

1

In the Supreme Court of Bangladesh

High Court Division

(Special Original Jurisdiction)

Writ Petition No. 5916 of 2008.

In the matter of

An application under Article 102(2) (a) (ii) of
the Constitution of the People's Republic of
Bangladesh.

And

In the matter of

Bangladesh National Women Lawyers

Association (BNWLA) represented by its

Executive Director, Ms. Salma Ali.

..... the petitioner

Versus

Government of Bangladesh and Others.

..... the respondents

Mrs. Fawzia Karim Firoze with Mrs. Seema

Zahur, Ms. Rebeka Sultana and Ms. Sathi

Shahjahan

..... for the petitioner.

Mr. Razik Al-Jail, DAG

.....for respondent No. 3.

Dr. Rafiqur Rahman

..... for respondent No. 7.

Mr. Mahmudul Islam

..... *Amicus Curiae*

Ms. Sara Hossain and Mr. Probir Neogi.

..... Intervenors

Present:

Mr. Justice Syed Mahmud Hossain

And

Mr. Justice Quamrul Islam Siddiqui

Heard on 16.10.2008, 13.11.2008, 9.3.2009, 11.3.2009.

Judgment on 14.5.2009.

Syed Mahmud Hossain J,

In this application under Article 102 of the Constitution of the People's

Republic of Bangladesh, a Rule Nisi was issued

2

calling upon the respondents to show cause as to why the respondents failed to adopt guidelines, or policy or enact proper legislations to address the issue of abuse of sexual harassment for protecting and safeguarding the rights of the women and girl children at work place, educational institutions/universities and other places wherever necessary which has been regularly reported in the media, public and other places.

The facts leading to the issuance of the Rule, in brief, are:

Bangladesh National Women Lawyers Association (BNWLA) was formed in 1979 by a group of women lawyers with an aim and objective to empower the women and children of their rights.

At present there are no legislative provisions to address sexual harassment of women and girl children and in the absence of the legislative provisions the need to find out an effective and/or alternative mechanism to cater the need is an urgent social imperative. On 7 July, 2008 “সামাজিক প্রতিরোধ কমিটি,” (Social Resistance Committee), a platform of 47 right based organizations such as the petitioner, Bangladesh Mahila Parishad, Ain-O-Shalish Kendra, Bangladesh Mahila Samity arranged a press conference on the issue and put in sharp focus the acuteness of the problem and highlighted how the sexual harassment was taking place in different organizations and institutions. The Committee at the press conference presented a statistics showing 333 incidents of repressions on women from January to June 2008. The Committee also adopted seven resolutions including framing of guidelines to stop sexual harassment and implementation thereof at all educational institutions and universities. On 1.8.2008, ‘The Daily Star’

3

brought out in its weekly magazine, a front page story regarding campus violence on sexual harassment. The article stated that in the absence of any formal structure of complaint hearing many Bangladesh students keep incidents of sexual harassment to themselves out of the necessity to avoid social stigma.

A lady officer of the National University finding no other way to redress her grievance of sexual harassment by the then Vice-Chancellor of the University filed a case in Nari-O-Shishu Nirjaton Daman Adalat. Later, when the existing social condition pushed her back to the wall, she protested in vain and lost her job. Such type of stories is every day incident where women suffered in silence and despaired for not having any place to seek relief of their pains from sexual harassment at work place/educational institutions.

A few of the many incidents are stated hereinafter:

On 15.8.2008, 'The Daily Star' in its weekly magazine stated that in the absence of any formal structure of complaint hearing, many Bangladeshi students keep incidents of sexual harassment to themselves. Students fear having their identities exposed to social stigma and in the case of a teacher-student relationship the student is usually too aware of the power advantage the teacher has over her. The magazine continued, in 1998, sexual harassment on campus finally exploded as a public issue at Jahangirnagar University (J.U). Since then, a section of progressive teachers have been campaigning for a formal policy on sexual harassment and to date there has been no step in the right direction towards approving such a policy.

4

In May 2006, the students of the Botany Department of Rajshahi University called a strike on the campus demanding removal of Prof Nurul Aman for alleged sexual harassment of a female student of the department. (The Daily Star, May 8, 2006). Students of Sociology Department of Rajshahi University led demonstration in the campus demanding punishment for, and dismissal of, a teacher of the department for alleged sexual harassment of a female student of the department (The New Age, May 10, 2006).

On 16.11.2006, allegations were brought against a teacher of the Bangla Department of Jahangirnagar University by a first year female student of that department. A fact-finding committee, formed to conduct primary investigation of the allegation against the teacher found her allegations to be true (The Daily Star, December 24, 2006). Transcripts of the text messages sent to the student were obtained and records of how many calls were made to her and at what time were gathered from the phone company. The teacher, Assistant Professor Golam Mostafa, was eventually dismissed from his duties. Just before this, a teacher of the BBA department resigned over allegations of sexual harassment. Authorities of Psychology Department at Dhaka University (DU) temporarily relieved a teacher of all kinds of academic activities in the department for his alleged involvement in sexually harassing a female student of the same department. The student along with her father submitted a memorandum to the Vice-Chancellor of Dhaka University accusing the teacher of sexual harassment. (The Daily Star May 22, 2008).

An eminent woman Professor Dilara Chowdhury of Jahangirnagar University made a study and published a book on "Sexual Harassment of

5

Bangladeshi Women at Work Place". In the book she states that there being no law on sexual harassment in Bangladesh to date Bangladesh women are exposed to sexual harassment randomly. Eve-teasing can be as cruel and as violent as physical assaults. Young women like Simi Banu of Narayanganj,

Farjana Afrin Rumi of Khulna, Rumi of Fatikchari and Trisha of Gaibandha had taken their lives to escape the relentless sexual harassment by young loitering hoodlums. Her study reveals the acuteness and seriousness of the problem.

We would like to refer to a few case studies made by Professor Dilara Chowdhury in her book, “Sexual Harassment of Bangladesh Women at Workplace” (Annexure-F to the Writ Petition) as under:

The International Labour Organization (ILO) report of 2001 indicated that “certain groups of women workers tend to be at greater risk of being subjected to sexual harassment notably girls and young women in maledominated occupation or training institutions, and more generally in situations where large numbers of women are supervised by a small number of men who are in position of authority. This could not be more applicable to any other sector than the Ready-Made Garment (RMG) industries of Bangladesh. There are in all 3700 RMG industries in the country. Most are located in the capital city of Dhaka. About twenty lac workers, of which 80% are female are involved in this sector. The organizational structure, culture, job situation, and the power relationship are such that women workers remain more or less at the mercy of the management, which is almost 100% male. The females are at the lowest rung of the hierarchy with high job insecurity.

6

Case Study from Garments Sector:

Golapi is 18 years old. She is unmarried and has been working in a garment factory for three years. She became the victim of sexual harassment by the manager and one of the supervisors of the factory. The supervisor would touch her shoulder and back while passing by her station. At times, he would bend over her and put his hand on her shoulder and try to reach her bosom. Golapi had no where to go as the manager himself was also the tormentor who would make comments about her figure and appearance. He often commented in her presence that he would like to have her.

Subsequently, Golapi was given night shift duty. As usual just like the previous five days she was on night shift duty when she was called by the supervisor into a room where the manager was also present. Both the supervisor and the manager tried to rape her. While the supervisor grabbed her from behind and gagged her, the manager tried to tear her clothes off. At one stage she started screaming and cried for help. When she tried to break free and screamed the manager attempted to choke her with the help of a shirt. She started bleeding in the mouth because of choking. She was taken to the hospital in almost unconscious condition. Salaries of both manager and supervisor of that particular month had been withheld by the owner as a

punishment indeed.

Media

Parveen is a thirty years old unmarried young woman who has been working as reporter for a vernacular daily. The environment of the organization, according to Parveen is prone to sexual harassment. She herself

7

has become victim of sexual harassment in her organization and mostly it was done by her male colleagues. On many occasions, she faced unwanted touch from her male colleague but she tolerated such male advance mainly for a number of reasons: lack of sexual harassment policy and sexual grievance procedure, existing gender ideology, patriarchal socialization and the fact that the incidents were made to look like accidental one. Sexist comments like “You are beautiful and you have enormous sex appeal” have been common. Although she found these male behaviours demeaning, her male colleagues seem to be quite oblivious about the impact of such language and physical gestures. What was particularly bothersome was when she became the victim of persistent sexual harassment by one of her colleagues. He would leer at her and touch her in subtle way. On one occasion, he told her that he found her very appealing and would like to have a special relationship with her. She got angry and rebuked him and also told him to get lost. Next day, during lunch she was looking for her purse in her handbag and while fumbling she found a strip of birth control pills. She was shocked and as she lifted her face she found her tormentor sitting right across the room who was looking at her with a sinister smile on his face. Parveen fought back her tears and simply walked out of the room. She felt absolutely helpless.

Non Government Organization (NGO)

Sima has been working for twenty years. She reported that male/female ratio is lopsided and the competition is uneven because of social condition and the way a girl child is treated from her birth. She has been a member of the Gender Committee for seven years and finds that crude harassment is much less than before, but it still occurs. She narrated two rape incidents that

8

occurred at the Field Office. In one case, Selina who was base line worker in the Field Office used to get harassed by her supervisor. The supervisor, on various occasions, used to touch her and brush his body against her. One day she got held up because of rain and had to wait in supervisor’s office room. The supervisor raped her. In another case a rape incident took place in Comilla Field Office where a trainee was raped by the supervisor. Both incidents took place in mid-1990s before the adoption of the sexual harassment policy but upon complaints both supervisors lost their jobs.

However, it is to be noted that even after the adoption of the policy between 1997 and 2002 as many as five rape cases have been reported to the Gender Unit of Human Rights.

Academia

The female Professor Mahjabin is also a victim of character assassination propaganda through leaflet distribution. The professor is young, outspoken and has an excellent academic background. In traditional Bangladesh society some one like her is not usually looked upon kindly. In 1998, she committed the 'mistake' by attending a meeting that was arranged to discuss the matter of the male faculty member who was facing an allegation of rape of a female student by him. The leaflet made comment about Professor Mahjabin's personal life and carried on her character assassination alleging that she had an extra-martial affairs with one of the male member of the faculty. It is to be noted that in Bangladesh culture character assassination of woman to put her in her 'proper place' is very common. In a society where great emphasis is given on woman's chastity and where her standing within the family and society depends on it, character

assassination affects her in multifarious ways. She loses her dignity, her reputation and value as a woman not only within her immediate family like her husband and children but also within her extended family and in-laws family. She is put to shame to an extent that she gets psychologically shattered. In case of Professor Mahjabin, the perpetrators tried to do exactly the same. They did not stop at leaflet distribution. They also made phone calls to her thirteen years old son and e-mails to her husband. The harassment continued for a long time. She was harassed to a point that her professional life got affected [..].

There are as many as nineteen (19) respondents on whom notices were served by a special messenger of the Court.

Respondent No. 3, Ministry of Women and Children represented by its Secretary entered appearance by filing power but did not file any affidavit-inopposition.

Mr. Rajik Al-Jalil, learned Deputy Attorney General appeared on behalf of respondent No. 3. Respondent No. 7, the Vice-Chancellor of Dhaka University filed affidavit-in-opposition. The case of this respondent is that the University of Dhaka has not been made party and that only impleading the Vice-Chancellor as respondent No. 7 is not enough and as such the present Writ Petition is not maintainable and that respondent No. 4, the Ministry of Education represented by its Secretary can take effective steps in this regard. Subsequently, the University of Dhaka was added as respondent No. 9 along

with others and a supplementary Rule Nisi was issued on 27.10.2008. But none of the added respondents entered appearance. At the hearing, even the learned Advocate for respondent No. 7 was not present.

10

Mrs. Faujia Karim, learned Advocate for the petitioners, submits that the suffering of the women at their workplaces and educational institutions knew no bounds owing to the absence of any law in this field.

Mr. Rajik Al-Jalil, learned Deputy Attorney General, submits that there are many laws in the country for protecting the women including Nari-OShisu Nirjatan Daman Ain and as such, no new guidelines are necessary in this regard.

Mr. Mahmudul Islam, the learned *amicus curiae*, submits that it is the constitutional obligation of the Government to enact law to protect the women at their workplaces and educational institutions in order to preserve their fundamental rights enshrined in the Constitution.

He further submits that this constitutional Court is competent to give directives in the form of guidelines under article 111 of the Constitution till legislation is made by the Parliament in this regard.

Ms. Sara Hossain and Mr. Probir Neogi learned Advocate appearing as an intervenors, submit that without any further delay directives in the form of guidelines should be formulated to protect the women at their workplaces and educational institutions.

We have considered the Writ Petition, the supplementary affidavits and the annexures thereto.

We have already discussed some of the harrowing tales of repression and sexual abuse on women at their workplaces, educational institutions and other Government and Non-Government Organizations.

Sub-article (1) of article 19 of the Constitution provides that the State shall endeavour to ensure equality of opportunity to all citizens.

11

Article 10 of the Constitution provides that steps shall be taken to ensure participation of women in all spheres of national life which is not possible unless we can put a stop to sexual harassment. Such participation cannot be ensured unless they are protected from this flagrant and pervasive vice.

Article 26 occurring in the chapter of fundamental rights states that all citizens are equal before the law and are entitled to equal protection of law.

Article 29 occurring in the same chapter states, amongst others, that there shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic and that no citizen shall, on the

grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against, in respect of any employment or office in the service of the Republic. Sub-article (2) of article 28 specifically provides that women should have equal rights with men in all spheres of the State and of public life. Sub-article (4) of article 28 provides that nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.

Article 31 provides, amongst others, that to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

Article 32 provides that no person shall be deprived of life or personal liberty save in accordance with law.

12

The fundamental rights guaranteed in chapter III of the Constitution of Bangladesh are sufficient to embrace all the elements of gender equality including prevention of sexual harassment or abuse. Independence of judiciary is an integral part of our constitutional scheme. The international conventions and norms are to be read into the fundamental rights in the absence of any domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction to interpret municipal law in conformity with international law and conventions when there is no inconsistency between them or there is a void in the domestic law.

Protection from sexual harassment and right to education and work with dignity is universally recognised as basic human rights. The common minimum requirement of these rights has received global acceptance. Therefore, the International Conventions and norms are of great significance in the formulation of the guidelines to achieve this purpose.

The responsibility of this Court under article 102 of the Constitution for the enforcement of the fundamental rights enumerated in chapter III of the Constitution in the absence of legislation must be viewed along with the role of judiciary envisaged in the “Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region [1995] CCJA PRes (19 August 1995)”. Those principles were accepted by the Chief Justices of the Asia and the Pacific including the then Hon’ble Chief Justice of Bangladesh Mr. Justice A.T.M Afzal, at Beijing in 1995. Those principles represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. “The

Objectives of the Judiciary” mentioned in the Beijing Statement of Principles (as amended at Manila, 28 August 1997) are:

“10. The objectives and functions of the judiciary include the following:

- (a) To ensure that all persons are able to live securely under the Rule of Law;
- (b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
- (c) To administer the law impartially among persons and between persons and the State”.

On 18.8.2008, we passed an interim order in the present Rule Nisi as under:

“In this matter Rule was issued on 7.8.2008. On that date instead of passing any interim order, we directed the petitioner to serve notices upon the respondents by a special messenger of this Court at its own cost. Accordingly, notices were duly served upon the respondents. Today, Mr. Mansoor Habib, learned Additional Attorney General, appears on behalf of the respondents and submits that instead of passing any interim order the matter should be disposed of on an urgent basis after the vacation. This Court will go on vacation in two weeks’ time and reopen on 12.10.2008, and thereafter the matter may be taken up for hearing. However, considering the general implication of the issues involved in the Rule from the social perspective, we strongly feel that irrespective of the fate of the Rule some immediate initiatives may be taken by the respondents to address the social menace of sexual harassment of women at their workplace, educational institutions, and

14 elsewhere. These initiatives may include building up of awareness, consultation with women groups, various stakeholders and others. These processes should result in making effective law and proper implementation thereof. This office is directed to communicate the order to the respondents by a special messenger of this Court”.

The interim order referred to above was communicated to the respondents but no effective measures were taken to address the social menace. Meanwhile, eight months have elapsed. In this connection, it is important to mention that the University Grant Commission formulated draft guidelines, namely, “the Guidelines for Elimination of Sexual Harassment and Repression at Higher Educational Institutes, 2008” but ultimately could not adopt those guidelines for various reasons.

In February, 2008, the Government of Bangladesh in the Ministry of

Women and Children Affairs adopted “জাতীয় নারী উন্নয়ন নীতি”(“National Women Development Policy” in short, the Policy). In the first chapter of the Policy, the Government stated about its confirmation and commitment to abide by different International Conventions and other International Instruments to safeguard and uphold the rights of the women in Bangladesh. At the Millennium Summit, 2000, Bangladesh was among the 10 States to have signed the Optional Protocol of CEDAW. In chapter III of the Policy, the Government stated that strong measures were taken to remove discrimination against women and girl children. Clause 3.3 of that chapter states as under: “নারীর মানবাধিকার নিশ্চিত করার লক্ষ্যে বিদ্যমান আইন সংশোধন ও প্রয়োজনীয় নতুন আইন প্রণয়ন করা ”|

15

Clause 3.7 is as under:

গুনগত শিক্ষার সকল পর্যায়ে, চাকরিতে, কারিগরী প্রশিক্ষণে, সব পরিতোষিকের ক্ষেত্রে কর্মরত অবস্থায় স্বাস্থ্য ও নিরাপত্তায়, সামাজিক নিরাপত্তা এবং স্বাস্থ্য পরিচর্যায় নারীর সমান অধিকার নিশ্চিত করা ।

Even after adoption of the Policy in 2008, the Government is yet to enact any law to protect the women at their workplaces and educational institutes.

On December 18, 1979, **the Convention on the Elimination of All Forms of Discrimination Against Women** (in short, **CEDAW**) was opened for signature. The treaty came into force and closed for signature on September 3, 1981 with the ratification of 20 states. Since then, states that did not sign the treaty can now only accede to it. The instrument of ratification, accession, or succession is deposited with the Secretary-General of the United Nations. Bangladesh acceded to the CEDAW on 6.11.1984.

Article 11 of the Convention runs as under:

State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

Clauses (a) and (f) of Article 11 are as follows:-

- (a) The right to work as an inalienable right of all human beings;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

Article 24 of CEDAW necessary for disposal of this case is as under:

16

“State parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention”.

The general recommendation No. 19 (11th Session, 1992) of CEDAW

in this context in respect of Article 11 are:

“Violence and equality in employment:

(17) Equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment in the workplace.

(18) Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advances, sexually coloured remarks, showing pornography and sexual demands, 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 recruiting or promotion, or when it creates a hostile working environment. Effective complaints procedures and remedies, including compensation should be provided.

Specific recommendation.

(24) (f) States parties should include in their reports information about sexual harassment, and on measures to protect women from sexual harassment and other forms of violence of coercion in the workplace.”

17

Bangladesh is also a signatory to the “**Declaration on the Elimination of Violence against Women** (Resolution No. 48/104 of 20 December 1993)” which in its Article 1 states as under:

“For the purposes of the Declaration, the term “violence against women” means any act of genderbased violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercions or arbitrary deprivation of liberty, whether occurring in public or in private life.”

The framers of the Constitution were particularly impressed by the formulation of the basic rights in the **Universal Declaration of Human Rights**. If we make a comparison of Part III of the Constitution with the **Universal Declaration of Human Rights** (UDHR) we shall find that most of the rights enumerated in the Declaration have found place in some form or other in Part III and some have been recognised in Part II of the Constitution. The Declaration was followed by two Covenants-Covenant on Civil and Political Rights (ICCPR) and Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations General Assembly in December, 1966 making the rights contained in the UDHR binding on all

states that have signed the treaty, creating human rights law. Article 7 of UDHR states that all are equal before the law and are entitled without any discrimination to equal protection of the law and that all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

18

Our courts will not enforce those Covenants as treaties and conventions, even if ratified by the State, are not part of the *corpus juris* of the State unless those are incorporated in the municipal legislation. However, the court can look into these conventions and covenants as an aid to interpretation of the provisions of Part III, particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution. *In the case of H.M. Ershad v. Bangladesh, 2001 BLD (AD) 69*, it is held: “The national courts should not straightway ignore the international obligations which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments.” In the case of *Apparel Export Promotion Council v. Chopra, AIR 1999 SC 625* it is held, “In cases involving violation of human rights, the courts must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field.”

Article 25 occurring in Part II (Fundamental Principles of State Policy) of the Constitution states, amongst others, that the State shall base its international relations on the principles of respect for international law and the principles enunciated in the United Nations Charter.

As stated earlier equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment at the workplace and educational institutions.

19

Sexual abuse is a global problem as evidenced by the discussions made below:

In Micari V. Mann, 481 N.Y.S.2d967 (Sup, Ct. 1984) a reported case on sexual harassment in U.S.A, states that sexual harassment is an abuse of trust at education institutes being *in loco parentis*.

Reliance may be made on the case of *Janzen and Govereau Vs. Platy Enterprise Ltd.* (Supreme Court of Canada) reported in the *International Women's Rights Cases at page-451*.

In the above case, Dainna Janzeen made a complaint to the Human

Rights Commission of Manitoba against Platy Enterprise Ltd, its owners agents and servants, Pharos Restaurant. She was employed as a waitress at the Pharos Restaurant, located at 9 St. Mary's Road, from August to October, 1982. During her period of employment at the restaurant, she was continuously sexually harassed by Tommy, the cook. On many occasions Tommy grabbed her legs and touched her knee, bum and crotch area. When she resisted his sexual advances, he told her to shut up or he would fire her. He began to yell at her in front of staff and criticize her work. Five days later on 29 January 1983, Tracy Govereau made a complaint of a similar nature against same parties alleging sexual harassment by "Tommy, the cook". The case went upto the Supreme Court of Canada. Chief Justice Dickson who delivered the judgment of the Court held that sexual harassment in the workplace might broadly be 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. When sexual harassment occurred in the workplace, it was an abuse of both economic and 20

sexual power. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacked the dignity and self-respect of the victim both as an employee and as a human being.

"Law Relating to Sexual Harassment AT Work" 1st Edition-2007 by Mr. Alok Bhasin included a foreword by Mr. Justice J.S. Verma, Former Chief Justice of India and Former Chairman, National Human Rights Commission.

Mr. Alok Bhasin referred to a definition of sexual harassment at page Nos. 9 and 10, which was mentioned in the decision in the Canadian case of *Canadian Pacific Ltd. and B.M.W.E. (Parker)* as under:

"While physical touching and the making of sexual demands may be the crudest form of sexual harassment, giving rise to the earliest complaints and court or tribunal decisions, experience has shown that the concept of sexual harassment can be much broader. Innuendo by words or gestures, unwelcome staring, sexually-abusive jokes or other language, the unwelcome displaying of pornography and the writing of graffiti on workplace walls which singles out or demeans individual employees are all now generally recognised as forms of sexual harassment, even though they may not involve an abuse of power or the making of sexual demands by the member of one sex upon a member of the other sex".

The above quotation was extracted by Malone, J. in *David Dotchin v. Saskatchewan (Worker's Compensation Board)*, *Queen's Bench, Judicial*

Centre of Regina, Canada, 2002 SKQB 279.

21

That book at page 12 also adverted to a Canadian case, *David Dotchin V. Saskatchewan (Workers' Compensation Board), Queen's Bench, Judicial Centre of Regina, Canada, 2002 SKQB 279* in which Malone, J. held that the plaintiff's conduct, which involved "leering, looking at the bodies of female employees in an inappropriate manner and making sexually suggestive comments" amounted to 'sexual harassment'.

In its landmark judgment, the Supreme Court of India in the case of *Vishaka and Others Vs. State of Rajasthan, AIR 1997 SC 3011*, formulated guidelines to protect women at their workplaces by defining sexual harassment and prescribing procedures for redress. The concluding portion of the judgment runs as under:

"Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These Writ Petitions are disposed of, accordingly".

In the above case the learned Solicitor General for the Union of India helped the Court in formulation of the guidelines.

In the backdrop of the pronouncement of the above judgment, the National Commission For Women which is a statutory and autonomous body constituted in 1990 by the Government of India formulated the Code of Conduct for workplaces putting down the Supreme Court Guidelines in 1998. The Commission circulated the Code widely amongst all the Central Ministries and Government Departments. The Commission also circulated it

22

to all State Commissioners for women, NGOs and apex bodies of the Corporate Sector and to the Media. (Annexure-H to the Writ Petition)

While analyzing the definition of sexual harassment in the case of *Vishaka and Others Vs. State of Rajasthan and Others*, the Supreme Court of India in the case of *Apparel Export Promotion Council Vs. A.K. Chopra, AIR 1999 SC 625* has held 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.

In the light of the judgments pronounced by the Supreme Court of India in the cases of *Vishaka and Others Vs. State of Rajasthan and Others* and *Apparel Export Promotion Council Vs. A.K. Chopra*, Jawharlal Nehru University adopted “Rules and Procedures of the Gender Sensitization Committee against Sexual Harassment (GSCASH) (Annexure-M to the supplementary affidavit dated 19.4.2009).

In the case of *Hira Nath Misra Vs. Principal Rajendra Medical College*, AIR 1973 SC 1260, thirty-six female students of a medical college filed a complaint with the principal regarding the misbehaviour of certain boys of the college in the girls’ hostel. The Enquiry Committee, constituted by the principal, recorded the statement of the girls in the absence of the boys, and found them guilty. They were subsequently served expulsion orders. This

23
was challenged by the boys on the ground that evidence was taken in their absence, and that they were not allowed to cross-examine the girls. Even the names of girls were not disclosed to them considering the safety of the girls. The expulsion was upheld upto the Supreme Court.

Directives in the form of Guidelines:

In the backdrop of our discussion and observations made above, and in view of the inadequacy of safeguards against sexual abuse and harassment of women at work places and educational institutions whereby noble pledges of our Constitution made in so many articles to build up a society free from gender discrimination and characterized by gender equality are being undermined everyday in every sphere of life, we are inclined to issue certain directives in the form of guidelines as detailed below to be followed and observed at all work places and educational institutions till adequate and effective legislation is made in this field. These directives are aimed at filling up the legislative vacuum in the nature of law declared by the High Court Division under the mandate and within the meaning of article 111 of the Constitution.

1. Extent. These guidelines shall apply to all work places and educational institutions in both public and private sectors within the territory of Bangladesh.

2. Aims and objectives.

The aims and objectives of these guidelines include-

- (a) to create awareness about sexual harassments;
- (b) to create awareness about the consequences of sexual offences;
- (c) to create awareness that sexual harassment is punishable offence.

24

3. Duties of employers and authorities.

Since it is the duty of all citizens and public servants to observe the Constitution and the laws, and since the Constitution of the Republic in several articles ensures gender equality and the State's firm and consistent stand against all sorts of discrimination on the ground of sex, and since the Constitution ensures equal rights of women with men in all spheres of the State and public life and contemplates equality before law and right to equal protection of law, it shall be the duty of the employers and other responsible persons in work places, and the authorities of all educational institutions to maintain an effective mechanism to prevent or deter the commission of offences of sexual abuse and harassment, and to provide effective measures for prosecution of the offences of sexual harassment resorting to all available legal and possible institutional steps.

4. Definition.

i) **Sexual Harassment** includes a.

Unwelcome sexually determined behaviour (whether directly or by implication) as physical contact and advances;

b. Attempts or efforts to establish physical relation having sexual implication by abuse of administrative, authoritative or professional powers;

c. Sexually coloured verbal representation;

d. Demand or request for sexual favours;

e. Showing pornography;

f. Sexually coloured remark or gesture;

g. Indecent gesture, teasing through abusive language, stalking, joking having sexual implication.

25

h. Insult through letters, telephone calls, cell phone calls, SMS, pottering, notice, cartoon, writing on bench, chair, table, notice boards, walls of office, factory, classroom, washroom having sexual implication.

i. Taking still or video photographs for the purpose of blackmailing and character assassination;

j. Preventing participation in sports, cultural, organizational and academic activities on the ground of sex and/or for the purpose of sexual harassment;

k. Making love proposal and exerting pressure or posing threats in case of refusal to love proposal;

l. Attempt to establish sexual relation by intimidation, deception or false assurance.

Such conduct mentioned in clauses (a) to (l) can be humiliating and may constitute a health and safety problem at workplaces or educational institutions; it is discriminatory when the woman has reasonable grounds to

believe that her objection would disadvantage her in connection with her education or employment in various ways or when it creates a hostile environment at workplaces or educational institutions.

ii) **Concerned Authority** means an authority of any educational institution or work place in both public and private sectors, which is authorised under the relevant disciplinary rules to take action in case of misconduct.

iii) **Disciplinary Rules** mean rules prescribed by any Act or Ordinance or any other sub-ordinate legislations and include any rules framed for

26
maintenance of discipline in any public or private institutions, organisations and work places.

5. Creating awareness and public opinion.

a. In order to deter and eliminate sexual harassment and torture, and to create a safe environment for work and education, the employers/ management of all workplaces and authorities of all educational institutions will attach prime importance to the publicity and publication against sexual harassment and gender discrimination. There must be sufficient orientation before the formal classes start for a new session in educational institutions, and monthly, half yearly orientation in all workplaces and institutions;

b. There must be arrangement for proper counselling for the concerned persons, if necessary;

c. Awareness of the rights of female students and employees guaranteed and conferred by the Constitution and the statutes should be created by notifying in simple words the relevant provisions of the Constitution and the statutes;

d. The educational institutions and the employers will maintain regular communication and effective consultation with the administrative authorities to create awareness among the personnel in law enforcing agencies in this regard;

e. To prepare and publish booklets containing these guidelines and provisions of the Constitution and statutes regarding gender equality and sexual offences;

f. To create awareness regarding fundamental rights guaranteed in the Constitution;

27

6. Preventive steps.

All employers and persons in charge of work places and authorities of all educational institutions shall take effective measures for prevention of sexual harassment. To discharge these obligations, they shall take, amongst

others, the following steps:

- a. Prohibition of sexual harassment and sexual torture as defined in clause 4 above should be notified, published and circulated widely and in an effective manner;
- b. Constitutional and statutory provisions against gender discriminations and sexual harassment and punishment for the offences of sexual harassment and torture should be widely circulated;
- c. To ensure that there is no hostile environment towards women at workplaces and educational institutions, and to engender confidence and trust in women workers and students that they are not placed in a disadvantaged position in comparison to their male colleagues and fellow students.

7. Disciplinary Action:

Appropriate disciplinary action must be initiated in case of any falling within the definition of sexual harassment and torture in clause 4 of these guidelines.

8. Complaints:

Where such acts do not constitute misconduct under the disciplinary rules, an appropriate and effective mechanism must be evolved at the workplaces, and educational institutions, in both public and private sectors for record and redress of the complaint made by the victim. The following measures must be included in the complaint mechanism.

28

- (a) It must be ensured that the identity of the complainant and also that of the accused will not be disclosed until the allegation is proved;
- (b) Security of complainant will be ensured by the Concerned Authority;
- (c) Complaint can be lodged by the victim or through her relatives, friends or lawyers, and it can be sent by mail also;
- (d) A complainant can file the complaint with a female member of the Complaint Committee separately;
- (e) The complaint will be lodged with the Complaint Committee to be constituted as provided in clause 9 below.

9. Complaint Committee.

- (a) In all work places and educational institutions in both public and private sectors, the Concerned Authority will constitute a Complaint Committee in order to receive complaints, and to conduct investigation and make recommendations.
- (b) The Complaint Committee will have minimum five members and majority of the members will be women. The head of the Complaint Committee should be a woman, if available.

(c) The Complaint Committee should have at least two members from outside the organization concerned, preferably from organizations working on gender issues and sexual abuse.

(d) The Complaint Committees will submit annual reports to the Government on the compliance of these guidelines.

29

10. Procedure of the Complaint Committee. Normally the complaint has to be lodged with the Complaint Committee within 30 working days of the occurrence. To verify the complaint the Complaint Committee will:

i). In case of minor harassment, if it is possible, the Complaint Committee shall dispose of the complaint with the consent of the parties involved and shall report to the Concerned Authority of the educational institution or work place in public or private sector, as the case may be.

ii) In all other cases the Complaint Committee shall investigate the matter.

iii) The Complaint Committee will have the power to send registered notice by mail to the parties and the witnesses, conduct hearing, gather evidence, and examine all relevant papers. In this type of complaint, apart from oral evidence emphasis should be placed on circumstantial evidence. To conduct the work of the Complaint Committee effectively the related office of the educational institutions and workplaces in both public and private sectors will be bound to extend any cooperation which is requested from them. The Complaint Committee will keep the identities of the complainant/s confidential. While recording the testimony of the complainant/s any question or behaviour which is intentionally base, insulting or harassing should be avoided. The testimony must be recorded in camera. If the complainant wants to withdraw the complaint or stop the investigation then the reason behind this has to be investigated and mentioned in the report.

The Complaint Committee shall submit the investigation report with recommendation within 30 working days to the Concerned Authority of the

30 educational institution or work place, as the case may be. The period of 30 days may be extended up to 60 days where it is found necessary.

If it is proved that a false complaint has been filed intentionally then a report will be submitted to the Concerned Authority recommending appropriate action for the complainant/s. The Complaint Committee will take decisions on the basis of the view expressed by the majority of its members.

11. Punishment:

The Concerned Authority may suspend temporarily the accused person (other than students) and in case of students, may prevent them from

attending their classes on the receipt of the recommendation of the Complaint Committee. If the accused is found guilty of sexual harassment, the Concerned Authority shall treat it as misconduct and take proper action according to the disciplinary rules of all work places and the educational institutions in both public and private sectors within 30 (thirty) days and/or shall refer the matter to the appropriate Court or tribunal if the act complained of constitutes an offence under any penal law.

We direct that the above guidelines will be strictly followed and observed in all educational institutions and work places in both public and private sectors until adequate and appropriate legislation is made in this field. In this judgment the expression, “woman” has been used to include a female of any age as defined in the Nari-O-Shisu Nirjaton Daman Ain, 2000. In the result, the Rule and the supplementary Rule are made absolute with the directives in the form of guidelines described hereinbefore.

31

We would like to record our note of appreciation to Mr. Mahmudul Islam who assisted the Court as *amicus curiae* by rendering valuable assistance in the performance of the difficult task in public interest.

There is no order as to costs.

Quamrul Islam Siddiqui, J

I agree.