pradesh\textsuperscript{27}, The Hon’ble Apex Court observed, “In
dealing with circumstantial evidence there is always the danger that suspicion may take the
place of legal proof. It is well to remember that in cases where the evidence is of a
circumstantial nature the circumstances from which the conclusion of guilt is to be drawn
should in the first instance, be fully established and all the facts so established should be
consistent only with the hypothesis of the guilt of the accused. In other words there can be a
chain of evidence so far complete as not to leave any reasonable ground for a conclusion
consistent with the innocence of the accused and it must be such as to show that within all
human probability the act must have been done by the accused.”

In the case of Ashok Kumar v. State of Madhya Pradesh\textsuperscript{28}, the Hon’ble Apex Court
held that “The circumstances from which an inference of guilt is sought to be drawn must be
cogently and firmly established. Those circumstances should be of a definite tendency
unerringly pointing towards the guilt of accused. The circumstances, taken cumulatively should
from a chain so complete that there is no escape from the conclusion that within all human
probability the crime was committed by the accused and none else. The Circumstantial
Evidence in order to sustain conviction must be complete and incapable of explanation on any
other hypothesis than that of the guilt of the accused and such evidence should not only be
consistent with the guilt of the accused but should be inconsistent with his innocence.”

In Kallu v. State of Uttar Pradesh\textsuperscript{29}, The Hon’ble Supreme Court while convicting
the accused held that “Circumstantial Evidence has established that the death of the deceased
was caused by the accused and no one else.” The facts of the case are that the accused was
tried for the killing of the deceased by shooting him with a country made gun. A cartridge was
found close to the bed of the deceased. The accused was detained at a distance of 14 miles from
the town which was the place of incidence. He produced a gun from his house which indicated
that he could have alone have known of its existence there. The firearms specialist proved that
it was the same gun from which the shot was fired and deceased was killed.

The witness can be divided mainly into two categories-

- Eye Witness
- Circumstantial Witness

\textsuperscript{27} Hanumant v. State Of Madhya Pradesh (AIR 1995 SC 343)
\textsuperscript{28} Ashok Kumar v. State Of Madhya Pradesh (AIR 1989 SC 1890)
\textsuperscript{29} Kallu v. State Of Uttar Pradesh (AIR 1958 SC 180)
Witness can be further divided into following kinds -

Credential of an accused in Court by an ‘Eye witness’ is a serious matter and the chances of a false identification are very high\(^\text{30}\). In *Shivaji Sahebrao Bobade v. State of Maharashtra*\(^\text{31}\) The Apex Court held that “where a case hangs on the evidence of a single eye witness it may be enough to sustain the conviction given sterling testimony of a competent, honest man although as a rule of prudence courts call for corroboration. It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs.”

In *Anil Phukan v. State of Assam*\(^\text{32}\) The Apex Court Held that “Indeed, conviction can be based on the testimony of a single eye witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect.”

It clearly comes out that there has been no different approach from the principles laid down in *Vadivelu Thevar case* and, therefore, statement can be recorded on the source of the statement of only eye witness provided his trustworthiness is not taken aback by any adverse situation appearing on the record against him and the court, at the same time, is certain that he is a truthful witness. The court will not then persist on confirmation by any other eye witness particularly as the occurrence might have occurred at a time or place when there was no chance of any other eye witness being present. Indeed, the courts insist on the worthiness, and, not on the quantity of evidence.”\(^\text{33}\)

It is decided in the case of *Coles v. Coles*\(^\text{34}\) that “a hostile witness has been described as a witness who from the manner in which he gives his evidence shows that he is not desirous of telling the truth to the Court. This is not a very good -definition of a hostile witness and the

\(^{30}\)‘Proof of Guilt’ by Glanville Williams, 3rd Edition
\(^{31}\)Shivaji Sahebrao Bobade v. State of Maharashtra, 1973 (2) SCC 793
\(^{34}\)(1866) L.R. 1 P. & D. 70
Indian Evidence Act is most careful in Section 154 not to restrict the right of ‘cross-examination’ even by committing itself to the word ‘hostile’.

This Court in **Bhagwan Singh v. State of Haryana**\(^{35}\) held that “merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness.”

In **State of U.P. v, Ramesh Prasad Misra**\(^{36}\) the Apex Court held that “the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or accused, but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defense may be accepted.”

The Apex Court in **Balu Sonba Shinde v. State of Maharashtra**\(^{37}\) held that “the declaration of a witness to be hostile does not ipso facto reject the evidence. The portion of evidence being advantageous to the parties may be taken advantage of, but the Court should be extremely cautious and circumspect in such acceptance. The testimony of hostile witness has to be tested, weighed and considered in the same manner in which the evidence of any other witness in the case. In order to provide justice Evidence and witnesses are very necessary and they hold a very important place in the Law. With the help of Evidence the judge reaches a verdict. The evidence heard by the court is the most important factor in determining whether the judgment will be in favor of Prosecution side or Defense side. Although the other principal of Burden of Proof plays a pivotal role.”

### 2.4 Adaptability to Electronic Evidence

Section 65-A of the Evidence Act provides that the contents of electronic record may be proved in accordance with the provisions of section 65-B. A three judge Bench of the Apex Court in the case of **Anwar P.V. vs. P.K. Basheer**\(^{38}\), while interpreting section 65-B of the Evidence Act, has held that “Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Whereas Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non

---

35 Shyama vs State Of Rajasthan, 1977 WLN 278  
37 In Balu Sonba Shinde v. State of Maharashtra 2003 SCC (Crl.) 112  
38 Anwar P.V. vs. P.K. Basheer, 2014 (10) SCC 473
obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document i.e. electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65-B (2). Following are the specified conditions under Section 65-B (2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

Under Section 65-B (4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65-B (2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD),
pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence.

All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A.”

The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.

It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally goes to the weight of evidence and not to admissibility.

Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the modus operandi prescribed under Section 65-B of the Evidence Act. That is a complete code in itself, being a special act; the general law under Sections 63 and 65 has to yield.

A two-Judge Bench of the Apex Court in State (NCT of Delhi) v. Navjot Sandhu\(^39\) while considering the printouts of the computerised records of the calls pertaining to the cellophanes, held that “according to Section 63, secondary evidence means and includes, among other things, copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in

---

\(^{39}\) In State (NCT of Delhi) v. Navjot Sandhu (SCC p. 714)
the call records is stored in huge servers which cannot be easily moved and produced in the court. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65. It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65-B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65-B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic record. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. ‘GENERALIA SPECIALIBUS NON DEROGANT’, which means special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-Aand 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, does not lay down the correct legal position. It requires to being overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”

So, if we refer the following definition in the light of the provisions incorporated u/s65-A & 65-B of evidence Act; Electronic Evidence is one another type of documentary evidence which is if duly proved in the manner provided in sec 65-B, can be considered as strong evidence.
Section 2(t) of Information Technology Act 2000\textsuperscript{40} electronic record means;

“Data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche”

Before elaborate discussion of Electronic evidence it is required to be get a flash back up on the structure of evidence Act and also the principles of law for adducing, relying and considering evidence.

We have a three part in evidence act

- First Part is for “Relevancy of Fact”;
- Second part is of “On Proof” and
- Third part is regarding “Production and Effect of Evidence”.

All evidence passes through above three stages. To consider any matter or thing relevant it must been suite in the frame of first part i.e. section 5 to 55. To appreciate evidence which is considered relevant there are provisions of part-II. To make electronic evidence relevant and to establish the mode of its proof there are certain provision at different stages in the evidence Act. There are detailed provisions included in evidence act in which definition and the procedure of introducing electronic evidence has been mentioned by legislation. Those provisions are hereunder.

To consider Relevancy of Fact of electronic evidence there is Section 22A, which is included in Act. That is similar to sec. 22 in which is embargo on producing oral evidence so as to consider the contents of document, similarly Sec.22A declares that “oral evidence as to the contents of electronic records are not relevant, unless the genuineness of electronic record produced as in the question. Entries in books of account, including those maintained in electronic form, An entry in any public or other official book, register or by a public servant in the discharge of official duty in the performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept are the relevant facts as per Sec 34 and 35 of evidence Act.

As it is already laid down provision u/s 45 regarding the relevancy of expert opinion referred to in Sec.79A of I.T Act, now we have Sec.45A to consider opinion given by an examiner of electronic evidence regarding any information transmitted or stored in any computer resource or any other electronic or digital form is also relevant fact. As like other expert opinions, court may rely up on the opinion of an examiner who has given in the manner prescribed u/s 79A of I.T.ACT.

\textsuperscript{40} Section 2(t) of Information Technology Act 2000
Further, when the Apex Court has to form an opinion as to the electronic signature of any person, the opinion of the certifying Authority which has issued the electronic Signature Certificate is also relevant u/s 47A of evidence Act.

In the second part "On Proof" of the evidence Act following provisions has been included to cover electronic evidence;
65A. Special provisions as to evidence relating to electronic record
65B. Admissibility of electronic records
67A. Proof as to digital signature
73A. Proof as to verification of digital signature
81A. Presumption as to Gazettes in electronic forms
85A. Presumption as to electronic agreements
85B. Presumption as to electronic records and digital signatures
85C. Presumption as to Digital Signature Certificates
88A. Presumption as to electronic messages
90A. Presumption as to electronic records five years old
131. Production of documents or electronic records which another person, having possession, could refuse to produce

The amendments and basic structure of evidence Act, any substance on which matter has been expressed or described can be considered a document, provided that the purpose of such expression or description is to record the matter. Electronic records have been defined in the Information Technology Act, 2000 as any data, record or data generated, any image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche. An electronic record can be safely included under such a definition because matter is recorded on the computer as bits and bytes, which are the digital equivalent of figures or marks. Computer records were widely considered to be hearsay statements since any information retrieved from a computer would consist of input provided by a human being. Thus, be it a word document containing statements written by one party, or an image of a missing person generated by the computer based on the inputs given to it, all such records will be hearsay. An electronic document would either involve documents stored in a digital form, or a print out of the same. What is recorded digitally is a document, but cannot be perceived by a person not using the computer system into which that information was initially fed. Electronic documents were admitted as real evidence, that is, material evidence, but such evidence requires certification with respect to the reliability of the machine for admission. Being both hearsay as
well as secondary evidence, there was much hesitation regarding the admissibility of electronic records as evidence.

In India, the change in attitude came with the amendment to the Indian Evidence Act in 2000. Sections 65A and 65B were introduced into the chapter relating to documentary evidence. Section 65A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65B is complied with. Section 65B provides that shall be considered documents, thereby making it primary evidence, if the computer which produced the record had been regularly in use, the information fed into the computer was part of the regular use of the computer and the computer had been operating properly. It further provides that all computer output shall be considered as being produced by the computer itself, whether it was produced directly or indirectly, whether with human intervention or without. This provision does away with the concept of computer evidence being hearsay. Thus, with the amendments introduced into the statute, electronic evidence in India is no longer either secondary or hearsay evidence, but falls within the best evidence rule.

While allowing all forms of computer output to be admissible as primary evidence, the statute has overlooked the risk of manipulation. Tampering with electronic evidence is not very difficult and miscreants may find it easy to change records which are to be submitted in court. However, technology itself has solutions for such problems. Computer forensic has developed enough to find ways of cross checking whether an electronic record has been tampered with, when and in what manner.

Computers are the most widely used gadget today. A lot of other gadgets involve computer chips in their functioning. Thus, the scope of Section 65A and 65B is indeed very large. Going strictly by the word of the law, any device involving a computer chip should be adducible in court as evidence. However, practical considerations as well as ethics have to be borne in mind before letting the ambit of these Sections flow that far. For instance, the Supreme Court has declared test results of narco-analysis to be inadmissible evidence since they violate Article 20(3) of the Constitution. It is submitted that every new form of computer technology that is sought to be used in the process of production of evidence should be subjected to such tests of Constitutionality and legality before permitting their usage.

3. Concept of Burden of Proof in Harassment Matters

The onus probandi, which means Burden of proof is the duty of a party in a legal proceeding to prove an assertion of fact; it includes both the burden of production and the burden of persuasion; As per Section 101 of the Indian Evidence Act, 1872 defines “burden of proof” which clearly lays down that “whosoever desires any court to give judgment as to any
legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist.”

The Apex Court criticized the judgment of the High Court along with the trial court’s judgment stating that the burden to prove the existence of sale deed was clearly on the plaintiff/respondent in the present.

According to Black’s Law Dictionary, “Burden of Proof” in the context of law of evidence can be defined as the necessity or duty of affirmatively proving a fact on an issue raised between of the parties in a cause. Webster Dictionary defines the same as the duty of proving a particular position in a court of law, a failure in the performance of which duty calls for judgment against the party on whom the duty is imposed.

The subject-matter of the Burden of Proof as applied to judicial proceedings falls into two parts:

- Burden of Proving an issue.
- Burden of Proving a particular fact.

The High Court of Madras noticed in S. Chitra v. Director of Fire Services[^41] that “the alleged harasser made counter-allegations against the victim. Here, the petitioner, an unmarried women, who had lost her father and was supporting her entire family, was working as a Junior Assistant in the Fire Services Department. She complained of sexual harassment against certain officers of her Department. By the impugned order, a punishment of postponement of increment for a period of three years was imposed on her. The Court noted that: “Instead of conducting an enquiry in respect of the complaint, which made allegations of sexual harassment, the second respondent framed a charge memo, dated 5.1.96 in PR.1/96. The charges levelled against the petitioner were based upon the counter complaint made by the Divisional Fire Office, Office Superintendent and the Assistant. It was made to appear that she was insulting the DFO in insolent terms and that she compelled the office Superintendent and the Assistant to take her to cinema theatre. In addition to the counter complaint, it was also stated that she picked up quarrel with other women employees and adopted a go slow.”

The Madras High Court further noted that the victim’s sexual harassment complaints were ignored while the charges against her stood proved. Her appeal was rejected by a one sentence order. While pronouncing the judgement the court observed that “It is a classic case where the complainant has become the accused and the accused became the complainants. The

[^41]: S. Chitra v. Director of Fire Services [decision dated 30th September 2009 in W.P. (C) 37598 of 2006]
Court directed a complaints committee to be constituted in accordance with the Vishaka Guidelines and the punishment order against the petitioner was quashed."

The Apex Court in **D.S. Grewal v. Vimmi Joshi** also noted the phenomenon of retaliatory allegations and inadequacy in following the Vishaka Guidelines while enquiring into a complaint of sexual harassment. A school teacher complained of sexual harassment against the Vice Chairman of the school management. Her services were terminated while she was still on probation. In the meanwhile a purported enquiry was conducted where it was found to be not a case of sexual harassment. However, the Vice Chairman was directed to be counselled. Retaliatory allegations of financial irregularities were made against the teacher by the school management. The teacher filed a writ petition questioning the legality of her termination and alleging sexual harassment. A Division Bench of the Uttarakhand High Court directed disciplinary action against the alleged harasser without getting the matter enquired. The Supreme Court relying on its decisions in Vishaka and AEPC partially modified the order directing institution of a three-member sexual harassment enquiry committee and imposed costs of Rs. 50,000/- on the alleged harasser.

Reverting to the case on hand, a plainly false complaint by accused has resulted in the miscarriage of justice to the Petitioner on account of the failure by the Experts Committee to properly enquire into the matter. To be fair to learned counsel for the Respondent MHFW, he made no attempt to justify the Report of the Experts Committee.

The Petitioner’s generally refer to the provisions of the Copyright Act which prohibit dissemination of published articles without the permission of the author. In support of her submission that she has been defamed by such complaint, the Petitioner produced documents showing that accused gave very wide publicity to his allegations against her. She has alleged that this unwarranted wide publicity tarnished her reputation. This Court can only observe that dissemination of such unsubstantiated allegations in academic circles is unfortunate. If only the Experts Committee had ascertained the factual position, this situation arising out of the complaint of accused, could easily have been rectified. The Petitioner has needlessly been made to face the trauma of her reputation being tarnished for a plainly false complaint. This Court reserves to the Petitioner the liberty to seek other appropriate remedies, including damages, in civil proceedings in accordance with law.

Whether there is any justification for transferring the Petitioner. In particular, the proviso to Guideline 4 of the Vishaka Guidelines which reads:

---

42 D.S. Grewal v. Vimmi Joshi (2009) 2 SCC 210
“In particular, it should ensure that victims or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.”

Although Clause 4 deals with criminal proceedings, the proviso thereto encapsulates a salutary rule of not allowing the perpetrator and the complainant to remain in the same place while the enquiry is on. It would equally apply to disciplinary proceedings. In any event, there is nothing in the Vishaka Guidelines that permits the involuntary transfer of the complainant even while the perpetrator continues in the same establishment. The Petitioner pointed out that even in the LHMC she has not been permitted to function and she has had to repeatedly approach the CAT and this Court. Although the Petitioner has now been reinstated at the LHMC, given the circumstances described hereinbefore, the Petitioner has faced injustice and has not been able to work peacefully at the LHMC.\(^{43}\)

In any event, the MHFW will ensure that such committee is constituted strictly in accordance with the Vishaka Guidelines as well as the instructions under the CCS Rules which have been extracted hereinbefore. This should be done within a period of four weeks. A definite outer time limit should be fixed for the conclusion of the enquiry.

4. Objective of enactment

As per the law workplace sexual pestering can no longer be dismissed as some moral misbehavior. The Guidelines issued in the Vishaka case raised that bar, when for the first time it acknowledged “each incident of sexual harassment” as an infringement of the fundamental right to equality. That view has instituted its way into the Act, which upholds the right of women as citizens to a place of work free of sexual pestering. Complaints Committees at all places of work are now charged with the role to ensure that the right remains together, through a fair, informed, user-friendly process of redress.

The Sexual Harassment Act has been enacted with the objective of

- “Providing women protection against sexual harassment at the workplace and for the prevention and redressal of complaints of sexual harassment;

- Sexual harassment is considered as a violation of the fundamental right of a woman to equality as guaranteed under Articles 14 and 15 of the Constitution of India;

- Her right to life and to live with dignity as per Article 21 of the Constitution of India.

\(^{43}\) Ibid
• It has also been considered as an infringement of a right to practice or to carry out any occupation, trade or business under Article 19(1) (g) of the Constitution, which includes a right to a safe environment free from harassment.”

The definition of sexual harassment in the Sexual Harassment of women at workplace Act is in line with the Apex Court’s definition in the Vishaka Judgment and includes “any unwelcome sexually determined behavior (whether directly or by implication) such as physical contact and advances, demand or request for sexual favors, sexually colored remarks, showing pornography, or any other unwelcome physical verbal or non-verbal conduct of sexual nature. It stipulate that a woman shall not be subjected to sexual harassment at any workplace. As per the statute, presence or occurrence of circumstances of implied or explicit promise of preferential treatment in employment; threat of detrimental treatment in employment; threat about present or future employment; interference with work or creating an intimidating or offensive or hostile work environment; or humiliating treatment likely to affect the lady employee’s health or safety may amount to sexual harassment.”

5. General Features of Enactment

Sexual pestering can take place anywhere and has several forms and outcomes. It can take place at public places where it takes the form of eve teasing, molestation. At workplaces sexual harassment has come to be seen, and rightly so, as a serious offence. There is however no distinction in the nature of these acts nor specific laws pertaining to them.

Molestation is the sexual exploitation of a child or a woman by an adult for sexual gratification or for profit. Sexual pestering is intimidation, bullying or coercion of a sexual nature, or the unwelcome or inappropriate promise of rewards in exchange for sexual favors. In India there are not many laws regarding the same. Those found guilty can be punished under section 294 and sec 509 of IPC.

These provisions of IPC are beset with flaws since they contain a number of ambiguous words. As in case of Section 294, the act or utterance must be made in public places which mean sexual harassment which takes place behind closed doors as in the case of homes, shops, telephones, etc. will not be considered as sexual harassment under this section. Also the act or utterance must cause annoyance but the provision doesn’t suggest any means of measuring the same. Similarly Section 509 of IPC is applicable when there is an intention to outrage the modesty of any woman which again is impossible to prove since intention is difficult to prove.

The Sexual Harassment of Women at Workplace Act defines sexual harassment as any unwelcome act, gesture, remark or any other behavior to outrage the modesty of women at workplace. However what is to be understood is the distinction between welcome and
unwelcome. If the act is not unwelcome then the “offender” is not an offender. An act may be proved welcome by the offender by citing reasons such as provoking on account of attire, expressions, gestures etc. by the victim, which may not be the case. Similarly the definition contains the word physical contact which is unclear in its meaning.

The provisions contain several loopholes which can be exploited easily by the harasser in his favor. Clearly the provisions and laws need to be more comprehensive to provide a means of justice to those who have been victims and a means of protection for those who could be potential victims.44

This Act is not gender neutral as only women can file a complaint. No man can file a sexual harassment complaint. Are men not harassed sexually?

As per section 2(o), the definition of workplace includes “any place visited by the employee arising out of or during the course of employment including transportation provided by the employer for undertaking such journey.” Therefore as per this definition even areas outside the control of the employer such as office of clients, taxis; hotels etc… become a workplace. Therefore, during an official tour the place of stay (ie hotel), travel mode (ie. taxi) and office of customers / clients are all included as workplace and the employer is liable if any incident happens with the woman employee . The provision is quite a strange as the employer is not omnipresent and cannot be responsible as these places are not in his control.

Section 3 defines sexual harassment containing clauses such as “implied or explicit threat about her present or future employment status’ and ‘interferes with her work or creating an intimidating or offensive or hostile work environment for her”. Therefore bringing out quality issues with the woman’s work or providing / enforcing deadlines may be construed as threatening her future employment status or creating an offensive work environment.

A committee needs to be formed which will look at all sexual harassment cases. The committee needs to have “A woman Presiding officer committed to the cause of women” and minimum 2 other employees “committed to the cause of women”. The Act is not clear as to the term “committed to the cause of women”. Further, a member has to be from women NGO and a majority of the members of the committee must be women. By defining the constitution of the committee in such a way, at the very first step itself biasness has been introduced. Having a committee which is specifically formed to promote women specific-causes is colored. How do we expect justice to be served by such a committee?

44. Law of the Sexual Harassment of women at workplace Act 2013
Section 10 discusses the complaint handling provisions. First, a settlement with the offender would be tried to be achieved. A question comes out immediately that if the woman was sexually harassed, why does she need to reconcile with the offender?

Section 11 states that “the committees shall have the same powers as vested in a civil court.” But on the other hand it states that none of the members of the committee are required to have legal knowledge or be legal professionals. Providing powers of a court to persons having no legal knowledge is strange and contrary to each other.

Section 12, during the pendency of the complaint the aggrieved woman may request for
1. Transfer to another workplace
2. A paid leave, further, this leave is over and above the ‘Privilege Leave’ grated by the organization. On the face of it, the provisions seem logical, but there are no misuses clauses mentioned in the Act, which will be discussed further.

Therefore, without a misuse clause this provision is unjust on the employer as the organization may need to give paid leave if a complaint is made.

Section 13, in case sexual harassment is proved any one of the following provisions may apply; firstly organization may take action for sexual harassment as per the service rules and secondly deduct compensation from the salary of the accused employee and the compensation may be recovered as land revenue from the accused employee.

The provision is indifferent in itself, as a compensation to an alleged victim for such a heinous wrong either opted by the alleged victim or given by perpetrator or even allowed by the committee itself puts an eye on the decision taken.

Section 14 states that in case of false complaints (which are backed by forged documents submitted by the complainant or a malicious intent, which needs to be proved) an action will be taken as per the service rules of the organization. Further, it states, if the complaint cannot be substantiated, it will not attract any action. This is an unfair provision as only such false cases which are coupled with forged documents or proving malicious intent attracts penalties. With just one complaint the whole life of the man is ruined. Non-proving of complaint though does justify that there were false allegations on part of complainant, yet a question for whole life time is put on the life of the innocent. This provision does not sense to be ‘Just and fair’?

Section 15 determines the level of compensation to be paid to the woman which depends on

“The mental trauma, pain, suffering and emotional distress caused to her; The loss in the career opportunity due to the incident of sexual harassment; Medical expenses incurred by
the victim for physical or psychiatric treatment; The income and financial status of the respondent (Respondent is the person who supposedly commits the harassment); Feasibility of such payments in lump sum or in instalments. The fourth point above means that if the harasser is a wealthy person, then the compensation level will be higher. In other words, compensation level is determined by the income level of the accused.”

Section 16, the complaints handled by this Act is specifically kept outside the purview of Right to Information (RTI) Act. Therefore, details of false / fabricated cases will not be available. Further, even in case of false complaints, the identity of the woman will be not being disclosed but the man is open to media trials and his information may be made public. Further, in case of genuine cases, the details may be made public provided the identity of the woman is protected.

There are many issues here, keeping it out of the purview of the RTI Act will not provide information on the misuse of this Act. Further, only successful cases will be reported thus proving a 100% success rate. The identity of women, even in false cases, is kept confidential. As there are no penalties for false cases and identity is protected, there is no disincentive to file a false case. Just an accusation by the woman will destroy a man’s life with no consequences whatsoever for fabricated complaints.

Each individual has the right to work in an environment free from demeaning and humiliating sexual harassment. So, women should also be given all the rights they are entitled to but that does not mean that only women must be given these rights, there must be equally protective rights available with man too to avoid the question of Gender inequality.

5.1 Main Features of enactment

- **Feasibility issues in the composition of the Internal Complaints Committee**-(i) Constitution of an internal committee at each administrative unit-The Bill requires that every office or branch with 10 or more employees constitute an Internal Complaints Committee. This requirement differs from the one proposed in the draft Bill circulated by the National Commission for Women (NCW) in 2010. The NCW Draft Bill prescribed that if units of the workplace are located at different places, an Internal Committee shall be constituted as far as practicable at all administrative units or offices.

- **NGO representation in Internal Committees**-Each Internal Committee requires membership form an NGO or association committee to the cause of women. This implies that every unit in the country with 10 or more employees needs to have such person in the Committee.
- **Bar on engagement in additional paid employment.** - No member of the Internal Committee is allowed to be appointed in any paid employment outside the duties of her office. This implies that even the external person in the Committee (who is with an NGO) may not hold any other part-time employment.

- **Powers of a civil court.** - The Internal Complaints Committee has been vested with the powers of a civil court for summoning, discovery and production of documents etc. The set-up of the Internal Committee does not need any member to have a legal background. Besides, the Bill does not stipulate any requirement of legal training to the Committee for fulfilling these duties. This provision differs from that of the Local Complaints Committee, in which at least one member has to if possible have a background in law or legal knowledge.

- **Vague rules for the constitution of the Local Complaints Committee** - Two different bodies are called ‘Local Complaints Committee’. It also lays down that an additional Local Complaints Committee shall be formed at the block level to deal with complaints in certain cases. The jurisdiction and functions of these committees have not been delineated.

- **Availability of Protection Officers** - The Bill prescribes that a Protection Officer (PO), appointed under the Domestic Violence Act, 2005, shall be a member of the Local Complaints Committee. These Local Committee shall be established at the district level and may also be set up at the block level.

- **Scope for misuse of some provisions** - Punishment for false or malicious complaints. - The Bill provides that in case a committee arrives at a decision that the charges were false or malicious, it may recommend that action be taken against the woman who made the complaint. The clause also provides that mere incapability to verify a complaint or provide sufficient proof need not attract action against the complainant.

  Though there may be merit in providing safeguard against malicious complaints, this clause penalizes even false complaints (which may not be malicious). This could deter women from filing complaints. Recent Bills such as the Public Interest Disclosure Bill, 2010 (commonly known as the Whistleblower’s Bill), penalize only those complaints that are malafidely and knowingly false. “The National Advisory Council (NCA) has recommended that the entire clause be removed as it might deter victims from seeking protection of the proposed legislation.
**Exclusion of domestic workers**- The definition of ‘employee’ specifically excludes ‘domestic workers working at home. The NAC recommended that the Bill should be applicable to domestic workers as these employees, ‘especially live-in workers, are prone to sexual harassment and abuse, without access to any complaint mechanism or remedial measures. However, the Government stated that ‘it may be difficult to enforce the provisions of the Bill within the privacy of homes and it may be more particular for them to take recourse to provisions under criminal law.

**International experience.**- Sexual pestering is a form of illegal employment discrimination in many developed countries including the US, UK and the European Union counties. In these domains, the definition of sexual harassment includes employer-employee relationship as well as a hostile work environment. This is similar to the current Bill. However, those laws differ in one important aspect, in that they are gender neutral. This Bill provides protection only to women, and not to men.

To conclude as to the analysis, there have been many impediments attached with enactment. Though the Act appears to be progressive yet it suffers certain Lacunas which need to be worked upon. Our society keeps on changing day by day, as such we need to introduce the provisions according to help in safe working in an establishment or workplace.