

## **“EMERGENCE OF THE POSH ACT & ITS FEATURES VIZ-A-VIZ VISHAKA GUIDELINES”**

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India is rapidly progressing in its developmental goals and more women are joining the workforce, resulting the sexual harassment of women at workplace is becoming increasingly prevalent in India. Sexual harassment at workplace is an extension of violence in everyday life and is discriminatory and exploitative, as it affects women’s right to life and livelihood.

These incidences of sexual harassment results in violation of the fundamental rights of a woman to equality under Articles 14 and 15 of the **Constitution of India** (hereinafter known as **“the Constitution”**) and also affecting her right to live with dignity as envisaged under Article 21 of the Constitution. Women all around the world have faced instances of sexual harassment, which may include sexual advances, and other verbal or physical harassment of a sexual nature and the same is required to be dealt with proper care as a safe and secure workplace is therefore, a woman’s legal right.

In order to curb these acts/ incidents of sexual harassment at workplace, the Ministry of Women and Child Development, Government of India, enacted the first codified legislation specifically dealing with the issues of workplace sexual harassment, i.e. **“The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013”** (hereinafter referred to as the **“POSH Act”**), which came into effect on **December 09, 2013**. Subsequently, the government of India also notified the rules under the POSH Act titled **“The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal Rules, 2013”** (hereinafter referred to as the **“POSH Rules”**). The POSH Act along with POSH Rules, collectively referred to as the **“POSH Law”**, aims to foster a safe and secure working environment for women by preventing, prohibiting and redressing the instances of sexual harassment at workplaces in India.

Thereafter in 2013 itself, an amendment has been promulgated by way of the Criminal Law (Amendment) Act, 2013 post Nirbhaya rape outrage, which has criminalized the offences such as sexual harassment, stalking, and voyeurism.

The following write-up is deliberating in detail, evolution of the law on sexual harassment in India, its developments covering various judgments/ case laws, legislative timeline of enactment of POSH Law in India and our comprehensive analysis on POSH Law, its salient features & scope, and other legal provisions applicable to the workplace sexual harassment in India.

### **LEGISLATIVE TIMELINE OF ENACTMENT OF POSH LAW IN INDIA**



#### POSH LAW: SALIENT FEATURES AND ITS SCOPE

The POSH Law is legislated based upon the guidelines and norms (hereinafter called as the **"Vishaka Guidelines"**) declared by the Hon'ble Supreme Court of India (**"Supreme Court"**)

on **August 13, 1997**, acknowledged sexual harassment at the workplace as violation of human right. However, it took a decade after the landmark judgement of **Vishaka & Ors. v. State of Rajasthan & Ors.**<sup>1</sup> (hereinafter called as “**the Vishaka Judgement**”) for the legislature to initiate the crafting of a definitive law on the workplace sexual harassment. The Vishaka Guidelines then superseded by the POSH Law in December 2013.

**Applicability:** The POSH Act extends to the whole of India<sup>2</sup> and recognizes that the sexual harassment constitutes a violation of fundamental rights of women and their right to life and live with dignity and carry on any profession, trade, or business in an environment free from sexual harassment.

**POSH Law affects all of India and is not gender neutral as it protects only women. A man who is a victim of sexual harassment at the workplace is not entitled to invoke POSH Law, rather he must rely on company policies or service rules that prohibit sexual harassment of any nature. However, many organizations have opted to make their POSH policy gender neutral in order to ensure an equal representation of the workforce. POSH Law applies to both organized and unorganized sectors**<sup>3</sup>.

**Salient features of the POSH Law:** The POSH Act provides a civil remedy to women and is in addition to other laws that are currently in force, i.e., both civil as well as criminal recourse is available to an aggrieved woman. The POSH Act has been enacted and in force since 2013, with a three-fold objective of:

- ✓ Prohibition of sexual harassment at workplace;
- ✓ Preventing and protecting women against workplace sexual harassment; and
- ✓ To ensure effective redressal of complaints of workplace sexual harassment.

#### 1. **Who is an “Aggrieved Woman”<sup>4</sup>?**

“Aggrieved woman” means-

- a. 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;
- b. In relation to a dwelling place or house, a woman of any age who is employed in such a dwelling place or house.

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<sup>1</sup> (1997) 6 SCC 241, AIR 1997 SC 3011

<sup>2</sup> Section 1(2) of the POSH Act

<sup>3</sup> Section 2(p) of the POSH Act

<sup>4</sup> Section 2(a) of the POSH Act

2. **Definition of “Sexual Harassment”<sup>5</sup> as per POSH Law:** The POSH Act defines “Sexual Harassment” in line with the Supreme Court’s definition of ‘sexual harassment’ in the Vishaka Judgement. As per POSH Act, “Sexual Harassment” includes any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely:

- i. Physical contact and advances; or
- ii. A demand or request for sexual favors; or
- iii. Making sexually colored remarks; or
- iv. Showing pornography; or
- v. Any other unwelcome physical, verbal, or non-verbal conduct of sexual nature

3. **What is a “Workplace”<sup>6</sup>?**

The Act introduces the concept of an ‘extended workplace’. In addition to the office of the employer or employee, any place visited by the employee arising out of or during the course of employment, including transportation provided by the employer for the purpose of commuting to and from the place of employment, will also constitute a workplace. The most commonly seen situations of an extended workplace are those scenarios where an official event is taking place in a social setting, but endorsed or financed by the employer, in which case, such events will also be deemed a workplace under POSH Law.

4. The definition of an “**Employee**”<sup>7</sup> under the POSH Act is fairly wide to cover regular, temporary, ad hoc employees, individuals engaged on a daily wage basis, either directly or through an agent, contract laborer’s, co-workers, probationers, trainees, and apprentices, with or without the knowledge of the principal employer, whether for remuneration or not, working on a voluntary basis or otherwise, whether the terms of employment are express or implied.

5. **Complaints Committee:** An important feature of the POSH Law that it envisages the setting up of a grievance redressal forum, i.e., complaints committee. The Act provides for two types of complaints mechanism: **Internal Committee<sup>8</sup> (“IC”) and Local Committee<sup>9</sup> (“LC”)**. The IC and LC have the same powers as vested in a civil court under

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<sup>5</sup>Section 2(n) of the POSH Act

<sup>6</sup>Section 2(o) of the POSH Act

<sup>7</sup>Section 2(f) of the POSH Act

<sup>8</sup>Section 2(h) & 4 of the POSH Act

<sup>9</sup>Section 2(i) and 6 of the POSH Act

the Code of Civil Procedure, 1908. **All the complaints committees shall have at least half of the total members so nominated of women. The members of the complaint committees will hold their position for up to 3 years from the date of their nomination or appointment.**

- a. **IC:** Every employer<sup>10</sup> is responsible to constitute an IC at each office or branch, of an organization **employing 10 or more employees**, to hear and redress grievances pertaining to sexual harassment. Failure to set up an IC has led to imposition of fine as it is a non-compliance under the POSH Law. The IC will be composed of the following 4 members:

<b>i. Presiding Officer:</b>	a woman employed at a senior level at the workplace from amongst the employees.
<b>ii. 2 members (minimum):</b>	From amongst employees committed to the cause of women/ having legal knowledge/ experience in social work
<b>iii. External member:</b>	From amongst NGOs/associations committed to the cause of women or a person familiar with the issues relating to sexual harassment

- b. **LC:** At the district level, the government is required to set up a LC to investigate and redress the complaints pertaining to sexual harassment **from the unorganized sector or establishments where IC has not been constituted on account of the establishment having less than 10 employees or in case the complaint is against the employer or from domestic workers.** The LC will be composed of the following 5 members:

<b>i. Chairperson:</b>	Nominated from amongst the eminent women in the field of social work and committed to the cause of women.
<b>ii. Local woman:</b>	One of the members to be nominated from amongst the women working in the block, taluka, tehsil or ward or municipality in the district.
<b>iii. 2 NGO members*:</b>	From amongst NGOs/associations/ persons committed to the cause of women or familiar with the issues of sexual harassment, provided that: <ul style="list-style-type: none"><li>• At least one must be a woman.</li><li>• At least one must have a background of law or</li></ul>

<sup>10</sup> Section 2(g) of the POSH Act

	have legal knowledge
iv. Ex-officio member:	The concerned officer dealing with social welfare or women and child development in the district

*\*one of the nominees shall be a woman belonging to the scheduled castes/ scheduled tribes/ other backward classes or minority community notified by the central government, from time to time.*

6. **Reporting of complaint**<sup>11</sup>: An aggrieved woman who intends to make a complaint is required to **submit 06 copies of the written complaint** along with supporting documents & other necessary details as prescribed, **within 03 months from the date of incident to the IC/LC, as the case may be.** The 3 months' timeline may be extended to another 03 months by IC/LC, as the case may be, in case sufficient cause is demonstrated by the complainant in writing for delay in reporting a complaint. In case aggrieved woman is unable to make a complaint on account of her physical/ mental incapacity/ death/ otherwise, her legal heir/ such other person as may be prescribed may make a complaint.
7. **Conciliation**<sup>12</sup>: The Act also provides that IC/ LC, as the case may be, can take steps to **settle down the matter amicably at the request of an aggrieved woman, before initiating a formal inquiry to the complaint made, however, no monetary settlement shall be arrived as a basis of conciliation.**
8. **Redressal mechanism & timeline involved**: The POSH Law has laid down specific timelines for resolving complaints. The activities and respective timelines to be followed in accordance with the POSH Law is outlined herein below:

Submission of complaint:	Within 3 months of the last incident
Notice to the respondent:	Within 7 working days of receiving a copy of the complaint
Completion of enquiry:	Within 90 days
Submission of report by IC/ LC to employer/ district officer, as the case may be:	Within 10 days of completion of the inquiry
Implementation of recommendations:	Within 60 days

<sup>11</sup> Section 9 of the POSH Act

<sup>12</sup> Section 10 of the POSH Act

Appeal <sup>13</sup> by complainant/ respondent:	Within 90 days of the recommendations
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**9. Employers' duties and obligations<sup>14</sup>:** Every employer is under an obligation and duty bound to:

- ✓ Provide a safe and secure working environment;
- ✓ Set up an IC and ensure redressal of grievances of workplace sexual harassment in a time-bound manner;
- ✓ Display the penal consequences of harassment at conspicuous places in the workplace;
- ✓ Organize workshops and awareness sessions at regular intervals for sensitizing employees on the issues of sexual harassment at workplace and its implications;
- ✓ Provide necessary facilities to the IC/ LC, as the case may be, for dealing with the complaint and conducting an inquiry;
- ✓ Treat sexual harassment as misconduct under service rules and initiate action for such misconduct;
- ✓ Monitor the timely submission of reports by the IC;
- ✓ Provide assistance and cause to initiate action under IPC or any other law in force, against the perpetrator, or if the aggrieved woman so desires, where the perpetrator is not an employee, in the workplace at which the incident of sexual harassment took place;
- ✓ Assist in securing the attendance of respondent and witnesses before the IC/ LC, as the case may be;
- ✓ Make available such information to the IC/ LC, as the case may be, as it may require to the complaint made;

**Additionally, the employer is responsible for the following as per POSH Law:**

- ✓ Frame a POSH policy that prohibits unwelcome behavior that constitutes workplace sexual harassment, prevents the incidences of harassment through awareness programs/ sensitization sessions and provide a detailed framework for redress;
- ✓ Declare the name and contact details of all the members of IC;
- ✓ Publish the POSH policy over the company website/ intranet and circulation of the same, wherever required;
- ✓ Submit an annual report to the district officer, prepared by IC containing the details on number of cases filed and their disposal and number of workshops or awareness sessions against the workplace sexual harassment carried out to sensitize the employees;
- ✓ Include in the annual report of the organization, the number of cases of sexual harassment filed and disposed of.

<sup>13</sup> Section 18 of the POSH Act

<sup>14</sup> Section 19 of the POSH Act

10. **Consequences of making a false or malicious complaint<sup>15</sup>:** If the IC/ LC concludes that the allegation made by the aggrieved woman is false/ frivolous/ malicious/ complaint has been made knowing it to be untrue/ forged/ misleading information has been provided during the inquiry, then in that case disciplinary action in accordance with the service rules of the organization can be taken against such complainant and if service rules doesn't exist, then in such manner as may be prescribed under the POSH Rules.
11. **Confidentiality<sup>16</sup>:** The Act prohibits the publication or making known the contents of a complaint and the inquiry proceedings due to the sensitivity attached to the matters related to sexual harassment. Any breach of confidentiality will result in specific consequences. Furthermore, the POSH Act specifically stipulates that information pertaining to workplace sexual harassment shall not be subject to the provisions of the Right to Information Act, 2005.
12. **Consequences of non-compliances<sup>17</sup>:** Contravention of the provisions of the POSH Law, including failure to constitute the IC, will attract a penalty of INR 50,000 on the employer. A repetition of same offence could result in the punishment being doubled and/ or de-registration of the entity or revocation of any statutory business licenses. It is pertinent to note here that any offence committed under the POSH Law shall be non-cognizable<sup>18</sup>.

#### OTHER LEGAL PROVISIONS THAT CAN BE APPLICABLE TO THE WORKPLACE SEXUAL HARASSMENT

The other legal provisions include filing a **criminal case** under sections of **the Indian Penal Code, 1860 ("IPC")**, **the Indecent Representation of Women (Prohibition) Act** and/ or filing a **civil suit**.

1. **IPC:** Before the introduction of POSH Act, there was no statutory remedy available that directly addressed the workplace sexual harassment except the IPC. The only sections of the IPC that can be applicable to the sexual harassment at workplace (**which makes it a criminal case**) are herein below:
  - i. **Section 294:** 'Whoever, to the annoyance of others-,
    - (a) does any obscene act in any public place, or
    - (b) sings, recites, and utters any obscene songs, ballads, or words, in or near any public space,

<sup>15</sup> Section 14 of the POSH Act

<sup>16</sup> Section 16 and 17 of the POSH Act

<sup>17</sup> Section 26 of the POSH Act

<sup>18</sup> Section 27 of the POSH Act



shall be punished with imprisonment of either description for a term that may extend to 3 months, or with fine, or with both.'

This provision is included in Chapter XVI entitled 'Of Offences affecting Public Health, Safety, Convenience and Morals' and is cognizable, bailable and triable by any magistrate.

- ii. **Section 354:** Whoever assaults or uses criminal force on any woman, intending to **outrage her modesty** or knowing it likely that he will thereby outrage her modesty, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

**Amendments in IPC post Nirbhaya case in 2013:**

- ✓ **Section 354A:** Sexual harassment by a man;
- ✓ **Section 354B:** Forcing a woman to undress;
- ✓ **Section 354C:** Watching or capturing images of a woman without her consent (**voyeurism**);
- ✓ **Section 354D:** Following a woman and contacting her or trying to contact her despite her saying she does not want contact. Monitoring a woman using the internet or any other form of electronic communication (**stalking**);

- iii. **Section 509:** This deals with word, gesture or act intended **to insult the modesty of a woman**. This is included in Chapter 22 entitled 'Of Criminal Intimidation, Insult and Annoyance', and is cognizable, bailable and triable by any magistrate. It holds: 'Whoever, intending to insult the modesty of a woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture is seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to 1 year, or with fine, or with both.'

2. Under the **Indecent Representation of Women (Prohibition) Act (1987)**, if an individual harasses another **with books, photographs, paintings, films, pamphlets, packages, etc. containing the "indecent representation of women"**, they are liable for a minimum sentence of 2 years.

Further, section 7 (offences by companies) holds companies where there has been "indecent representation of women", such as the display of pornography, on the premises, guilty of offenses under this Act, with a minimum sentence of 2 years.

3. **Civil case:** A civil suit can be filed for damages under tort laws. That is, the basis for filing the case would be **mental anguish, physical harassment, loss of income and employment caused by the sexual harassment**.

## OTHER INDIAN GOVERNMENT INITIATIVES AGAINST SEXUAL HARASSMENT AT WORKPLACE

- ✓ **She-Box platform:** The Sexual harassment electronic Box (“**She-Box**”) is an effort of the Ministry of Women and Child Development, Government of India to provide a single window access to every woman, irrespective of her work status, whether working in organized or unorganized, private, or public sector, to facilitate the registration of complaint related to sexual harassment. Any woman facing sexual harassment at workplace can register their complaint through this portal (**[www.shebox.nic.in](http://www.shebox.nic.in)**). Once a complaint is submitted to the ‘She-Box’, it will be directly sent to the concerned authority having jurisdiction to take action into the matter.
- ✓ **Empaneled institutions/ resource persons:** To ensure the safety and security of women at all workplaces, the Indian Ministry of Women and Child Development is empaneling institutions/organizations willing to conduct awareness raising exercises around the provisions of the POSH Act. The empaneled institutes have to submit quarterly reports through ‘She-Box’ portal of all the training programs/workshop conducted by them under the POSH Act.

## INTERNATIONAL LAWS AND POLICIES FOR ADDRESSING THE ISSUES OF SEXUAL HARASSMENT IN THE WORKPLACE

International conventions to protect women against violence had been in place for a long while. The Vishaka Guidelines drew from few of them in the following ways:

1. **General recommendation 19 to the “Convention on the Elimination of All Forms of Discrimination against Women” (“CEDAW”):** It directs the state parties to take appropriate measures to eliminate discrimination against women in all fields, specifically including equality under law, in governance and politics, the workplace, education, healthcare, and in other areas of public and social life (Article 7-16).

*India, which is a party to this convention, has taken inference from its aspects of equality of women in the workplace, gender specific violence, and unwelcome sexually determined behavior and adopted them into the POSH Act.*

2. **International Labour Convention on Discrimination (Employment and Occupation) Convention (No. C111):** The ILO Committee of Experts on the Application of

Conventions and Recommendations has confirmed that sexual harassment is a form of sex discrimination covered by the Discrimination (Employment and Occupation) Convention (No. C111) of 1958. The ILO indigenous and Tribal Peoples Convention (No. 169) also specifically prohibits sexual harassment in the workplace.

*India ratified this document on June 03, 1960. Through this Convention, India has an obligation to prohibit and prevent any gender-based discrimination in the workplace.*

3. **United Nations General Assembly Resolution 48/104 on the Declaration on the Elimination of Violence against women**: It defines violence against women to include sexual harassment, which is prohibited at work, in educational institutions, and elsewhere (Article 2(b)), and encourages development of penal, civil or other administrative sanctions, as well as preventative approaches to eliminate violence against women (Article 4(d-f)).
4. Moreover, **the Beijing Platform for Action, para 178**, recognizes sexual harassment as a form of violence against women and as a form of discrimination, and calls on multiple factors including government, employers, unions, and civil society to ensure that governments enact and enforce laws on sexual harassment and that employers develop anti-harassment policies and prevention strategies.
5. **The International Covenant on Economic, Social, and Cultural Rights**: It contains several provisions particularly important for women. Article 7 recognizes her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate working environment.

## EVOLUTION OF THE LAW ON SEXUAL HARASSMENT IN INDIA

### I. **VISHAKA JUDGEMENT**

The framework for the sexual harassment at workplace law was for the very first time laid down in the Vishaka Judgement on August 13, 1997 by the Supreme Court. This is a case which deals with the evil of sexual harassment of a woman at her workplace and the incident revealed the hazards to which a working woman are exposed across the country, everywhere and everyday irrespective of their location and the urgency for safeguards to be carried out.

**Facts**: The facts of the case are herein below:

- ✓ In 1992, Bhanwari Devi, a dalit woman, was engaged as a social activist/ worker employed with the rural development program of the government of Rajasthan;
- ✓ Under one of the social development programs administered by the state of Rajasthan for stopping child marriages, Bhanwari Devi endeavored to stop the marriage of one-year old child in the community, however, she failed to do so;
- ✓ Later, she was brutally gang raped at her workplace as a revenge by the men of that community;
- ✓ Bhanwari Devi reported this brutal incident to the local authority(ies) but no action was taken;
- ✓ A Public Interest Litigation (“PIL”) was filed by Vishaka, a women’s welfare group and other women groups (“NGOs”), based on the facts of Bhanwari Devi’s case, against the state of Rajasthan and Union of India before the Supreme Court to enforce the fundamental rights of working women under Articles 14<sup>19</sup>, 19<sup>20</sup> and 21<sup>21</sup> of the Constitution, in view of the prevailing climate in which the violation of these rights is not uncommon;
- ✓ The primary objective to brought out such an action to the Supreme Court by the social activists and NGOs was to find a suitable method for the realization of true concept of ‘gender equality’ at the workplace for women, focusing attention towards societal aberration, and to prevent sexual harassment of working women in all work places through judicial process, to fill the vacuum in existing legislation.

**Hon’ble Supreme Court views and observations:**

- ✓ Sexual harassment at workplace is violative of constitutional rights of women (including rights of equality, to practice any profession and right to life with dignity) and are discriminatory towards women. Such violations, therefore, attract the remedy under Article 32 for the enforcement of these fundamental rights of women.
- ✓ The primary responsibility for ensuring such safety and dignity through suitable legislation, and the creation of a mechanism for its enforcement, is of the legislature and the executive. When, however, the instances of sexual harassment resulting in violation of fundamental rights of women workers under Articles 14, 19 and 21 are brought before us for redress under Article 32, an effective redressal requires that some guidelines should be laid down for the protection of these rights

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<sup>19</sup> Right to equality

<sup>20</sup> To practice any profession or to carry out any occupation, trade or business

<sup>21</sup> Right to life

to fill the legislative vacuum.

- ✓ Apart from Article 32 of the Constitution, there is a need to refer some other provisions which envisaged judicial intervention for eradication of this social evil. Some provisions in the Constitution in addition to Articles 14, 19 and 21, which have relevance are:

**Article 15:**

“15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth-

- (1) The State shall not discriminate against any citizen on only of religion, race, caste, sex, place of birth or any of them;
- (2) xxx xxx xxx xxx xxx xxx xxx xxx xxx
- (3) Nothing in this article shall prevent the State from making any special provision for women and children;
- (4) xxx xxx xxx xxx xxx xxx xxx xxx xxx”

“42. Provision for just and humane conditions of work and maternity relief- The State shall make a provision for securing just and humane conditions for work and maternity relief.”

**Article 51A:**

“51A: Fundamental duties- It shall be the duty of every citizen of India:

- (a) To abide by the constitution and respect its ideals and institutions.....

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- (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic, and regional or sectional diversities, to renounce practices derogatory to the dignity of women;

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6. Before we refer to the international conventions and norms having relevance in this field and the manner in which they assume significance in application and judicial interpretation, we may advert to some other provisions in the Constitution which permit such use. These provisions are:

**Article 51:**

“51. Promotion of international peace and security- The State shall endeavor to:

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(c) foster respect for international law and treaty obligations in the dealings of organized people with one another; and

xx xxx xxx xxx xxx xxx xxx xxx xxx”

**Article 253:**

“253. Legislation for giving effect to international agreements- Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty. Agreement or convention with any other country or countries or any decision made at any international conference, association or any other body.”

**Seventh Schedule:**

“List 1: Union List:

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14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

xx xxx xxx xxx xxx xxx xxx xxx xxx”

- ✓ In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, *the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19 and 21 of the Constitution and safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirits must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee;*
- ✓ The Court shall consider the progress made at each hearing culminated while formulation of the guidelines and norms to govern the behavior of the employers and all others at the workplaces to curb this social evil;
- ✓ Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. The common minimum

requirement of this right has received global acceptance. The International Conventions and norms are, therefore, of great significance in the formulation of the guidelines to achieve the abovesaid purpose;

- ✓ Considering the significance in the present context, the Court has placed a reliance on some provisions present in the **CEDAW**, for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in the Constitution, which are reproduced herein below:

**Article 11:**

“(1) 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:

(a) The right to work as an inalienable right of all human beings;

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(f) The right of protection of health and to safety in working conditions, including the safeguarding of the function of reproduction;

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**Article 24:**

“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.”

Thus, the general recommendations of CEDAW in this context in respect of Article 11 are:

**“Violence and equality in employment:**

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

23. Sexual harassment includes such unwelcome sexually determined behavior as physical contacts and advances, sexually colored 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 complaint procedures and

remedies, including compensation, should be provided;

24. States 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.”

- ✓ The Government of India has ratified the above resolution on June 25, 1993 with some reservations which are not material in the present context.

**Hon’ble Supreme Court Decision:** In light of the above observations, the Supreme Court, in this case had held the following on **13<sup>th</sup> August, 1997**:

- ✓ In view of the absence of the enacted law, either civil law or penal law, to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places and the enactment of such specific legislation will take considerable time, ***the Supreme Court laid down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This was done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it was further emphasized that this would be treated as the law declared by the Supreme Court under Article 141 of the Constitution.***
- ✓ The guidelines and norms prescribed/ the Vishaka Guidelines, which would have to be mandatorily followed by the employers in workplaces, both in private and government sector, to provide for a mechanism to redress grievances relating to sexual harassment at workplace. It was also stated that the Vishaka Guidelines do not prejudice any rights available under the Protection of Human Rights Act, 1993.

**THE KEY FEATURES OF THE VISHAKA GUIDELINES ARE HEREIN BELOW:**

1. ***It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all the steps required;***
2. ***Definition of ‘sexual harassment’ has been prescribed:***  
***‘Sexual Harassment’ includes such unwelcome sexually determined behavior***



*(whether directly or by implication) as:*

- a. Physical contact and advances;*
- b. A demand or request for sexual favors;*
- c. Sexually colored remarks;*
- d. Showing pornography;*
- e. Any other unwelcome physical, verbal or non-verbal conduct of sexual nature.*

3. ***Preventive steps to be followed:*** All employers or persons in charge of workplace, whether in the public or private sector are under a responsibility to take **appropriate steps to prevent sexual harassment**;
4. ***Criminal proceedings could be initiated in case of specific offence:*** Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with the law by making a complaint with the appropriate authority. In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer;
5. ***Disciplinary action could be taken:*** Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules;
6. ***Establishment of appropriate complaint mechanism:*** Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for redress of the complaint made by the victim. Such complaint mechanism should ensure the time bound treatment of complaints;
7. ***Constitution of Complaints Committee:*** The Complaints Committee to be formed which will look into the matters of sexual harassment of women at workplace. The Complaints Committee was mandated to be headed by a woman employee, with not less than half of its members being women and provided for the involvement of a third party person/ NGO expert who is familiar with the issue of sexual harassment, to prevent the possibility of any undue pressure or influence from senior levels and on the complainant;
8. ***Submission of annual report:*** The Complaints Committee must make an annual report to the government department concerned of the complaints and action taken by them.

*The employers and person in charge will also report on the compliance with the aforesaid guidelines including the reports of the Complaints Committee to the government department;*

9. **Workers' initiative:** *Employees should be allowed to raise issues of sexual harassment at workers' meeting and in any other appropriate forum and should be affirmatively discussed in employer – employee meetings;*
10. **Awareness:** *Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner;*
11. **Third party harassment:** *When these incidences occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all necessary and reasonable steps to assist the affected person in terms of support and preventive action.*

## II. POST VISHAKA DEVELOPMENTS

### 1. Apparel Export Promotion Council v. A.K. Chopra<sup>22</sup>

- ✓ The first case before the Supreme Court after Vishaka Judgement in this respect was the case of Apparel Export Promotion Council v. A.K. Chopra. In this case, **the Supreme Court reiterated the law laid down in the Vishaka Judgement** and upheld the dismissal of a superior officer of the Delhi based Apparel Export Promotion Council, who was found guilty of sexually harassing a subordinate female employee at the work place. **In this judgement, the Supreme Court enlarged the definition of sexual harassment by ruling that physical contact was not essential for it to amount to an act of sexual harassment;**
- ✓ The Supreme Court explained that ***“sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favors and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such conduct by the female employee and unreasonably interfering with her work performance, i.e. was capable of being used for affecting her***

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<sup>22</sup> AIR 1999 Supreme Court 625

*employment or work including recruiting or promotion or had the effect of creating an intimidating or when it creates a hostile working environment for her. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.”*

2. Medha Kotwal Lele & Ors. v. Union of India & Ors.<sup>23</sup>

- ✓ Several petitions had been filed before the Supreme Court by the NGOs, basis the note prepared by the Registrar General highlighted a number of sexual harassment cases stating that the complaints committee were not formed in accordance with the Vishaka Guidelines and that the said petitions fell under clause (6) of the PIL guidelines given by the Supreme Court, i.e. “Atrocities of Women” and in any event the Vishaka Guidelines were not being followed. Thereupon, the Supreme Court treated the petitions as writ petitions filed in the public interest, took cognizance and undertook the monitoring mechanism of implementation of the Vishaka Guidelines across the country by directing the state governments to file affidavits emphasizing on the steps taken by them to implement the Vishaka Guidelines;
- ✓ In its judgement, **the Apex Court observed that “the implementation of the Vishaka Guidelines has to be not only in form but also in substance and spirit so as to make available a safe and secure environment for women at work place in every aspect and thereby enabling working women to work with dignity, decency and due respect.”**
- ✓ Not being satisfied with the implementation of the Vishaka Guidelines, it directed the states to put in place sufficient mechanism to ensure effective implementation of the Vishaka Guidelines. **Finally, 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. The Apex Court also directed that the complaints committee as envisaged in the Vishaka Guidelines will be deemed to be an inquiry authority for the purposes of Central Civil Rules, 1964 and the report of the complaints committee will be deemed to be an inquiry report under those rules. It was directed that similar amendments shall also be carried out in The Industrial Employment (Standing Orders) Rules.**

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<sup>23</sup> Writ Petition (Crl.) No. 173 - 177/1999

**3. Formulation of “A Code of Conduct For Workplace” by the National Commission for Women (“NCW”) in 1998**

- ✓ The NCW, a statutory and autonomous body constituted by the government of India ‘**to secure justice for women, safeguard their rights and promote women’s empowerment**’, has taken up the matter of sexual harassment of women at work place as one of the focal issues in the realm of promotion of gender equality and women’s empowerment. Accordingly, in the year 1996, the NCW took up ‘sexual harassment of women at the work place’ as one of its focal issues. This was pursued with the various central ministries/ departments. In an effort to promote the well-being of all women employees at the work place, the NCW in 1998, formulated a “Code of Conduct for Work Place”, putting down the Supreme Court Vishaka Guidelines, in simple language and in accordance with the directives given by the Supreme Court and circulated it widely amongst all the central ministries and government departments, including all state commissions for women, NGOs and apex bodies of the corporate sector, viz. CII, FICCI, ASSOCHAM, etc., and media;
- ✓ Also, the NCW published the Vishaka Guidelines in August 2001, furthermore, since November, 2000, the NCW took an initiative to hold meetings with various organizations/ government departments to assess the extent to which the Vishaka Guidelines laid by the Apex Court have been implemented as well as to share the experience/ difficulties faced by various organizations in dealing with the complaints of sexual harassment. The meetings provided an interactive forum for exchange of experience with various organizations and more than 33 such meetings which have been attended by more than 800 organizations, were held during the 3 years’ time period;
- ✓ Subsequently, the Supreme Court issued a clarification on April 26, 2004, on their earlier guidelines of August, 1997 in relation to conduct rules applicable to Central Civil Services. The Department of Personnel and Training vide notification dated July 01, 2004 have also amended the Central Civil Services (Classification, Control and Appeal) Rules, 1965 CCS (CCA) as directed by the Supreme Court in pursuance of its judgement in the case of Medha Kotwal Lele & Ors. v. Union of India & Ors.

**CONCLUSION**

As India progresses as a nation, it is expected for organizations and workplaces to stay updated with the development and encourage safe and secure work environment free from any kind of sexual harassment and rid all forms of discrimination. The recognition of the right to protection against workplace sexual harassment is an intrinsic component of the protection of women's human rights. It is a move towards providing women independence, equality of opportunity and the right to work with dignity.

It is indisputable to say that the POSH Law is protecting many working women around India from being sexually harassed at their workplaces. It not only strengthens and gives confidence to female employees but also plays a major role in the widespread removal of such incidents in India. The POSH Law has empowered women and has been a platform for them to voice their concerns relating to the workplace sexual harassment in India. However, on other side considering the changing environment, the legislature to provide for the amendment in the POSH law to provide for the provisions to protect the men from sexual harassment.

**Authors:** I Iram Naaz, Senior Associate ([iram.naaz@acumenjuris.com](mailto:iram.naaz@acumenjuris.com)) I Abhishek Bansal, Partner ([abhishek.bansal@acumenjuris.com](mailto:abhishek.bansal@acumenjuris.com)) I ACUMEN JURIS I

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