

# INDIAN'S LAWS ON PREVENTION OF SEXUAL HARASSMENT AT WORK PLACE

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## REASONS & OBJECTS FOR ENACTING THE POSH ACT,2013

1. The various Acts have defined the definition of "sexual harassment at work place" but finally the Hon'ble Supreme Court has decided the principles of law in respect of prevention of 'Sexual Harassment at workplace" in matter of **Vishaka v. State of Rajasthan 1997 (6) SCC 241** based on an Article 19 (1) g of the Indian Constitution which affirms the right of all citizens to be employed in any profession of their choosing or to practice their own trade or business. Vishaka v. State of Rajasthan (supra) established that actions resulting in a violation of one's rights to 'Gender Equality' and 'Life and Liberty' are in fact a violation of the victim's fundamental right under Article 19 (1) g. The case ruling establishes that sexual harassment violates a woman's rights in the workplace and is thus not just a matter of personal injury. This case ruling had issued Vishaka guidelines under Article 32 of the Constitution of India. The Supreme Court had made it mandatory that these had to be followed by all organizations until a legislative framework on the subject has been drawn-up and enacted. However, the legislative void continued and the Supreme Court in **Apparel Export Promotion Council v. A.K Chopra ((1999) 1 SCC 759)** reiterated the law laid down in the Vishaka Judgment. Dr. Medha Kotwal of Aalochana (an NGO) highlighted a number of individual cases of sexual harassment stating that the Vishaka Guidelines were not being effectively implemented. Converting the letter into a writ petition, the Supreme Court took cognizance and undertook monitoring of implementation of the Vishaka Guidelines across the country. The Supreme Court asserted that in case of a non-compliance or non-adherence of the Vishaka Guidelines, it would be open to the aggrieved persons to approach the respective High Courts.

### **Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013**

2. On the directions of the Hon'ble Supreme Court , the Union of India framed and passed the preventive Act so-called "[Sexual Harassment of Women at Workplace \(Prevention, Prohibition and Redressal\) Act, 2013](#) ('Act')" and the underlying rules ([Sexual Harassment of Women at Workplace \(Prevention, Prohibition and Redressal\) Rules, 2013](#)) framed there under which are , now, applicable law in India to prevent and address instances of sexual harassment of women employees only. The Act was inserted with the twin intention of checking the issue of sexual harassment of women against women and creating a conducive and safe environment at workplace. The said Act was inserted based on the Hon'ble Supreme Court guide-lines in the matter of **Vishaka and Others Vs. State of Rajasthan & Others , 1997 (6) SCC 241**.

The reasons and object of the Act provides that no women shall be subjected to sexual harassment at 'workplace' - regardless of the nature of business being conducted or size of workforce. It is noteworthy that the Act covers actions of employees not just within the 'workplace', but also extends to any place visited by an employee in course of her employment. The Act provides protection to all women employees, who may be employed by the organization (whether directly or indirectly) or may be visiting the 'workplace'.

- 3.** Sexual harassment in workplace is a serious irritating factor that renders women's involvement in works unsafe and affects right to work with dignity. It is unwelcome verbal, visual or physical conduct of a sexual nature that is severe or pervasive and affects working conditions or creates a hostile work environment. Generally sexual harassment is a sexually oriented conduct that may endanger the victim's job, negatively affect the victim's job performance or undermine the victim's personal dignity. It may manifest itself physically or psychologically. Its milder and subtle forms may imply verbal innuendo, inappropriate affectionate gestures or propositions for dates and sexual favours. However it may also assume blatant and ugly forms like leering, physical grabbing and sexual assault or sexual molestation.
- 4.** To fit in the concept of sexual harassment the relevant conduct must be unwelcome. That is unwelcome to the recipient of that conduct. Conduct is not sexual harassment if it is welcome. So in order to determine if the conduct was welcome or unwelcome, Courts would naturally look at the complainant's reaction at the time the incident occurred and assess whether the complainant expressly, or by his or her behaviour demonstrated that the conduct was unwelcome. If the evidence shows that the complainant welcomed the conduct the complaint of sexual harassment would fail. For this reason, it is important to communicate (either verbally, in writing, or by your own actions) to the harasser that the conduct makes you uncomfortable and that you want it to stop.
- 5.** However, before 1997, women experiencing sexual harassment at workplace had to lodge a complaint under Section 354 of the Indian Penal Code that deals with the criminal assault of women to outrage women's modesty, and Section 509 that punishes an individual or individuals for using a word, gesture or act intended to insult the modesty of a woman. These sections left the interpretation of 'outraging woman's modesty' to the discretion of the police officer. The entire scenario changed in 1997 with the introduction of *Vishaka* guidelines.

## Supreme Court guidelines on sexual harassment

6. As stated above the Hon'ble Supreme Court in the matter of [Vishaka v. State of Rajasthan \(supra\)](#) for the first time recognized, acknowledged and explicitly defined sexual harassment as an – unwelcome sexual gesture or behaviour aimed or having a tendency to outrage the modesty of woman directly or indirectly.

Defining sexual harassment as an act aimed towards gender based discrimination that affects women's right to life and livelihood, the Supreme Court developed broad based guidelines for employers. This mandatory guidelines known as [Vishaka guidelines](#) are aimed towards resolution and prevention of sexual harassment. These guidelines bring in its purview all employers in organized and unorganized sectors by holding them responsible for providing safe work environment for women.

The *Vishaka* guidelines apply to all women whether students, working part time or full time, on contract or in voluntary/honorary capacity including domestic-helper etc. Expressly prohibiting sexual harassment at work place these legally binding guidelines put a lot of emphasis on appropriate preventive and curative measures. (The guidelines include the following as acts of sexual harassment: Physical contact and advances, Showing pornography, a demand or request for sexual favours, Any other unwelcome physical, verbal/non-verbal – such as whistling, obscene jokes, comments about physical appearances, threats, innuendos, gender based derogatory remarks, etc.)

### Some of the important guidelines are:

- The onus to provide a harassment free work environment has been laid down on the employers who are required to take the following steps:
- Employers must form a Complaints Committee.
- Express prohibition of sexual harassment in any form and make the employees aware of the implications through in house communication system / posters / meetings.
- Must include prohibition of sexual harassment with appropriate penalties against the offender in Conduct rules.
- Prohibition of sexual harassment in the standing orders under the Industrial Employment (Standing Orders) Act, 1946 to be included by private employers.
- Provision of appropriate work conditions in respect of- work, leisure, health, hygiene to further ensure that there is no hostile environment towards women.
- No woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment.
- Victims of sexual harassment to be given an option to seek transfer of the perpetrator or their own transfer.

Thus the *Vishaka* guidelines stipulated that all organisations would form a complaints committee to look into any such allegation. It would be headed by a woman employee and not less than half of its members would be women. All complaints of sexual harassment by any woman employee would be directed to this committee. The committee would advise the

victim on further course of action and recommend to the management the course of action against the person accused of harassment.

However in [Medha Kotwal Lele v Union of India](#) coordinator of Aalochana, a centre for documentation and research on women and other women's rights groups, together with others, petitioned the Court highlighting a number of individual cases of sexual harassment and arguing that the *Vishaka* Guidelines were not being effectively implemented. In particular, the petitioners argued that, despite the guidelines, women continued to be harassed in the workplace because the *Vishaka* Guidelines were being breached in both substance and spirit by state functionaries who harass women workers via legal and extra legal means, making them suffer and by insulting their dignity.

The Court stated that the *Vishaka* Guidelines had to be implemented in form, substance and spirit in order to help bring gender parity by ensuring women can work with dignity, decency and due respect. It noted that the *Vishaka* Guidelines require both employers and other responsible persons or institutions to observe them and to help prevent sexual harassment of women. The Court held that a number of states were falling short in this regard. It referred back to its earlier findings on 17 January 2006, that the *Vishaka* Guidelines had not been properly implemented by various States and Departments in India and referred to the direction it provided on that occasion to help to achieve better coordination and implementation. The Court went on to note that some states appeared not to have implemented earlier Court decisions which had required them to make their legislation compliant with the *Vishaka* Guidelines.

### **Comprehensive piece of legislation : POSH Act,2013**

On 23rd April 2013, the legislature finally brought into force a comprehensive legislation dealing with the protection of women against sexual harassment at workplace by enacting "The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

To achieve the aforementioned objectives of the aforesaid Act , the Act mandates employers to, inter-alia, formulate a policy against harassment ("Policy") and constitute a body to administer the policy. All employers, irrespective of the number of employees, are mandated to adopt a policy against sexual harassment at workplace. It is worthwhile to note here that although the Act extends protection only to women employees, employers are at liberty to keep it gender neutral (i.e. by extending protection to all employees). Under the Act, an employer of a 'workplace' which employs 10 (ten) or more than 10 (ten) employees is required to constitute an 'internal complaints committee' ("ICC"). Complaints in 'workplaces' with less than 10 (ten) employees are required to be taken up at a local complaints committees ('LCC") that are set up by the local area administration. The Policy document sets out the organization's intent in discouraging harassment and disseminates the rights of employees.

Any aggrieved women may approach the ICC with her complaint either directly or through her relative/co-worker/friend, etc. The employer, albeit through the ICC, will be mandated

to conduct an impartial and independent inquiry and provide its findings to the employer. To discharge its powers effectively, the ICC is armed with the ability to summon respondent or witnesses, record statements and examine documents. ICC is within its rights to, inter alia, recommend interim measures to the employer, viz. transfer of the aggrieved employee or the respondent, granting leave to the aggrieved employee or re-assignment of portfolios.

The ICC proceedings are required to be conducted in a time-bound and confidential manner. Recent judicial pronouncement in the matter of **Maersk Line India Private Limited v RP Television (India) Private Limited (CS No 183 of 2016)** cast an obligation of maintaining confidentiality on all parties - including the aggrieved employee.

Where the allegations against the person are established, the ICC may recommend proportionately severe actions to the employer, including, amongst others, requiring concerned person to issue written apology; withholding promotion/increment, issue censure or terminate employment of the concerned person or to deduct wages of the concerned person to compensate the aggrieved employee. The Act has also laid down adequate mechanisms for punishment of false/malicious complaints and false evidence.

If an employer fails to constitute an ICC or does not comply with the requirements prescribed under the Act, a monetary penalty of up to INR 50,000 may be imposed. A repetition of the same offence could result in imposition of twice the punishment and/or cancellation/revocation of any statutory business licenses or registrations.

### **Other Silent feature of the Act,2013**

The Act has in fact sought to widen the scope of the guidelines issued by the Supreme Court by bringing within its ambit (amongst other things) a "[domestic worker](#)" ([Section 2e](#)) defined to mean a woman who is employed to do the household work in any household for remuneration whether in cash or kind, either directly or through any agency on a temporary, permanent, part time or full time basis, but does not include any member of the family of the employer.

The Act has defined "sexual harassment" ([Section 2n](#)) to include any one or more of the following unwelcome acts or behaviour (whether directly or by implication) namely: (i) physical contact and advances; (ii) a demand or request for sexual favours; (iii) making sexually coloured remarks; (iv) showing pornography; or (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature. Further, the following may also amount to sexual harassment: (i) implied or explicit promise of preferential treatment; (ii) implied or explicit threat of detrimental treatment; (iii) implied or explicit threat about present or future employment status; (iv) interference with work or creating an intimidating or offensive or hostile work environment; or (v) humiliating treatment likely to affect health or safety.

The term 'employee' ([Section 2f](#)) includes regular, temporary, ad hoc, daily wage employees and persons who are working on a voluntary basis i.e. without remuneration. The term also includes contract workers, probationers, and trainees. The Act defines

“aggrieved woman” ([Section 2a](#)) to mean: (i) in relation to a workplace, a woman, of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent; (ii) in relation to a dwelling place or house, a woman of any age who is employed in such a dwelling place or house.

As per the Act workplace ([Section 2o](#)) includes: (i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society; (ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service; (iii) hospitals or nursing homes; (iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto; (v) 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; (vi) a dwelling place or a house.

### **Procedure for entertaining Complaint under the Act,2013**

The Act contemplates the constitution of [Internal Complaints Committee \(“ICC”\)](#) (Sec. 4) at the work place and Local Complaints Committee (“LCC”) at district and block levels (Sec. 6). A District Officer (District Collector or Deputy Collector) shall be responsible for facilitating and monitoring the activities under the Act

Every workplace employing 10 or more employees is required to constitute an ICC. The ICC is required to consist of at least four members, and its presiding officer is required to be a woman employed at a senior level. Provisions have been made in case no senior woman employee is available, to nominate a woman presiding officer from another office, administrative unit, workplace, or organisation. Further, one half of the members must be women. LCCs are to be set up by the appropriate government which shall receive complaints in respect of establishments that do not have ICCs on account of having fewer than 10 employees and to receive complaints from domestic workers.

### **Steps involved in the Complaint Process –Empowerment?**

#### ***Step I***

A complaint is to be made in writing by an aggrieved woman within 3 months of the date of the incident. The time limit may be extended for a further period of 3 months if, on account of certain circumstances, the woman was prevented from filing the complaint. If the aggrieved woman is unable to make a complaint on account of her physical or mental incapacity or death, her legal heirs may do so.

## ***Step II***

Upon receipt of the complaint, the ICC or LCC must proceed to make an inquiry in accordance with the service rules applicable to the respondent or in their absence, in accordance with rules framed under the Act.

## ***Step III***

The inquiry must be completed within a period of 90 days. In case of a complaint by a domestic worker, if in the opinion of the LCC a prima facie case exists, the LCC is required to forward the complaint to the police to register a case under the relevant provisions of the Indian Penal Code.

## ***Step IV***

Where the ICC finds that the allegations against the respondent are proven, it must submit a report to the employer to: (i) take action for sexual harassment as a misconduct in accordance with the provisions of the applicable service rules or where no service rules exist, in accordance with rules framed under the Act; (ii) to deduct from the salary or wages of the respondent such sum as it may consider appropriate to be paid to the aggrieved woman or to her legal heirs.

## ***Step V***

The employer must act on these recommendations within 60 days.

## **Scope for Conciliation and Settlement**

Before initiating an inquiry, the ICC or LCC may, at the request of the aggrieved woman, take steps to arrive at a settlement between the parties. However, no monetary settlement can be made as the basis of such conciliation (Section 10(1))

In case the ICC or LCC is of the view that a malicious or false complaint has been made, it may recommend that a penalty be levied on the complainant in accordance with the applicable service rules (Section – 14). However, an inquiry must be also made. Mere inability to substantiate a complaint will not attract action under this provision.

## **The Duties of an Employer**

The Act makes it the duty of every employer to: a) provide a safe working environment at the workplace which shall include safety from all the persons with whom a woman comes into contact at the workplace; b) display at any conspicuous place in the workplace, the penal consequences of sexual harassment and the order constituting the ICC; c) organise workshops and awareness programmes; d) provide necessary facilities to the ICC for dealing with complaints and conducting inquiries; e) assist in securing the attendance of the respondent and witnesses before the ICC; f) make available such information to the ICC or LCC, as it may require; g) provide assistance to the woman if she so chooses to file a criminal

complaint; h) initiate criminal action against the perpetrator; i) treat sexual harassment as a misconduct under the service rules and initiate action for such misconduct; and j) monitor the timely submission of reports by the ICC.

## **Penalties**

Where the employer fails to comply with the provisions of the Act, he shall be liable to be punished with a fine which may extend to Rs. 50,000. In case of a second or subsequent conviction under this Act, the employer may be punished with twice the punishment prescribed or by cancellation of his licence or withdrawal of his registration.

## **COMPLIANCE ON THE PART OF THE ESTABLISHMENT /COMPANY**

- (i) Formation of written policy to deal such matters
- (ii) Modification of the Certified Company's Standing Orders or Service Rules of the Government Organisation by including the such provision in major misconduct clause
- (iii) Disclosure of compliance under the Sexual harassment of Women at workplace Act in the Annual Reports of Private companies now made mandatory: Ministry of Corporate Affairs amends the Companies ( accounts) Rules,2014.
- (iv) Annual Report should be submitted to the District Magistrate by 31<sup>st</sup> January .

## **IMPORTANT DECIDED CASE LAW :**

### **Guide-lines of the Hon'ble Supreme Court in respect Act,**

- 1 Vishaka and Others Vs. State of Rajasthan & Others , 1997 (6) SCC 241

### **What constitutes 'sexual harassment'?**

2. Shanta Kumar v. Council of Scientific and Industrial Research (CDIR) & Ors, Delhi High Court ((2018) 156 FLR 719)
3. K.P. Anil Rajagopal v. State of Kerela, Kerela High Court ((2018) 1 KLJ 106)
7. Gaurav Jain v. Hindustan Latex Family Planning Promotion Trust and Ors. (2015 SCC OnLine Del 11026)
8. Apparel Export Promotion Council Vs. A K Chopra , AIR SC 625

### **Filing of a complaint with the ICC or LCC**

9. Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University (2014 SCC OnLine Bom 814)
10. Shital Prasad Sharma v. State of Rajasthan and Ors. (2018 SCC OnLine Raj 1676)

11. Sarita Verma v. New Delhi Municipal Corporation & Ors, (2016 LLR 785 (2))
12. Ruchika Singh Chhabra v. Air France India and Anr. (2018 SCC Online Del 9340)
13. Shital Prasad Sharma v. State of Rajasthan and Ors. (2018 SCC OnLine Raj 1676)
14. Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University, Bombay High Court (2014 SCC OnLine Bom 814)

#### **Powers of the ICC or LCC**

15. Tejinder Kaur v. UOI (2017 SCC Online DeL 12221)
16. *Confidential* v. Indian Institute of Corporate Affairs (2018 SCC Online Del 6801)
17. Ashok Kumar Singh v. University of Delhi and Ors (2017 LLR 1014)
18. Vidya Akhave v. Union of India, Department of Women & Children & Ors (2017 LLR 357)

#### **Conducting the inquiry proceedings:**

19. Tejinder Kaur v. UOI, Delhi High Court, (2017 SCC Online DeL 12221)
20. K. Hema Latha v. State of Tamil Nadu, Madras High Court, (MANU/TN/1414/2018)
21. Sibu v. Air India Limited, ((2016) 2 KLJ 434)
22. Gaurav Jain v. Hindustan Latex Family Planning Promotion Trust and Ors. (2015 SCC OnLine Del 11026)
23. Shital Prasad Sharma v. State of Rajasthan and Ors. (2018 SCC OnLine Raj 1676)

#### **Employers' rights and territorial jurisdiction of the courts:**

24. Mohan Kumar Singh v. Chief Manager (HRD) Central Bank of India, (2017 SCC OnLine Pat 2483)
25. Biplab Kumar Das v. IDBI Bank Ltd and Others, (2017 LLR 1148)
26. Jaya Kodate v. Rashtrasant Tukdoji Maharaj Nagpur University (2014 SCC OnLine Bom 814)

#### **Obligation for maintaining confidentiality on all parties - including the aggrieved employee.**

27. Maersk Line India Private Limited v RP Television (India) Private Limited (CS No 183 of 2016)

The above contents of this article is intended to provide a general guide-lines to the subject matter as elaborately explained . However , an expert / legal advice should be sought about your specific circumstances of the case and the same can be asked through email : [skpfdelhi@gmail.com](mailto:skpfdelhi@gmail.com) subject to the professional fee.