

## **THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013**

Sixteen years after the VishakaJudgement, India Finally has a law to ensure a safe working environment for women– The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter referred to as the Act). Further, by passing this Act, the Government of India has also fulfilled its obligations under the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), which had been ratified by India on June 25, 1993. This write up reviews the Act, in particular the introduction and statement of object and reasons; and the definitions, of aggrieved woman, domestic worker, employee, employer, respondent, sexual harassment and workplace, among others. Attempt have been made to cover the entire Act, by elaborating on the relevant sections, along with the corresponding rules.

### **1. PREAMBLE**

The Act was enacted by the Parliament in the 64<sup>th</sup> year of its Republic extending to the whole of India (Unlike other Acts, in which excluded is the jurisdiction of the State of Jammu & Kashmir), and came into force on December 9, 2015, with the notification of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 (14 of 2013) (Herein after called the Rules).

### **2. STATEMENT OF OBJECT AND REASONS**

In the Statement of Objects and Reasons of the Act it is emphatically stated that sexual harassment is termed as a violation of the fundamental rights of a woman to equality, life and liberty, as guaranteed under Articles 14 and 15 of the Constitution of India and right to life and to live with dignity under Article 21 of the Constitution of India. Sexual harassment is also considered a violation of a right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment.

In paragraph 3 of the statement of objects and reasons of the Act, recounted is Article 11 of the CEDAW, to which India is a party, and which requires State Parties to take all appropriate measure to eliminate discrimination against women in the field of employment; for equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment at workplace.

### **3. DEFINITIONS**

The second section of this Act contains the definition clauses, so that the words used are clear, free from ambiguity and there is no need to refer to other means of interpretation. The Act considers all employed women, not only those working in organizations, but also those in dwelling houses for in the definition of “aggrieved woman” included is a woman of any age who is employed a dwelling place or house and included in respondents is not only employee but a person against whom the aggrieved woman has made a complaint. Since the Indian economy has preponderance of informal and unorganized sector both in terms of number of workers and enterprises, and in view of the fact that this segment of economy has inbuilt vulnerabilities, specially of women who are subjected to sexual harassment as a form of economic coercion, the Act recognize this sector by defining specifically ‘unorganized sector’.

Given below are the definitions of aggrieved woman, domestic worker, employee, employer, respondent, sexual harassment and workplace.

**(i) Aggrieved woman**

- (a) Who is aggrieved woman – A woman who can file a complaint under this Act is defined as ‘aggrieved woman’, in Section 2 (a). According to this clause an aggrieved woman, means a woman of any age, who alleges to have been subjected to an act of sexual harassment in the workplace, by the respondent, this woman may or may not be an employee, she can be a third party also. The inclusion of third party in as ‘aggrieved woman’ has special relevance in sectors like retail, travel, courts or the unorganized sector where there is an abundance of public dealing and no set form of relationship for third parties.

The requirement for applicability of this Act is that a woman must have been in a working relation i.e. she may be a vendor or supplier, outside trainer or consultant, a client or customer. It is immaterial if the sexual harassment has taken place on the employer’s premises or at a client or customer worksite, or field site or tour, so long as the woman is on work related activity, it would be covered under this section.

- (b) Dwelling House – In case of a dwelling place or house, a woman of any age who is employed in such a dwelling place or house will be an aggrieved woman. Thus to attract the ingredients of this section for filling a complaint, the woman’s employment in the dwelling house is essential, irrespective of whether she is employed on a temporary, permanent, part time or full time basis.
- (c) Third party assistance - The sexual harassment of women at Workplace (Prevention, Prohibition and Redressal) Rules 2013 (hereinafter referred to as

the Rules 2013) in Rule 6 stipulate that where the aggrieved woman is unable to make a complaint on account of her physical incapacity, on her behalf a complaint of sexual harassment can be filed by a third party i.e. by her relative or friend or her co-worker or an officer of the National Commission for Woman or State Woman's Commission or any person who has knowledge of the incident, with the written consent of the aggrieved woman. And where the aggrieved woman is unable to make a complaint on account of her mental incapacity, on her behalf a complaint by a relative or friend; or a special educator; or a qualified psychiatrist or psychologist; or the guardian or authority under whose care she is receiving treatment or care.

**(ii) Domestic worker**

Section 2 (e) of the Act defines as to who is a domestic worker, she is a woman who is employed to do the household work in any house hold for remuneration whether in cash or in kind, and may have been employed directly or through any agency, with her employment being on a temporary or permanent basis. The woman may be part time or full time employee, but does not include any member of the family of the employer.

The Act takes into account the fact that female domestic help are vulnerable to sexual abuse by other staff like driver, cook or third parties like vegetable vendor etc. and it is the responsibilities of the employer of the dwelling house to provide her a safe working environment.

**(iii) Employee**

Section 2 (f) of the Act defines the word 'Employee', according to which employee means:

- ❖ A person employed on regular, temporary, ad hoc or daily wage basis,
- ❖ Either directly or through an agent, including a contractor,
- ❖ With or, without the knowledge of the principle employer,
- ❖ Whether for remuneration or not, or working on a voluntary basis,
- ❖ Whether the terms of employment are express or implied and includes a co-worker, a contract worker, probationer, trainee, apprentice etc.

**(iv) Employer**

- (a) Organization – Section 2 (g) of the Act defines 'Employer' according to which employer in relation to any department, organization, institution, office, or unit of the appropriate Government or a local authority includes:

- ❖ The head of any department, organization, undertaking, establishment, enterprise, institution, office, branch or unit or such other officer as may be specified by an order.
- ❖ Person responsible for the management, supervision and control of the workplace.
- ❖ Person discharging contractual obligations with respect to his or her employee.

Further in Section 2g(ii) of the Act, it is clarified that in any workplace not covered under the sub clause (i), included will be any person responsible for the management, supervision and control of the workplace as the employer.

(b) Dwelling House – Section 2(g)(iv) states that in relation to a dwelling place or house, 'employer' includes a person or a household who employs or benefits from the employment of the women domestic worker.

**(v) Respondent**

According to section 2 (m) of the Act, Respondent is a person against whom the aggrieved woman has made a complaint under section 9. As per the definition, the person against whom the complaint has been lodged may or may not be the employee. The requirement is that –

- ❖ He should be perpetrator, and
- ❖ The harassment has been committed in connection with the work place.

**(vi) Sexual Harassment**

The definition of 'Sexual harassment' has been adopted from the Vishaka judgment and the term sexual harassment includes any unwelcome acts or behaviour (whether directly or by implication) such as physical contact and advances, demand or request for sexual favours, making sexually coloured remarks, showing pornography or any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

In section 2 (n) of the Act, sexual harassment has been defined as:

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

In the above definition falls a whole range of a behaviour and activity, which amounts to sexual harassment. Given below are few illustrations of such behaviour, considered as sexual harassment:

- ❖ Continuous idle chatter of a sexual nature;
- ❖ Comments about a woman's clothing, body and / or sexual activities;
- ❖ Offensive and persistent sex related jokes.
- ❖ Suggestive or insulting sounds such as whistling or kissing sounds;
- ❖ Comments of a sexual nature about weight, body shape, size or figure;
- ❖ Repeating some comments in films or otherwise which have double meaning.
- ❖ Repeated unsolicited propositions for dates and / or sexual relations;
- ❖ A sexual comment or sexually determined behavior.
- ❖ Leering at a woman's body and / or sexually suggestive gesturing.
- ❖ Displaying sexual visual material such as pin ups, cartoons, graffiti, computer programs, and catalogues of sexual nature.

Section 3 in addition to providing that no woman shall be subjected to sexual harassment at any workplace; also further lays down the circumstances which if present may amount to sexual harassment such as implied or expressed promise to preferential treatment or implied or explicit threat of detrimental treatment in her employment, implied or explicit threat about her present or future employment, interference with work or creating an intimidating or offensive or hostile work environment, humiliating treatment likely to affect health or safety of a woman.

#### **(vii) Workplace**

Workplace has been defined in Section 2(o) to remove any discrepancy in interpretation of whether the sexual harassment occurred in the workplace or not; and further also because the law imposes some specific duties and obligations on 'every employer of a workplace' and on disregard of the same a penalty is enforceable, hence it is important to understand and have clarity on the concept of 'workplace'. The Vishaka guidelines were continued to the traditional office set-up where there was a clear cut employer-employee relationship, whereas the Act in Section 2 (o) while defining "workplace' has expanded the definition to include:-

- ❖ Organisations, departments, office, branch unit etc. in the public and private sector, organized and unorganized, hospitals, nursing homes, educational institutions, sports institutes, stadiums, sports complex, and

- ❖ Any place visited by the employee during the course of employment including the transportation.

The Courts have held that in so far as the office complex is concerned, it would definitely come within the sweep of workplace, and referred to the test laid down by the Tribunal to determine a particular place is workplace or not, as the following:

- a) Proximity from the place of work;
- b) Control of management over such place / residence where working woman is residing; and
- c) Such a 'residence' has to be an extension or contiguous part of working place.

#### **4. CIRCUMSTANCES AMOUNTING TO SEXUAL HARASSMENT**

##### **(i) Quid Pro Quo and Retaliation**

The definition of sexual harassment in Section 2(n) of the Act is very wide, as it provides for direct or implied sexual conduct, which may involve physical contact and advances; or verbal conduct in the form of demand or request for sexual favours, sexually colored remarks, showing pornography etc. Most importantly, the Act takes cognizance of the fact that women are forced into a 'quid pro quo' situation and often face a hostile work environment for refusing to submit to sexual harassment and keeping this in mind, described in section 3 are the circumstances, which if occur in relation to an act of sexual harassment, the same may amount to sexual harassment. This section makes provision for prevention of sexual harassment. It provides that no woman shall be subject to sexual harassment, which includes the following:-

- I. Implied or explicit promise of preferential treatment in employment.
- II. Implied or explicit threat of detrimental treatment in her employment.
- III. Implied or explicit treatment about her present or future employment status.

All the three circumstances above relate to quid pro quo a latin phrase, which translated in English means "this for that". The basic idea being one of exchange. Thus quid pro quo sexual harassment or implied or explicit promise or preferential treatment in employment occurs; when the respondent makes the sexual conduct of a woman employee, a condition for employment benefits or advancement, or a condition for avoiding adverse employment action. In a typical situation of quid pro quo sexual harassment, the respondent being a person in power pressurizes the woman employee, usually a subordinate, for sexual favors in exchange for advancement in the workplace or under the threat of adverse employment action. A single instance of quid pro quo sexual harassment is

sufficient for the basis of a complaint, but in contrast, a single incident of hostile work environment sexual harassment may not qualify as a sufficient basis, unless the incident is “severe”.

Thus, in order to make a complaint under this provision the aggrieved woman must show by a preponderance of the evidence that the respondent had made unwanted sexual advances or directed behavior of a sexual nature to her as a condition for receiving concrete employee benefits and / or for avoiding adverse employment action. A “Preponderance of the evidence” means that after looking at all the evidence; it is more likely than not that the claimed events occurred.

The complainant has to satisfy the following elements:-

- (a) That she is was an employee of the same employer as the respondent, or she had applied to the respondent for employment, or she is was a person providing services pursuant to a contract with the employer of the respondent.
- (b) That the respondent made unwanted sexual or engaged in other unwelcome verbal or physical conduct of a sexual nature;
- (c) That employment benefits were conditioned, by words or conduct, on the aggrieved woman’s acceptance of the respondent’s alleged sexual advances or conduct; or that employment decisions affecting the aggrieved woman were made based on the her acceptance or rejection of the respondent’s sexual advances or conduct;
- (d) That at the time of the respondent’s conduct, he was an employee, or agent for the employer’
- (e) That the aggrieved woman was harmed; and
- (f) That the respondent’s conduct was a substantial factor in causing her harm

(ii) Hostile Work Environment

Section 3 (iv) relate to interference with a woman’s work, creating intimidating, offensive or a hostile work environment. Compared to quid pro quo the legal requirements in the area of hostile work environment sexual harassment are more complicated. “Hostile work environment” sexual harassment occurs when a woman in the workplace is subject to unwelcome advances, sexual innuendos, or offensive gender-related language that is “Sufficiently severe or pervasive from the perspective of a reasonable person of the same gender as the offended employee”. Repeated incidents increase the pervasiveness and gravity of the situation, so that a reasonable person would be more likely to find the conduct sexually harassing due to its repetition; however,

for sexual harassment to fall under this category a single incident is also sufficient provided it is so severe or pervasive to alter the conditions of the woman's employment and create a hostile work environment.

An aggrieved woman can also make a hostile work environment complaint, if she has been witness to the conduct of sexual harassment, and the conduct is severe or pervasive enough to be considered harassment by a reasonable woman similarly situated as the aggrieved woman. For example if the respondent who is a superior, indulges in favoritism towards women employees who succumb to RIS sexual conduct; then the pattern of sexual favoritism may constitute a hostile work environment for the message being propagated in the workplace is that "sexual affairs with the boss are a way to get ahead in the workplace".

## **5. CONSTITUTION OF INTERNAL COMPLAINTS COMMITTEE (ICC)**

Chapter II of the Act appropriately titled 'Constitution of Internal Complaints Committee' deals with the constitution of the complaints committee in Section 4 of the Act. Sub section (1) makes it mandatory for every employer of a workplace to constitute an "Internal Complaints Committee". The section further provides, if offices or administrative units of the organization are located at different places, the ICC is required to be constituted at all the administrative units or offices. Sub section (2) of Section 4, while dealing with the composition of the ICC enlarges upon the members who are to be nominated by the employer.

- (a) Woman Presiding Officer – The composition of the members of the ICC are given in sub section (2)(a), which makes it mandatory for the Presiding Officer of the committee to be a senior level woman officer. This is in harmony with the Vishaka judgment which mandated that the Committee be headed by a woman, however, the Act has gone a step further by qualifying that woman heading the committee/Presiding Officer should be a 'Woman employed at a senior level at workplace from amongst the employees.' This level of seniority has been incorporated with assumption that a woman officer at a senior level is less likely to be influenced by the position of the respondent; will in a better position to plan and manage the organization's sexual harassment prevention and training programs; and delineate and design appropriate sanctions or disciplinary measures to be applied to a respondent who violates the law by indulging in misconduct deemed to be sexual harassment in the workplace.

Often in field or site offices there may be women employees but none at the senior level, in view of this the sub section states that in case a senior level

woman employees is not available, then the Presiding officers shall be nominated from other offices or administrative units. Being well aware of the shortage or lack of women employee, then the Presiding Officer shall be nominated from any other workplace of the same employer or other department or organization.

(b) Inclusion of employees – The section in sub clause (2) (b), further provides that not less than two members should be from employees with experience in social work and legal knowledge; thereby providing proper representation to employees as stakeholders, based on an inclusive approach. Open, effective communication, as well as clear channels for feedback, including workers, optimizes the opportunity for discussion of issues related to sexual harassment in the workplace. It also significantly impacts on employee involvement in the organization, potentially resulting in high employee morale and increased productivity. Thus this provision has been incorporated to give proper representation to all categories of employees, and appears to be based on the assumption that the presence of employees/ workers in the Committee would not only make it inclusive, but they would be in a better position to protect the interest of workers/ employees, as compared to that of the management.

(c) Term of office – Recognizing that human beings are not angels, the framers of the statute have put in place institutional checks designed to prevent abuse of the enormous powers they have vested in the ICC, which are equivalent to the powers of a civil court. Sub clause (3) restricts the terms of the Presiding Officer and Members of the Internal Committee for holding office to three years.

(d) NGO member – The Act in sub clause (4) provides for inclusion of one member from NGO, or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment. The rationale being that the presence of NGO member will ensure neutrality and lack of bias since she/he is unlikely to be influenced by the management.

(e) Half the members women – The committee may comprise both male and female members, but in order to balance and protect the interest of the aggrieved woman, the proviso to sub action (2) of Section 4 states that at least one-half of the total members so nominated shall be women. It has been suggested that ideally the composition of the ICC members should ideally have been an odd number in order for the committee to arrive at a decision based on majority, in case of divided opinion.

Constituting an ICC not only shows compliance of the law; but also builds confidence in women employees by reassuring them that the organization genuinely values their presence and contribution to the organization.

## **6. CONFIDENTIALITY**

In view of the sensitive nature of the case, the law provides for confidentiality, and penalty for contravening the confidentiality clause. Section 16 of the Act prohibits publication or making known the identity and address of the aggrieved woman, respondent or witness, for confidentiality is absolutely critical and paramount in any inquiry. The clause also prohibits the publication or making known contents of complaint, the enquiry proceedings and the recommendations.

Section 16 states that notwithstanding anything contained in the Right to Information Act, 2005, the content of the complaint made under clause 9, the identity and addresses of the aggrieved woman, respondent and witnesses, any information relating to conciliation and enquiry proceedings, recommendation of the internal committee or the Local Committee, and the action taken by the employer or the District Officer shall not be published, communicated or made known to the public, and media in any manner.

The proviso an exception for circumstances where the information is disseminated regarding the justice secured to the woman, then it must be done without disclosing the name, address, identity or any other particulars calculated to lead to the identification of the aggrieved woman and witnesses.

NOTE-Efforts should be made to conduct the interviews and hold the proceeding in a private location, whether in the workplace or outside so that other employees in the workplace are not aware of what is taking place; and also to prevent the risk of a witnesses being harassed or intimidated and wanting them to feel as comfortable as possible to make a full informative statement.

Penalty on disclosure – Section 17 impose penalty for publication or making known contents of complaint and enquiry proceedings. The section stipulates that where any person entrusted with the duty to handle or deal with the complaint, enquiry or any recommendations or action to be taken under the provision of the proposed legislation contravenes the provisions of clause 16 relating to prohibition of publication or making known contents or complaint and enquiry proceedings, shall be liable for penalty in accordance with the provisions of the service rules applicable or where no such service rules exist, in such manner as may be prescribed by rules.

The Rule 2013 in Rule 12 prescribes the amount of Rupees five thousand as penalty.

## **7. APPEAL**

Provision for appeal is provided in Section 18, the purpose being to review decision of the ICC in order to determine if any legal error has occurred. This section provides either of the parties, on not being satisfied with the recommendations made by ICC to appeal to the Court or tribunal in accordance with the provision of the service rules or where no such service rules exist then, in such manner as may be prescribed in Rule 11. It must be understood that an appeal is not a new trial, thus not intended to give the appealing party, whether aggrieved woman or respondent, a second opportunity to reargue the facts of the case, nor adduce fresh documents or examine new witnesses. In other words, in order to be successful in appeal, it must be shown that the ICC, made a factual or legal error that affected the outcome of the decision in the case.

The section also specifies a time limit, and the appeal should be made within ninety days of the recommendations of the ICC.

## **8. ANNUAL REPORT**

The annual report of any organization is an important public document providing information regarding the organization – how well it is doing, are earnings higher, lower, or the same as the year before etc. Information regarding the same is presented clearly in the financial section of the annual report. The Act in Section 22, now has made it mandatory for employers, to include in the Annual Report the number of complaints filed of sexual harassment in the workplace, and their disposal under the Act, as per details specified in the Rule 14. Section 21 make it obligatory for the ICC, constituted by every employer, to submit in each calendar year an annual report to the employer, in the form prescribed. The employer is also required to intimate such number of cases, if any, to the District Officer.

## **9. PENALTY FOR NON-COMPLIANCE OF THE PROVIIONS OF THE ACT MONITORING IMPLEMENTATION OF ACT SECTION 26 PROVIDES FOR PENALTY OF FINE TO BE IMPOSED FOR NON-COMPLIANCE OF THE ACT IN CASES WHERE:**

- ❖ The employer fails to constitute an ICC
- ❖ Take action under sections 13,14 and 22
- ❖ Contravenes or attempts to contravene or abets contravention of provisions of this Act

In case any employer, after having been previously convicted of an offence punishable under this Act subsequently commits and is convicted of the same offence, then he is liable to-

- ❖ twice the punishment, which might have been imposed on a first conviction, subject to the punishment being maximum provided for the same offence;
- ❖ in case a higher punishment is prescribed under any other law, for the offence for which he is being prosecuted, the court shall take due cognizance of the same while awarding the punishment;
- ❖ cancellation, of license or withdrawal, or non-renewal, or approval, or cancellation of the registration by the Government or local authority required for carrying on his business or activity.

#### **10. CONNIZANCE OF OFFENCE UNDER THE ACT**

As per section 27 of the Act, court shall not take cognizance of any offence punishable under this Act, except on a complaint made by the aggrieved woman or any person authorized by the ICC in this behalf. The section further provides that no Court inferior to that of Metropolitan Magistrate of Judicial Magistrate first class shall try an offence punishable under this Act.

#### **11. PARALLEL PROCEEDINGS**

A number of organizations do not know how to proceed, and raise the query as to whether the ICC should file a police complaint or conduct an inquiry under the Act. To dispel the confusion section 28 clarifies that the provisions of this Act are in addition to, and not in derogation of the provisions of any other law for the time being in force. In other words, the remedies under other laws shall be additionally available to the aggrieved woman; thus parallel proceeding can be conducted by the ICC in the form of disciplinary action, and by the police on registering of FIR in the form of criminal action.

In conclusion it can be stated that the Act is a welcome relief for women and now it is compulsory under the law for every employer to constitute an internal complaints committee as per law and take preventive measures ensuring a violence free environment in the workplace for women; or face the consequence of being inflicted with penalty. The definition of sexual harassment given in the Act is also very wide, covering not only direct or implied sexual conduct, but also harassment that may be a verbal or non-verbal conduct; including implied or explicit promise of preferential treatment, or threat of detrimental treatment in the victim's employment; and humiliating treatment likely to affect the victim's health or safety. The Act encourages confidentiality of not only the aggrieved woman, but also the respondent and

witnesses, and the entire proceeding right from the contents of the complaints to the inquiry report. The responsibility of monitoring the act and its implementation is on the appropriate authority so that data is maintained on the number of cases filed and disposed of in respect of cases of sexual harassment in the workplace. It is hoped that in the years to come this data will provide guidance in taking corrective action for combatting sexual harassment in the workplace.

**Note:** Provision of the Act relating to Role and other functions of the Internal complaints committee are given separately in the write up titled as steps for conducting inquiry.