



MEDIATION AND WOMEN’S RIGHTS: EXPLORING THE ETHICAL CONUNDRUM AND FEASIBILITY OF THE PROCESS IN SEXUAL HARASSMENT CLAIMS

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ABSTRACT

Mediation today has emerged as one of the most desirable dispute resolving mechanisms, especially in the contemporary corporate world. Convenience with regards to cost expenditure, time consumption and mental element of parties has accepted the process of mediation tremendously. Unlike the traditional litigation, which hovers all over winning the battle, mediation on the other hand seeks to make a win-win approach for both the sides with the help of a neutral third party seeking to assist the dispute resolution. Talking of sexual harassment, it is well observed that in countries like India, the subject is still not talked about much by the victim himself. Several reasons hold its back; one of them being that the victim usually feels anxious with regards to his or her career prospects. Other factors; being the confidentiality aspect and the reputation aspect too. The very act is in violation of the fundamental rights enshrined in the Indian Constitution like Right to Equality, Right to Freedom against Discrimination, Right to Work with Dignity, etc. and must be taken seriously when reported. However, it cannot be denied that once a case enters court, it normally takes a decade or two to finally get disposed of with a balanced judgment. Cases like that of sexual harassment adversely effects the company’s overall productivity affecting right from its internal climate to commencement of cold wars amongst employees. Sexual Harassment Act of 2013 establishes an Internal Complaints Committee for prevention, prohibition and redressal of sexual harassment cases at workplace, but a question that strikes here is- Are the decisions of such committee always balanced, thereby of any just and good use to the victim?

This paper seeks to analyse and compare situations of sexual harassment cases within the purviews of litigation and mediation along with their pros and cons. Also, the very Act of 2013 as mentioned aforesaid is discussed with regards to its efficiency and practicability. The authors also put light on the mental element of the parties to the matter. Towards the end, the paper gives its conclusion as to the better option for handling such cases along with certain suggestions to implement the scheme effectively throughout.

KEYWORDS: Harassment, Litigation, Mediation, Employee, Women Rights

INTRODUCTION

“So many people who deal with sexual harassment don't have the means to file lawsuits or to get legal representation or legal advice”.

-Tarana Burke

Harassment basically includes a vast variety of behaviours which are offensive in its nature. Harassment is generally known or understood as the behaviour which tends to embarrass

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a person, humiliates or demeans. From the legal point of view, these types of conducts are those that can be seen as threatening, upsetting or disturbing on the victim. They develop from the grounds of biasness which can nullify or deprive the victim of such harassment from exercising or enjoying their rights. When these types of conducts become continuous or repetitive in nature, they are to be known commonly as bullying.

Sexual harassment amounts to that category of harassment which introduces sexual factor in the harassment and the unpleasant or indecorous promise which states that there will be rewards in trade for favours of sexual nature. The scope of Sexual harassment varies from actions such as from light offenses to major crimes such as assault or sexual abuse which are targeted to demean or defame the victim who is subjected to sexual harassment. There is no specific place and circumstance for harassment as it can occur in various societal premises which include but not limited till offices, residential places, educational institutes, temples, etc. Harassers or victims are of gender neutral nature as that can be of any gender.

According to many Indian as well as International laws, sexual harassment is deemed to be illegal. Laws covering the scope of sexual harassment most commonly don't prohibit light offences such as teasing or making offhand comments to the victim or some minor isolated incidents as they are treaded lightly. In the offices, harassment is to be treated illegal when the act of harassment is continuous or frequent or of a gravity which cannot be ignored and thus creating a unfriendly or unsympathetic work environment or if resisted by the victim of such attack, it results in an unfavourable executive decisions which can be anything like demotion from a post or letting them go of their jobs, or giving away there opportunities to someone else. The legal and social concept of sexual harassment differentiates and changes culture by culture.

The act of Sexual harassment done conducted by an employer or a person in authority over its subordinate is a type of discrimination between their employees, as for promotions or incentives those employees will be preferred who provide the sexual favours to the companies, disregarding the talent, skills or hard work. For almost all the corporate houses, organizations, companies or businesses, prevention of the sexual harassment and protecting their employees from charges of sexual harassments has become the main goals of legal decision-making.

MEDIATION

The term "mediation" basically means any situation in which there raises a need for third party to interfere and help the two parties to come to an agreement. Speaking in more specific way, mediation includes a proper structure along with a timetable and is dynamic in nature, all of this is what differentiate the mediation from common negotiation, the process of mediation is conducted with full confidentiality and its proceeding are private and can't be revealed, and are enforced by the authority of law. Participation to enter into proceeding of mediation is generally voluntary and sometimes mandated by the judicial officer. In Mediation proceeding, the parties can appoint a mediator or can get the court to appoint a mediator for them. The appointed mediator is supposed to act in the capacity of third neutral party and help the parties to reach a conclusion rather than dictate their solution. Mediation is proving to be a more successful as well as peaceful and is accepted solution in International society in finding a solution to end any conflict. Mediation can be used to solve conflict of any magnitude and most of the time, it works a sure deal.



PROBLEM OF SEXUAL HARASSMENT CASES IN COURT

The amount of reports of sexual harassment and the claims has increased dramatically in last few years. Many persons and citizens feel that this need of action is being overused and somewhat being abusive by the employees. There is constant fear of huge legal bills which can be incurred by false claims as many employees can file false claim in order to blackmail their companies to get what they want and when employee doesn't agree to the conditions, the employee files the report of sexual harassment against the companies. There is also the fear of ugliness of the claims itself as it can affect the Public Relations of the company and can harm the credibility of the company as well as in severe cases, can destroy the image of the company.

In most cases, proclamations of sexual harassment by companies leave them trying to judge the authenticity of two employees and who are equally valuable to the company. Such fragile judgment calls often make companies very uncomfortable. Litigations of court proceedings are very expensive as well as time consuming as company's resources can get exhausted, that's why the companies prefer mediation over the legal court proceedings. It is to be noted that litigation or court proceedings, gives it's result where one party is a winner and one party is a loser which in return completely damages the employment relationship of both the parties concerned.

SEXUAL HARASSMENT ACT, 2013

Having an existing enactment to serve the purpose cannot be overrun. The Act which came on force on December 09th, 2013 seeks to provide protection to women at workplace from sexual harassment. The Preamble to the Act clearly mandates its purpose as to provide protection to women, thereby preserving their fundamental rights as enshrined under Article 14, Article 15 and Article 21 of the Indian Constitution.

The Act seeks to establish an Internal Complaints Committee which shall address matters and complaints in the nature of sexual harassment. In the absence of such committee, the complaints shall be received by the Local Committee as mentioned under section 6 of the act. The Internal Complaints Committee comprises of a presiding officer who shall be a woman, two employees having legal knowledge or having experience in social work and one member from non-governmental organisation.

Now, as per the words of section 4 of the act, it clearly described that all of the above-mentioned members of the Internal Complaints Committee shall be nominated by the employer. Being nominated by the employer himself, there is left only a little scope for just decision making. Reason being, it mostly shall be dependent upon the will and wish of the employer as to who is to be made liable and who is to be granted acquittal, as nomination of all these members is ultimately done by the employer himself. So in a way or other, this seeks to infringe the first principle of natural justice- "Nemo judex in causa sua" also known as the 'Rule against Bias' which means that no man should be made a judge in his own cause. Let's say a case comes in reference to sexual harassment being committed by the employer. In this scene, will the employer let the committee pass any decision unfavourable to him?

It is already a well settled principle that "Power tends to Corrupt and Absolute Power tends to Corrupt Absolutely"

The authors here strongly feel that such approach can do no good to the victim wherein it appears clear that biasness may take place. For any mechanism or redressal model to be



successful, it is essential for the parties, especially the Complainant, has confidence into such model or mechanism that nothing but justice shall be done to him or her. But in most of the cases that we witness today have biasness, even if not apparently visible. There lays no surprise to see insider settlement taking place with the panel members of the committee prior or even at the time of redressal. It is nothing but simple mockery of the whole scheme upon which the institution lies. Favours one employee over another is a common thing seen in organisations and bodies today. But this will not solve or serve the purpose the Act for which it was literally made.

The authors feel that by going through the language of section 4 of the act, it can be assumed that in one way or the other, internal biasness may take place relying on the factors mentioned above. Hence, instead of being nominated by the employer himself, the said panel members must be elected by voting or polling system in an institution or organisation as this tends to dilute the power of nomination which is absolutely conferred in the hands of the employer, now in the hands of all employees and officers and therefore shall constitute a better system of transparency, check and balance which will ultimately result in reduction of biasness and will serve the full purpose of the enacted legislation.

BENEFITS OF MEDIATION IN SEXUAL HARASSMENT CASES

The problems which are created through process of court battle or litigation proceedings of sexual harassment cases; it causes anticipatory businessmen or senior officers of the organization or company to refer to the substitute means for getting justice done. In recent times, some companies have started using mediation to resolve the claims of sexual harassment.

As sexual acts whether consensual or forced, can be of very private matter for the victim and the victim might not be able to express his or her feelings in the court room with full of people and media reporting every single word. The documents of the case or judgement can be easily and freely accessed by anyone using Internet or filing Right to Information petition and can infringe the privacy of the victim. Along with privacy infringement of the victim, the image or public relations of the company is also on the line and one decision against them can ruin their reputation or credibility for good.

Here comes the mediation as in the proceedings of mediation, there is the element of confidentiality as if a victim or accused share anything with the mediator, the mediator isn't supposed to share it with anyone else, unless and until with the consent of the person giving such information. This saves the public image of the company as well as the reputation of the victim as this society doesn't treat the victim of any sexual offence with appropriate respect and equal status. Nonetheless, proceedings of mediation can be commenced with absolute privacy and confidentially which safeguards the privacy and image of the company and the proceedings of the mediation are also very flexible as it is not bound by the Code of Civil Procedure or Code of Criminal Procedure and also there is no need of Lawyers and thus making it cheaper as compared to court proceedings.

Generally, each party of a sexual harassment case or claim brings various subjects to the matter. But mainly, sexual harassment cases consist of three major parties one being: the victim who is, mostly, the employee of the company. Whereas the second party is the accused who is also mostly the employee of the company and third party being the company itself. The victim



usually wants to press charges against several issues such as that the victim himself has been harassed or abused in any way and wants to feel good about themselves again. The victim mainly wants the unpleasant behaviour against themselves to stop but not on the cost of their career being put on stake. It is a common mental notion that the victim may put a question mark on his or her career by reporting the complaint. Basically, in most of the cases, the victim wishes to keep doing their job normally and pretend like that nothing of significance has happened here.

Subject to the conditions of the specific case, the victim may wish that the company to rectify any past unjust transaction from which the victim has been refrained such as the loss incurred of not getting a promotion due to the apparent harassment or any back pay which was on hold due to the proceedings of sexual harassment. The victim may very well also wish that company should punish the accused involved in the act of sexual harassment. In the end, the victim normally wishes to stay away from any further mental or emotional trauma sustained during sexual harassment act which includes the possible pain whether mental or financial of a trial.

The accused of the act generally wishes to safeguard the confidentiality of the nature of the charges however much and as to the greatest length possible and in every way to keep their job in the company as revealing of such charges would likely lead to losing his job and no else company will give him or her the job which will destroy his or her career. The accused may also wish acquittal from this charge if possible. Since for proving of the act sexual harassment one does not require to proof his or her intent, mostly the accused wishes to get to know where he went wrong or what was his or her intent and sometimes he or she would wish the chance to make amends or compensations if any act of unintended harm have caused by them.

The company themselves wishes to stay away from any type of charge or act of public admission or any kind of liability. If the act of sexual harassment by an employee on another employee has occurred in the company, the company generally wishes to avoid huge sum of compensation and want to pay as less as possible to amend the situation. The company wishes to sustain the output and duty of the labour force and to justify policies of the company. In a perfect world, the company wishes to sustain its good, worthy employees and a pleasant relationship among their employees.

LITIGATION vs. MEDIATION

Litigation doesn't necessarily achieve the victim's wish to stay away from any future trauma as it doesn't let him or allow the victim to keep on doing their job pretending as nothing has happened but in litigation, the whole situation or the whole act of sexual harassment will become public and everyone will get to know about it. It is a real and in some case inevitable possibility that embarrassing information on the act of sexual harassment might very well come to the light of the public at large. Along with this, suing one's own company or owner also leads to various possible difficulties such as unfavourable relations in the workplace or holding the pay of the victim or other companies might hesitate to give them jobs in future as their image is tend to be of the person who sues the company for compensation.

The desires of accused are also not completely fulfilled with the use of litigation to get justice or a fair result because of the key factor which is confidentiality. The concept of confidentiality is a far-fetched dream in the court room, as courts are open for public and its judgement are open for all. Furthermore, court room proceedings do not certainly put focus on



the dynamics of changing of attitudes of the employee or companies or even allowing accused to get to know or understand about where they went wrong.

In the end, litigation horribly fails to fulfil the desire of the company whose only factor is the cost. Litigation is expensive as well as time consuming as it takes a lot of time due to the heavy burden on the judiciary and expensive as the high fees of the lawyers. Comparatively Mediation costs nothing in relation to litigation fees due to no need of lawyers and their high fees and less time consuming as there is no procedural law included or any type of judicial burden. It is to believe that once the parties have faced each other in the court room as lawyers will use everything incriminating them to get their hands on to try and win the case thus leading to the destruction of the relationship between the employee and employer. As a result of court room proceedings, the employer is very well likely to lose weather one or both of the employees of the company. Building up to this, those employees who are not involved in the matter and are left in the office are likely supposed to take sides and debating who is right and who is wrong in the matter which leads to decline in efficiency and creates the work atmosphere problems for the work force that remains.

On the other hand, Mediation doesn't face limitations as the litigation faces and fulfils almost all of the objectives of both the parties involved and of the company as well. As it allows the victim and accused to work out their own solution respective to their own needs and on their own conditions and that the mutual agreement can be tailor made to meet the need of both the parties.

Mediation is helpful to keep the scope of conflict between the parties itself which protects the privacy and preserves the confidentiality of the victim and accused. As the claim of sexual harassment remains under confidentiality it is less likely that there would be any negative repercussions in future relating to career. So in case if any dispute or resolution develops of nature of sexual harassment, the victim may retain their job with the employer.

The process of mediation helps and allows the victim to express their frustrations and develop a way to find a remedy that will let the victim to feel whole again. These kinds of remedies are generally not attainable through the process of litigation or court room proceedings, such remedies include apologies and the promises of doing help in achieving another job. In an instance where the accused has been unjust in the near past, such unjustness can be amended through the process of mediation. Let's say, the company can agree to restore the victim to its position or give an unfairly promotions which were withheld. The company can transfer or fire or re-educate the accused of the sexual harassment through various seminars or training on prevention of sexual harassment in workplace. The remedies are tailor made through mediation and tend to put less focus on giving a monetary compensation to the conflict and more on addressing the real wickedness involved.

Along with the victim's, process of Mediation also meets the desire of accused's goals as mediation allows the accused to get a chance to put forth and clarify their side of the narrative. The factor of confidentiality provided in the proceedings will let them to resolve the conflict without destroying the public image, so acquittal without getting the public to know about the charge becomes a possibility because if the charge of sexual harassment is the result of a misunderstanding between the parties, the said misunderstanding and miscommunication can be talked through or worked through mediation without putting the parties' positions in jeopardy.



Mediation also helps and lets the well-intentioned accused of sexual harassment to comprehend and from their mistakes and rectify the situation for the unintentional or intentional harm inflicted upon the victim of the act of sexual harassment.

The company further advances from the process of mediation as it is rapid and cheap as compared to that of litigation. In addition to this, thanks to the factor of confidentiality involved in this process, the working staff or labour force will be less affected or disturbed by the charges of the sexual harassment on their boss or colleagues. As process of mediation does not include the examination of the witnesses, so this process of mediation provides less disturbance of the office staff; which results in workers not taking sides in the conflict and does not interfere with the melodiousness and efficiency of the labour force will be uninterrupted completely. In the end, mediation leads to less stress as compared to litigation for all the parties involved in the matter.

A study in 1998 revealed that claims of sexual harassment alone costs the Fortune 500 companies the astonishing amount of \$6.7 million per year, with costs for smaller companies being equivalently troublesome. It is clear that this is a field in which protection and prevention is of high importance for betterment of morale and office environment and helps the companies to avoid the lawsuits which can be incurred in instances of claims of sexual harassment.

According to an article published in the Negotiation Journal, research has showcased that victims facing any type of harassment whether sexual and or any other just simply wishes this kind of behaviour to stop. Their goal is not to punish, litigate, or force the offender out of their job. What other choice does a victim have to stop inappropriate conduct? It is so obvious that the most straight forward or direct approach and perhaps the priority choice should be to speak sprightly to the other person or other party involved in order to get the inappropriate conduct to stop. But most of the times this is not always an option for one reason or another.

The process of mediation can help provide a comfortable place in which the victim can attain the main target of stopping this kind of inappropriate conduct in the workplace. Without having proper mechanism to tackle with situations like these, the victim of the act of sexual harassment has been left only with two choices whether to go through the process of a formal complaint and investigation or to do nothing at all. However, these choices or options not always meet the desires of whether the employee or the company.

Harassment most generally happens when there is gap in communication or known as matter of miscommunication and misunderstanding between the parties or different styles or cultural expectations as people come from different places or cultures and work together in order to achieve organizational goals, as there is a big scale of operations and lots of factors included. Any type of conflict is bound to happen between one or two persons. Even in the cases when the act of sexual harassment is intentional, it is to believed that with proper communication, the sexual harassment can be most often stopped satisfactorily without any conflict.

WHEN IS MEDIATION APPROPRIATE?

If a company decides to utilize the process of mediation for instances of sexual harassment claims, it should have specific guidelines relating to what matter will fall under process of mediation and will matters shall not be mediated. While most companies want to refer the cases of sexual harassment claims to the mediation services when the participants are willing to mediate, the mediators are generally very careful in order to decide whether there are



justificatory conditions that would lead to state that process of mediation is unfit. In instances actual physical harm is included such as sexual assault or gravity of a power differential is too great to leave for granted and allow for fairness for extreme differences in status or rank of the officer accused, companies are supposed to be less likely to see mediation as a proper event for solving of such problem. In addition to that, if the company has already decided that proved harasser must be fired; such mediation may not be deemed appropriate. Mediators can however, aid the company in directing many of the problems that attend sexual harassment complaints. For example, it is said that companies have found that mediation is one of the good ways to educate and train the perpetrator about inappropriate conduct in the work place or anywhere in the life. It also gives the victims of sexual harassment a platform in which they can share their feelings that may have arisen as a consequence of contemptuous handling of the matter. Cases of sexual harassment claims are mostly very difficult to resolve because the company is faced with the dilemma of “he said this or she said this and that” type of circumstances and have little to no else other kind of evidence..

WHERE DO COMPANIES FIND MEDIATORS?

Professional mediators can be obtained by companies or organizations through various agencies such as the American Arbitration Association and the scope of Alternative Dispute Resolution section of the Michigan Bar Association. Most often there is a dispute resolution centre in larger communities which helps in resolving dispute among the parties. Agencies like these provide mediation services which are typically being provided for free of charge and also provide services like mediation training and workshop programmes. If a company employs a large amount of work place or labour force, companies may very well wishes to consider employ an in-house and full time mediator available in the company since it is both convenient and cost effective to have a mediation centre in the company itself. In most of the companies, Human Resources personnel are trained in mediation and are supposed to be made available in the capacity of the mediators. Sensitivity of such mediators or human resource personnel in their treatment to people of different race and different gender issues should be taken well into consideration before selecting personnel to become mediators and hold mediation services.

CONCLUSION

Mediation proves to be a tool of very significance and of great value for organizations or companies to include prevention or protection of sexual harassment in their sexual harassment policies. These type of policies may help and be used by employees who would normally refrain themselves from using the typical complaint process as it is very expensive and time consuming and generally work force doesn't have access to such amount of time and resources to fight the legal battle against their harassment. Although mediation is not sufficient for all type of sexual harassment complaints as the gravity of sexual harassment varies as the higher degree of sexual harassment attracts criminal charges under the Criminal law of the country, if the gravity of the offence is nominal and not of a greater degree, mediation can be proved to be beneficial as well as advantageous process for both the accuser and the accused if provisions aren't applied properly.



SUGGESTIONS ON MAKING MEDIATION GENDER NEUTRAL AND ENSURING JUSTICE

- Appointing women as lead mediators or co lead mediators in the cases of sexual harassment.
- Aiming for gender parity or neutrality in the mediation support team as it would prevent biased decisions and justice will be achieved without questioning of the agreement reached.
- It is very essential to ensure that all team members indulged in mediation have a good understanding of their gender dimensions of their thematic or their geographic areas of expertise.
- Including gender and mediation expertise in the mediation team or engaging external expertise as it would allow for them to get outside opinion and end goal of justice will be achieved.
- Organizing context-specific gender and inclusion workshops or training for the mediation team at the start of the mediation process and when specific issues of the conflict are negotiated.
