

THE AWARENESS AND REDRESSAL OF SEXUAL HARASSMENT OF WOMEN AT WORKPLACE

Over the years, India's progressive workforce witnessed a significant rise in women workforce, however the issue of Sexual Harassment of women at workplace remained unacknowledged and unregulated until 1997, when the Supreme Court in its Landmark Vishaka Judgment [Vishaka & Ors v/s State of Rajasthan & Ors (AIR 1997 SUPREME COURT 3011)], for the first time, acknowledged sexual harassment of women employees at the workplace as a human rights violation. The Supreme Court in its landmark Judgment while reaffirming that sexual harassment is a form of discrimination against women & violates the constitutional right to equality, right to life, right to live with dignity, right to practice or to carry out any occupation, trade or business as guaranteed under Articles 14, 15, 19(g) and 21 of the Constitution of India it also laid down guidelines defining the term "Sexual Harassment". It further mandated that every employer provide a mechanism to redress grievances pertaining to workplace sexual harassment and enforce the right of gender equality of working women.

The United Nations Convention on Elimination of all Forms of Discrimination ("**CEDAW**") stipulates that State Parties take all appropriate measures to eliminate discrimination against women in the field of employment. India became a signatory to the CEDAW as far back as 1980, however it failed to put in place an effective mechanism to redress sexual harassment of women at workplace. After nearly 3 decades, in view of the recent public outcry and uproar of sexual harassment crimes against woman, India has finally enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013 (the "Act"). The Act received the President of India's assent on 22nd became effective on 9th December, 2013.

The Act seeks to protect all woman employees whether on regular, temporary, ad hoc or daily wage basis, either employed directly or through an agent, domestic workers, contract labour, co-workers, probationers, trainees and apprentices whether for remuneration or not, working on a voluntary basis or otherwise by fixing the responsibility on the employer as well as the District Magistrate/Additional District Magistrate/Collector/Deputy Collector of every District in the State as a District Officer and laying down a statutory redressal mechanism.

WHAT IS SEXUAL HARASSMENT?

The definition of sexual harassment in the Act is in line with the Supreme Court's definition in the Vishaka Judgment and 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 favours; or
- iii. Making sexually coloured remarks; or
- iv. Showing pornography; or
- v. Any other unwelcome physical, verbal or non-verbal conduct of sexual nature

The Act further lists circumstances [Section 3(2) of the Act] which would be considered acts of Sexual Harassment

- vi. Implied or explicit promise of preferential treatment in her employment; or
- vii. Implied or explicit threat of detrimental treatment in her employment; or
- viii. Implied or explicit threat about her present or future employment status; or
- ix. Interference with her work or creating an intimidating or offensive or hostile work environment for her; or
- x. Humiliating treatment likely to affect her health or safety

WHERE WOULD AN ACT OF SEXUAL HARASSMENT BE CONSIDERED TO HAVE OCCURRED?

The Act stipulates that a woman shall not be subjected to sexual harassment at any "**Workplace**" [Section

2(o) of the Act]. Thus the term "Workplace" is of significant importance and is given a wide interpretation to mean and include amongst others places: department, organization, undertakings, establishment, enterprise, institution, office, branch, private sector organization, hospitals, nursing homes, sports institutions, stadiums, places visited by the employee arising out of or during the course of employment including transportation, a dwelling place or a house.

COMPLAINTS COMMITTEE

The Act requires an employer to set up an 'Internal Complaints Committee' ("**ICC**") at each office or branch, of an organization employing at least 10 employees. The government is in turn required to set up a 'Local Complaints Committees' ("**LCC**") at the district level to investigate complaints regarding sexual harassment from establishments where the ICC has not been constituted on account of the establishment having less than 10 employees or if the complaint is against the employer. The Act also sets out the constitution of the committees, process to be followed for making a complaint, disposal of complaints in a time bound manner and granting interim reliefs such as (i) transfer of the aggrieved woman or the respondent to any other workplace; or (ii) granting leave to the aggrieved woman up to a period of 3 months in addition to her regular statutory/ contractual leave entitlement.

REDRESSAL MECHANISM

Any aggrieved employee can within 3 months from date of the sexual harassment incident report the same, in writing, to the ICC or LCC. In the event the conciliation proceedings fail, the ICC or LCC is required to conduct an inquiry & complete the same within 90 days from receipt of the complaint and thereafter publish its report with its recommendations within 10 days from completion of the inquiry. Further, the employer is bound to act on the recommendations of the report within 60 days of publication of the report.

PENALTY

In the event the employer fails to comply with the provisions of the Act, he will be liable to be punished with a fine up to Rs. 50,000. In case of a second or subsequent conviction under this Act, the employer may be punished with twice the punishment or by cancellation of his licence or withdrawal of his registration. In the event of false and malicious complaints appropriate action would be initiated against the complainant.

CONCLUSION

Whilst the Act emphasizes treatment of sexual harassment as a "misconduct" under the employee service rules, it obligates the employers to ensure a safe and healthy work environment to women employees, organize periodic workshops & create awareness programmes at regular intervals in the organization for sensitizing its employees with the provisions of the Act. The codification of the Act is in effect a significant step towards creating awareness especially in the business community of the legal rights of an aggrieved woman employee & arming the ladies with necessary legal powers to fight gender inequality, discrimination meted out to them & sexual harassment at their workplaces.

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AT INDIA - LEGAL SNAPSHOTS

Re-christening Foreign Portfolio Investors (FPIs)

The Securities and Exchange Board of India ("**SEBI**"), the Indian capital markets regulator has on 7th January 2014 notified a new Foreign Portfolio Investor ("**FPI**") Regulation to put in place an easier registration process & operating framework for overseas entities seeking to invest in the Indian capital markets.

The new **FPI** Regulations replaces the existing SEBI Regulations for Foreign Institutional Investors ("**FII**s") in view of which, the new class of investors i.e. "**FPI**'s", would now encompass all FIIs, their sub-accounts and Qualified Foreign Investors (QFIs). Under the new Regulation, **FPI**'s have been divided into 3 categories as per their risk profile and the KYC (Know Your Client) requirements. The **Category I FPI**'s, which would be the lowest risk entities and would include foreign governments and government related foreign investors. **Category II FPI**'s would include appropriately regulated broad based funds, appropriately regulated entities, broad-based funds whose investment manager is appropriately regulated, university funds, university related endowments, pension funds etc and the **Category III FPI**'s would include all others not eligible under the first two categories.

The Reserve Bank of India ("RBI") permits Put and Call options for Foreign Investment

The RBI has recently in January 2014 permitted Indian companies to offer its foreign investors a pre-contracted exit price (popularly referred to as "put-call" option) at a future date whilst accepting funds subject to certain conditions. The optionality clause is permitted in equity shares and compulsorily & mandatorily convertible preference shares /debentures to be issued to a person resident outside India under the Foreign Direct Investment Scheme subject certain conditions i.e.

- i. A minimum lock-in period of 1 year or a minimum lock-in period as prescribed under FDI Regulations, whichever is higher;
- ii. After the lock-in period, the Non-resident investor exercising the option shall be eligible to exit with any assured return i.e.
 - In case of a listed company, the non-resident investor shall be eligible to exit at the market price prevailing at the recognized stock exchanges;
 - In case of unlisted company, the non-resident investor shall be eligible to exit from the investment in equity shares of the investee company at a price not exceeding that arrived at on the basis of Return on Equity (RoE) as per the latest audited balance sheet
- iii. Investments in CDCs (Compulsorily Convertible Debentures) and Compulsorily Convertible Preference Shares (CCPS) of an investee company may be transferred at a price worked out as per any internationally accepted pricing methodology at the time of exit duly certified by a Chartered Accountant or a SEBI registered Merchant Banker.

The RBI has further stated that all existing contracts will need to comply with the above mentioned conditions to qualify as "FDI compliant".

Conversion of External Commercial Borrowing & Lump sum Fee/Royalty into Equity

An Indian company is entitled to issue equity shares against External Commercial Borrowings ("**ECB**"), Lump sum Fee and Royalty subject to certain conditions and prescribed pricing guidelines. The Reserve Bank of India ("**RBI**") has recently pursuant to its Circular [A.P (DIR Series) Circular No.94 dated 16th January, 2014] clarified that where the liability sought to be converted by the Company is denominated in foreign currency, the parties concerned may apply the exchange rate prevailing on the date of the agreement between the parties concerned for such conversion. RBI has further clarified that it would have no objection if the borrower Company wishes to issue equity shares for a rupee amount less than that arrived at by mutual agreement with the ECB lender, however the fair value of the equity shares to be issued shall be worked out with reference to the date of conversion only.

Establishment of Liaison Office in India by Foreign entities

In accordance with the Foreign Exchange Management (Establishment in India of Branch or Office or

other Place of Business) Regulations, 2000 no entity or person, being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, Iran or China is permitted to establish in India, a branch office or a liaison office or a project office or any other place of business by whatever name called, without the prior permission of the RBI. The RBI has now vide its recent circular [A.P(DIR Series) Circular No.93 dated 15th January, 2014] extended the provisions of this Regulation along with their specified conditions to entities registered in/resident of Hong Kong and Macau as well.

The Reserve Bank of India ("RBI") eases External Commercial Borrowings ("ECB") norms for infrastructure companies

In order to strengthen the flow of resources to the infrastructure sector, the RBI has pursuant to its recent circular [A.P (DIR Series) Circular No. 78 dated 3rd December, 2013] permitted Companies to raise ECB's for their infrastructure project use in Special Purpose Vehicles ("SPV") through their holding Companies or Core Investment Companies under the automatic route/approval route, subject to certain terms and conditions.

The conditions stipulate that the infrastructure projects are required to be implemented by the SPV established exclusively for the project and the ECB proceeds can be utilized either for fresh capital expenditure (capex) or for refinancing of existing rupee loans (under the approval route) availed of from the domestic banking system for capex as per the extant norms on refinancing. Further ECB for SPV can be raised up to 3 years after the commercial operations date of the SPV and the SPV should give an undertaking that no other method of funding, such as trade credit, will be utilized for that portion of fresh capital expenditure financed through ECB proceeds.

Government allows FII, NRI investment in Insurance sector under 26% FDI cap

The Department of Industrial Policy and Promotion (DIPP) a part of the commerce ministry of India, has clarified vide [Press Note No.2 (2014 Series)] dated 04th February, 2014 that the foreign investment in the insurance sector will include portfolio investment as well as investment by non-resident Indians. The earlier regime which permitted upto 26% Foreign Direct Investment ("**FDI**") in the insurance sector through automatic route, had not clearly specified if that included other foreign investments as well. DIPP has now clarified and cleared that the 26% limit would include FDI, Foreign Institutional Investment (FII) and investments by Non-Residents Indians. The Press Note further spells out that the policy will apply to insurance companies, insurance brokers, third-party administrators, surveyors and loss assessors.

Filling of records of equitable mortgages with the Central Registry

Institutions notified under the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Act ("**SARFAESI Act**") have to mandatorily register the records of the mortgages created in their favour by deposit of title deeds with the Central Registry of Securitization Asset Reconstruction and the Security Interest of India ("**CERSAI**"). In order to avoid potential fraud & multiple financing against the same property the RBI has now vide its Circular directed all Non Banking Financial Companies (NBFCs) to file and register the records of all equitable mortgages created in their favour on or after March 2011 with the Central Registry and also register the records with the Central Registry as and when equitable mortgages are created in their favour.

RBI clarifies definition of 'Group Company' for Foreign Direct Investment ("FDI") in India

In order to have more clarity on the meaning of a "Group Company" the Government after the review of the extant FDI Policy, decided to incorporate the definition for "Group Company" in the Consolidated FDI policy. In view of which RBI has incorporated the definition of "Group Company" to mean two or more enterprises which, directly or indirectly, are in position to exercise 26% or more of voting rights in

another enterprise or appoint more than 50% of members of the Board of Directors in the other enterprise. The circular [A.P (DIR Series) Circular No 68 dated 1st November 2013] has deemed to have come into force with effect from 3rd June, 2013.

Small and Medium Enterprises ("SMEs") can be listed on the SME Exchange without an Initial Public Offer ("IPO")

SEBI has permitted listing of SMEs without any requirement of an Initial Public Offering ("IPO") and trading of specified securities of SMEs including start-up companies on the Institutional Trading Platform ("**ITP**") in SME Exchanges pursuant to its new set of regulations .i.e. The SEBI (Listing of Specified Securities on Institutional Trading Platform) Regulations, 2013 ("ITP Regulations") dated 24th October 2013 which have been inserted as a new Chapter to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("ICDR Regulations"). The regulations sets out several eligibility criteria for listing i.e. the company, group companies or subsidiaries should not have been referred to the Board for Industrial and Financial Reconstruction within a period of 5 years prior to the date of application for listing, no regulatory action should have been taken against the company seeking to list on ITP , its promoter or director, by SEBI, RBI, Insurance Regulatory and Development Authority or Corporate Affairs Ministry within 5 years prior to the date of application for listing, no winding up petition against the Company should have been admitted by any competent court etc. Whilst the regulations lay down strict compliances and eligibility criteria, it will provide easier exit options for entities such as Angel Investors, Venture Capital Funds and Private Equity Investors.

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