

## Obligations of Employer Under the New Sexual Harassment Law

The concept of sexual harassment at workplace in India often connotes sexual offensive behavior, power exploitation or discriminatory background. Such harassment can be in a form of a single act or a continuous one. Sexual Harassment is repeatedly confused with physical actions only; however the judicial system has brought under its ambit mental agony too but without victim's consent. Given the fact that women are working in several corporate offices, financial institutes and NGO's with highly designated posts, the offence of sexual harassment are still in existence and the number of such offence are not uncommon.

### Legislative Framework

Prior to the amendment in 2013, the Indian Penal Code, 1860 (IPC) remotely dealt with the offence of sexual harassment. Only certain related laws were framed as offences that either amount to obscenity in public or act that are seen to violate the modesty of women under sections 294, 354 and 509 of the IPC.

The realm of judicial interpretation widened and the subject 'sexual harassment of women at workplace' was addressed in the landmark case of *Vishaka & Ors vs State Of Rajasthan & Ors JT 1997 (7) SC 384* wherein, the Hon'ble Supreme Court laid down detailed guidelines for controlling the offence of sexual harassment of women at workplace. However, the said guidelines were not effective in achieving gender empowerment and equality which the said guidelines aimed of.

In April 2013, IPC was amended vide the Criminal Law (Amendment) Act, 2013, which enlists new offences like, acid attack, sexual harassment, voyeurism, stalking have been incorporated into the Indian Penal Code.

Further, in December 2013, the Government of India has made effective "*The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013*" (the Act). The Act proposes a definition of sexual harassment, which is as laid down by the Hon'ble Supreme Court in *Vishaka v. State of Rajasthan* (supra). Additionally, it recognizes the promise or threat to a woman's employment prospects or creation of hostile work environment as 'sexual harassment' at workplace and expressly seeks to prohibit such acts. The Government of India has also notified the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013* which provides the procedural aspects of the new law.

### Employer's Obligations under the Act

The objective of the Act is to provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto. The ambit of the Act is wide and is applicable to both public and private sectors whether organized or unorganized.

Under the Act, a workplace also covers, within its scope, places visited by employees during the course of employment or for reasons arising out of employment - including transportation provided by the employer for the purpose of commuting to and from the place of employment.

The definition of 'employer' Under the Act, includes the head of the Government department/organization/institution/office/branch/unit, the person responsible for management/supervisions/control of the workplace, the person discharging contractual obligations with respect to his/her employees and in relation to a domestic worker the person who benefits from that employment.

Section 2 (n) of the Act defines sexual harassment as "includes any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely:

- physical contact and advances; or
- a demand or request for sexual favour; or
- making sexually colored remarks; or
- showing pornography; or
- any other unwelcome physical verbal or non-verbal conduct of sexual nature.

The redressal instrument provided in the Act is in the form of Internal Complaints Committee (ICC) and Local Complaints Committee (LCC). All workplaces employing 10 or more than 10 workers are mandated under the Act to constitute an ICC. The ICC constitutes of 4 members in the committee under the Chairpersonship of a senior woman employee and will include 2 members from amongst the employees preferably committed to the cause of women or has experience in social work/legal knowledge and includes a third party member (NGO etc) as well.

Moreover, the Act further provides that if an employer fails to form ICC or does not comply with any provisions contained therein, the Act prescribes a monetary penalty of up to INR 50,000/-.

It may be too early to comment whether the Act will achieve its objective of women empowerment and gender equality or not, however, it appears that the obligations of an employer under the Act will ensure that women are protected against sexual harassment at all the work places, be it in public or private.

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Real Estate Investment Trusts or REITs is an investment vehicle through which monies of investors is gathered and invested primarily in completed real estate assets such as buildings, malls etc. These provide an avenue for investors, who benefit by receiving regular income as well as developers (as an exit option) who are able to channel such monies collected into building for commercial purposes. Framework for REITs exists globally in several countries including Australia, the United States of America, Japan and Singapore. In addition to other advantages, REITs help in bringing about transparency and accountability in the real estate sector.

### Need For REITS In India

The real estate sector has grown exponentially in India especially in the last decade. Rapid economic growth largely coupled with the expansion in the corporate sector has led to an increased demand/requirement for commercial buildings or spaces. Keeping the above mentioned factors in mind as also to keep up with global practices, the SEBI (Securities and Exchange Board of India) drafted the SEBI (Real Estate Investment Trusts) Regulations, 2013. SEBI had made a similar attempt in 2008 only to withdraw it later. This move from SEBI has been received positively in the market especially in times of economic slowdown, wherein there's scarcity of funds and the real estate market has suffered too as a direct result of market factors.

### Salient Features of the Regulations

At its initiation stage now, REIT regulations seem to be catering mostly to high net worth persons and institutions; an effort to safeguard investors as this is an investment with high risks. The regulations also seem very akin to that of IPOs.

- **Structure**

REITs in India must be set up as a 'Trust' under the Indian Trusts Act, 1882 and are prohibited from launching any schemes. The parties so associated would consist of a trustee (registered with SEBI), sponsor, manager and principal valuer. REITs are required to be registered with SEBI.

- **Offering and Listing of Units**

- Initially, RTEIs can raise funds through an initial offer and later, through follow-on offers.
- The regulations have made the listing of units for all REITs compulsory.
- It specifies that the size of the assets under RTEI shall not be less than a 1000 crore ensuring the entry of only established players in the market.
- Specifies a minimum offer size of Rs. 250 crore and a minimum public float of 25% of the value of the REIT, this again to ensure larger public participation.

- **Scope of Investment & Dividends**

- SEBI has framed the regulations in consonance with REIT policies across the globe. It has therefore mandated that – at least, 90% of the value of REIT assets must be invested in completed revenue generating properties; while the remaining 10% may be invested in developmental properties.
- It has also mandated the distribution of 90% of the income after tax to ensure regular income of the investors.
- REITs are permitted to invest directly or through SPVs, requiring the SPVs to hold at least 90% of the assets directly and REITs to have direct control over such SPVs.
- REITs have been prohibited from investing in vacant and agricultural land or mortgages (other than mortgage backed securities).

- **Criterion for Sponsor and Manager of REIT**

Apart from some responsibilities entrusted on the trustee, manager etc, SEBI's regulations also creates an eligibility criterion for the appointment of the sponsor and the manager who must all be separate entities.

**Sponsor:-**

- Must have a net worth of at least rupees 20 crores on a consolidated basis.
- Must hold at least 15% of the REIT assets at all times and should hold at least 25% of the units of the REIT before the initial offer.
- The sponsor must have a minimum of 5 years experience in the real estate industry.

**Manager:-**

- Must have a net worth of at least rupees 5 crores. In addition, must have a minimum of 5 years experience in property/fund management or real estate development.

- **Valuation of Assets**

SEBI has incorporated a sound valuation framework in its regulations. It has laid down the following:

- It has mandated that a physical inspection of the properties be carried out at least once a year. Also, NAV is to be declared twice a year.
- Mandated that a complete valuation be carried out for the purchase of any new property (transaction not exceeding 110%) or sale of existing property (transaction must be at least 90%).

- **Transparency & Disclosure**

The SEBI through these guidelines has sought to address most aspects concerning and governing REITs. One such facet is the importance of ensuring transparency and therefore, detailed disclosure requirements have been laid down- in party related transactions, focus on valuation of assets and their disclosures, specific disclosure requirements for reports sent to the investors. The manager and the trustee have also been conferred with certain responsibilities with regard to ensuring the making of correct disclosures. Schedule III of the regulations deal specifically with mandatory disclosures.

## Other Concerns

- Uncertain title- Several experts and others have voiced their concern over the lack of clear title and incomplete contracts which often impedes the growth of the real estate sector. Such problems enhance the risk undertaken by the investors.
- Taxation of REITs income- Also, the regulations or SEBI hasn't clarified yet on the taxation scheme or stamp duty for REITs or its investors. Clarity on these matters will ensure proper implementation of the Regulations set forth as of now.

Thus, we find that REITs will be a boosting factor in the growth of real estate in the country, empowering investors and developers both to benefit. Once FDI is wholly implemented, the sector is likely to gain from foreign investors considering the large size of units being offered as of now under REITs.

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## Review of General Atlanta Singapore Fund Pte. Ltd. & Anr v. Fourcee Infrastructure Equipments Pvt. Ltd. & Ors

There has often been a dispute on the applicability of Section 8 of the Indian Arbitration and Conciliation Act, 1996 especially in relation to the intervention of the courts. One such intervention may be a petition brought before the Court for the grant of interim measures as a result of which the Court must settle as to which petition must be disposed off first. After much discussion on this matter in various courts, with varied judgments, it has now been settled in the present case by the Mumbai Bench of Company Law Board (CLB), Mumbai in *General Atlanta Singapore Fund Pte. Ltd. & Anr v. Fourcee Infrastructure Equipments Pvt. Ltd. & Ors*, 2013.

FACTS: In the present case, an application was filed by the Respondents challenging the jurisdiction of the Bench of the CLB and submitting that the dispute which had arisen be referred to arbitration as per the agreement. However, the petitioners filed another petition invoking the jurisdiction of the Bench under certain sections of the Companies Act, 1956 and also, through it seeking various reliefs and interim reliefs.

Several issues were discussed in the case in light of various other judgments:

### Application of Section 9-A of the Civil Procedure Code

The counsel for the Petitioners submitted that by the understanding and interpretation of Section 9-A of the Civil Procedure Code, it is clear that although "if an objection is raised to the jurisdiction of the court at the hearing of any application for grant of interim relief, no doubt the Court is required to determine that issue in the first instance as a preliminary issue and an application raising objection to the

jurisdiction to the Court is directed to be heard with all expedition”, the court may grant interim measures and “may consider necessary pending the decision on the question of jurisdiction”. To substantiate this view, two other cases were cited:

- *Tayabhai M. Bagasarwalla And Another vs. Hind Rubber Industries Pvt. Ltd. and Others. (1997) 3 Supreme Court Cases 443*
- *Ferani Hotels Private Limited Vs. Nusli Nevilli Wadia and others MANU/MH/1087/2012*

Taking cognizance of the aforementioned submission, the CLB itself produced the relevant extract from the Tayabhai case (supra) and upheld the submission so put forward.

### **Application of Section 8 of the Indian Arbitration & Conciliation Act, 1956**

In the present case, the scope and importance of said section was discussed extensively, as it has been earlier as well, through various judgments.

The counsel for the Respondents argued that “It is settled proposition of law that until the application under Section 8 of the Arbitration and Conciliation Act is considered and decided, the Board cannot enter into the other questions including that of grant of interim reliefs” by citing the apex court’s decision in “*Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums [(2003) 6 SCC 503]* and *Magma Leasing and Finance Ltd. & Anr. V/s Potluri Madhvilata and Anr [2009] 10 SCC 103*, a judgment which clearly laid down the Court’s duty to dispose a petition filed under Section 8 of the Arbitration Act if it met the required conditions.

The counsel for the Respondents cited another judgment to further reiterate that an application made under Section 8 was required to be disposed off first by the CLB.

The CLB then noted that Section 8 is “preemptory and mandatory in nature” and laid down 5 tests which must be met to invoke Section 8. They are:

- i. Existence of an Arbitration agreement.
- ii. Parties to the Company Petition and Arbitration Agreement are common.
- iii. Subject matter of action is same as subject matter of Arbitration Agreement.
- iv. Other Party moves the Court for reference to arbitration before filing its reply/ written statement.
- v. The Ld. Arbitrator is capable to adjudicate the issues involved and grant reliefs sought for by the Petitioners.

### **Reasoning by CLB**

The CLB then held that the disposal of an application under Section 8 of the Arbitration Act may take considerable time and in the meantime, the Petitioners

may be disadvantaged in many ways. Thus, if the CLB concludes that Section 8 not applicable, then it would leave the Petitioners remediless.

The CLB in support of the Petitioner's view further noted that due to an objection raised against the jurisdiction of the court, it should not be deprived of its power to grant interim measures.

However, interim relief was not granted in the present finally with the CLB stating two reasons for the same-

- Binding decision of the Apex Court to take up the application filed under Section 8 of the Arbitration Act.
- Inability on part of the petitioners to argue the application and the interim reliefs sought for simultaneously.

The CLB relied heavily on the HPCL judgment (supra) wherein it was held by the Supreme Court that when there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator.

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### **Written Arbitration Agreement Compulsory for Appointment of an Arbitrator Under Section 11 Of The Arbitration And Conciliation Act, 1996.**

The Bombay High Court in its recent judgement in *Yashvant Chunilal Mody v. Yusuf Karmali Kerwala*<sup>1</sup> has taken a view that under Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act") for appointment of an Arbitrator by the Court, the parties has to compulsorily produce a written arbitration agreement and cannot rely upon oral evidence to prove the arbitration agreement.

Briefly, the facts before the Bombay High Court was that the Applicant had sought the appointment of a sole arbitrator under Section 11 of the Act. The Respondent disputed that there was no written arbitration agreement between the parties, therefore the court was not empowered to appoint an arbitrator under the Act. The Applicant was unable to produce a written arbitration agreement and argued that the arbitration agreement can be proved by leading oral evidence.

The main thrust of the argument of the Applicant was that the arbitration agreement can be proved by his oral evidence and through his cross examination under Section 63(5) of the Indian Evidence Act, 1872<sup>2</sup>.

The Bombay High Court held that the mandate under Section 7 (3)<sup>3</sup> read with Section 7 (4)<sup>4</sup> of the Act makes it compulsory that the arbitration agreement has to

be in writing. The intention of the Legislation was to ensure that under the Act the arbitration agreement has to be in writing and not oral in nature. Thus, the argument in respect of Section 63(5) of the Indian Evidence Act, 1872 is unsustainable and is not the intention of the Legislation while enacting the said Act.

Though, in the present case the party was unable to produce a written arbitration agreement, however, the judgment is vague inasmuch that the language of Section 7 of the Act is unambiguous that the arbitration agreement has to be in writing but totally excluding leading oral evidence to prove an arbitration agreement should be taken up in Appeal.

1. Arbitration Application (L) No. 859 of 2013.
2. Oral accounts of the contents of a document given by some person who has himself seen it".
3. Section 7(3) specifies the mandate of a written agreement.
4. Section 7(4) contemplates the types of written agreements.

## News 10 @ a glance

### **Supreme Court over rules Delhi High Court Judgment, Section 377 back in force**

Recent set back faced by homosexuals as Supreme Court reinforces Section 377 (*Suresh Kumar Koushal and Anr Vs. NAZ Foundation and Ors. Civil Appeal No. 10972 of 2013 (Arising out of SLP (C) No. 15436 of 2009)*), quoting that "It is for the legislature to look into desirability of deleting section 377 of the IPC". Further Government is exploring options to issue ordinance or amendment in the act.

### **CCI imposes heavy penalty on Chemist and drug dealer association**

In the case of *M/s Sandhya Drug Agency vs Assam Drug Dealers Association & others Case No. 41 of 201*, Competition Commission slapped a fine of Rs. 5.61 Lakhs on



Assam Drug Dealers Association and it had previously fined its parent body for indulging in unfair trade practice that restricts supply of medicine in market. CCI charged above body for abusing its dominant position and further it will take action against All Kerala Chemists and Druggists Association and the Barpeta Drugs Dealers Association on similar charges. As of now CCI has issued an order for "Cease and Desist" against all the above said bodies.

### **RBI to introduce new capital requirements by 2016 for banks (RBI database)**

Country's banking system is currently facing rising levels of loans, about 10 percent of the total loans being categorised as bad or restructured, to tackle the same, Banks will be classified as systemically important shall be required to hold additional capital in the range of 0.2 percent to 1 percent of their risk weighted assets, according to the central bank proposals. The higher capital requirement will begin from April 2016 and would be implemented in phases until 2019. The names of banks classified as D-SIBs will be disclosed in August every year, starting in 2015, RBI said "The banks designated as D-SIBs will be subjected to more intense supervision in the form of higher frequency and higher intensity of off- and on-site monitoring,"

## **Bombay High Court judgment upheld and compulsory VAT on builders**

Supreme Court in *M/s. Larsen & Toubro Limited & Anr. Vs State of Karnataka & Anr. (Civil Appeal No. 8672-8688)* reaffirmed the position of Bombay High Court, confirming the state government's decision on imposing 5% Vat on buildings that were under construction from June 30, 2006 to March 1, 2010.

Currently 1% Vat is payable by the builders on such constructions. This verdict is a big blow for builders as consumers are already in possession and recovery of VAT amount from them would lead to dispute among builders-consumers.

## **Respite offered by RBI to unlisted companies**

In the recent notification issued by RBI (RBI/2013-14/363 Circular no-69), it stated "unlisted companies can directly list on stock exchanges abroad to raise funds for acquisitions or retiring overseas debts, a move which may help India containing high current account deficit and in case the funds raised are not utilised abroad, it said, the company should repatriate the funds to India within 15 days and park it with a scheduled bank and "may be used domestically".

Companies shall be allowed to do so without any prior or subsequent listing for the period of two years. RBI aims to bring down the CAD to below \$56 billion this financial year,

as against \$88.2 billion in the last financial year. Rupee value versus US dollar has been affected severely because of high CAD and other global factors.

**Live in relation is not a crime or a sin, however:**

Apex Court has ruled that a “live-in relationship” would not amount to a “relationship in the nature of marriage” falling within the definition of “domestic relationship” under Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 (DV Act) if the lady in such a relationship knew that the male partner was already married. The judgment came in the form of an appeal from the case of *Indra Sarmav vs VKV Sarma, Criminal Appeal No. 2009 of 2013 (Special Leave Petition (Crl.) NO.4895 of 2012)* against the decision of the Karnataka High Court (HC).

**Sexual Harassment laws gets notified, come into force from 9th December**

Nearly 7 months after receiving president’s assent, the act was notified in the official gazette by the ministry of women and child development. The delay in notifying the Act after it had received Presidential assent had caused considerable clamour in mainstream media.

**PIN punching now compulsory:  
RBI**

After recent events of fraud, RBI has decided that every time a consumer enters into a transaction, he will need to punch in his PIN. This step was taken by the authority for minimizing frauds.

### **Restrictions on use of beacons**

Supreme Court in *Abhay Singh vs State of Uttar Pradesh and Ors. Special Leave Petition (C) No. 23984/2010* earlier this month passed an order restricting the use of red beacons without flashers only to high constitutional functionaries and blue ones for emergency services and the police. The order was made after reported misuse of beacons by politicians and bureaucrats.

### **FIPB approves H&M investment in India**

World's second largest fashion retailer H&M, a Swedish retailer is all set to open 50 stores after FIPB approves Rs 7.2 billion in the country. The government approval will allow the company to set up a wholly-owned subsidiary in the country. Swedish budget furniture chain IKEA was one of the first to receive an approval for its investment plans in May this year.