

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

PUBLIC INTEREST LITIGATION NO. OF 2019

In the matter of Articles 14, 19
and 21 of the Constitution of
India

AND

In the matter of Sexual
Harassment of Women at
Workplace (Prevention,
Prohibition and Redressal) Act,
2013

1. Abha Singh

2. Janaki Chaudhary

... PETITIONER

VERSUS

- 1.** The Secretary,
Ministry of Women and Child Development,
Government of India,
Shastri Bhavan, Dr. Rajendra Prasad Road,
Rajpath, Central Secretariat,
New Delhi – 110001
- 2.** The Secretary,
Ministry of Corporate Affairs,
'A' Wing, Shastri Bhawan,

Rajendra Prasad Road,

New Delhi - 110001

3. The National Commission for Women,

Plot No. 21, Jasola Institutional Area,

New Delhi – 110025

4. The State of Maharashtra,

Through the Secretary,

Women and Child Department

3rd Floor, New Administrative Building

Madam Cama Road, Hutatma Rajguru Chowk,

Mumbai - 400032, Maharashtra, India

... RESPONDENTS

TO

THE HONOURABLE CHIEF JUSTICE

AND THE OTHER HONOURABLE PUISNE

JUDGES OF THIS HON'BLE COURT.

THE HUMBLE PETITION OF THE

PETITIONER ABOVENAMED

MOST RESPECTFULLY SHEWETH:

1.0 PARTICULARS OF THE CAUSE/ORDER AGAINST WHICH THE PETITION IS MADE:

1.1 Petitioner no. 1 is a former corporate executive and has been in charge of heading the Prevention of Sexual Harassment Committee in her former company for over two and a half years. She has also had first hand experience of the challenges that a Member of the Internal Complaints Committee is faced with. Drawing from her own experience, she has also written to the Ministry of Women and Child Development highlighting the inadequacies in the Prevention of Sexual Harassment at the Workplace Act, 2013 (hereinafter "POSH Act"). Hereto annexed and marked as **EXHIBIT-'A'** is a copy of this letter.

1.2 Petitioner no. 2 is a social worker and, in the past, has taken up several issues of public importance. *Inter alia*, she has been taking up issues related to women from time to time and has had significant interaction with members of Internal Complaints Committees of companies. She also provides free legal aid for women under the aegis of her NGO RannSamar Foundation.

1.3 During the course of their work, the Petitioners have encountered various deficiencies in functioning of the Prevention of Sexual Harassment at the Workplace Act, 2013, which defeat the objectives of the Act. The Act was passed with the intention 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"

1.4 In pursuance of this objective, the Act defines the offence of the sexual harassment in broad terms and provides for the mandatory constitution of Internal Complaints Committees by Companies and Local Complaints Committees by the State. These Committees are bestowed with the power of civil courts, and are under obligation under the law to conduct a free and fair inquiry into the alleged incident and give an impartial recommendation to the employer.

1.5 However, the Members of such committees, akin to judges, have not been provided with any safeguards, which will enable them to act without fear and favour. Thus, an anomalous situation has arisen where ICC members have been conferred quasi-judicial powers

without the requisite independence and safeguards. This creates a highly unjust and iniquitous situation for ICC members as well as the parties to the case. This acts as a barrier to holistically **address** the issue of sexual harassment.

1.6 Hence, though this Petition, the Petitioners are highlighting the lacunae in the law and are seeking necessary relief in relation thereof.

2.0 PARTICULARS OF THE PETITIONERS:

2.1 Petitioner no. 1 is a former corporate executive and has been in charge of heading the Prevention of Sexual Harassment Committee in her former company for over 2 and a half years. She has also had first hand experience of the challenges that a Member of the Internal Complaints Committee is faced with. Drawing from her own experience, she has also written to the Ministry of Women and Child Development highlighting the inadequacies in the Prevention of Sexual Harassment at the Workplace Act, 2013. The letter is already attached as **Exhibit 'A'**.

2.2 Petitioner no. 2 is a social activist and, in the past, has taken up several issues of public importance. *Inter*

alia, she has been taking up issues related to women from time to time and has had significant interaction with members of Internal Complaints Committees (hereinafter referred to as "ICC") of companies. In the past Petitioner no. 2 has taken up several issues of public causes, which otherwise were lying in a state of inertia such as those concerning disability rights. She also provides free legal aid for women under the aegis of her NGO RannSamar Foundation.

2.3 The Petitioners are concerned citizens of India who fervently seek to abide by the Fundamental Duties enshrined under Article 51 of the Constitution of India. This Petition is being filed pursuant to such duties of the Petitioner as a citizen of India and her commitment for working for the society and for upholding the "Rule of Law" and ensuring a safe workplace for women in India.

3.0 DECLARATION AND UNDERTAKING OF THE PETITIONERS:

3.1 That the present petition is being filed by way of public Interest litigation and the petitioner does not have any personal interest in the matter. The petition is being filed in the interest of the public for the purpose of strengthening the Prevention of Sexual Harassment at

the Workplace Act, 2013 and for combatting the malaise of sexual harassment at the workplace.

3.2 That the entire litigation costs, including the advocate's fee and other charges are being borne by the petitioners.

3.3 That a thorough research has been conducted in the matter raised through the petition.

3.4 That to the best of the Petitioners' knowledge and research, the issue raised in this Petition were not dealt with or decided and that a similar or identical petition was not filed earlier by them.

3.5 That the petitioners have understood that in the course of hearing of this petition the Court may require any security to be furnished towards costs or any other charges and the petitioner/petitioners shall have to comply with such requirements.

4. FACTS IN BRIEF, CONSTITUTING THE CAUSE:

4.1 The parties in the Petition are as under:

4.1.1 Respondent No. 1 is the Secretary, Ministry of Women and Child Development, Government of India. He is the nodal authority conferred with powers of delegated

legislation and enforcement of the provisions of The Sexual Harassment of Women at Workplace Prevention, Prohibition and Redressal Act, 2013 (also referred to as the POSH Act of 2013). Respondent No. 1 is the primary authority for legislative enforcement of the POSH Act, 2013.

4.1.2 Respondent No. 2 is the Secretary, Ministry of Corporate Affairs, New Delhi. He is the nodal authority for enforcement of the provisions of the Companies Act, 2013. All legislative matters pertaining to public and private companies as well as Limited Liability Partnerships (LLPs) comes under his purview. The systems and procedures, as well as rules and guidelines governing corporate entities in India are framed by Respondent No. 2.

4.1.3 Respondent No. 3 is the National Commission for Women. Under Section 10 of the National Commission for Women Act, 1990, the NCW is vested with powers and functions to investigate and examine all matters relating to the safeguards provided for women under the Constitution and other laws.

4.1.4 Respondent No. 4 is the State of Maharashtra, through the Secretary, Women and Child Department. He is the nodal authority for overseeing enforcement and

implementation of the POSH Act, 2016 in the State of Maharashtra. Further he is also the "Appropriate Government" within the meaning of Sections and 25 of the POSH Act, 2016 having power to call for records from any workplace employer in matters pertaining to sexual harassment. Further he is also vested with rule-making power under Section 29 and is legally competent to frame guidelines which are sought by the Petitioner in this Petition.

4.2 The Petitioners submit that the brief background of the case has already been stated in Introduction and the same is being adopted herein.

4.3 The Petitioners further submit that the Prevention of Sexual Harassment Act, 2013 was enacted to address the grave issue of sexual harassment. The Act is intended to create a safe workplace for women. For this purpose it set up Internal Complaints Committees ("ICC") and Local Complaints Committees for effective grievance redressal. However, the Act creates an anomaly wherein a person from the private sector, with no legal training and no legal safeguards, has been granted the powers of a judge. This anomaly has also been noted by the Report of

the Justice J.S. Verma Committee, relevant parts of which are hereto annexed and marked as **EXHIBIT 'B'**.

4.4 The Petitioner submits that Members of the Internal Complaints Committees ("ICC") are tasked with the statutory duty of adjudicating sexual harassment complaints while being on the payroll of the company and can be terminated with 3 months pay as there is *no legal obligation on the private sector to follow the principles of natural justice*. This creates a serious conflict of interest and constrains ICC members from taking free, fair and impartial decisions. Further, if they take a decision that goes against the will of the senior management, they are susceptible to victimisation and targeting.

4.5 The above scenario becomes increasingly probable in instances in cases of sexual harassment where the ICC's actions have been **considered to be** questionable; a report of such an instance where this issue was raised has been annexed hereto and marked as **EXHIBIT 'C'**. Various media articles have also highlighted the flawed structure of the ICCs and its inability to function optimally. These articles are annexed hereto and marked as **EXHIBIT 'D'**.

4.6 Such issues act as barriers in addressing the serious issue of sexual harassment and are antithetical to the orders of the Hon'ble Supreme Court in Vishaka vs. State of Rajasthan (1997) 6 SCC 241, where it opined:

"Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally recognised basic human right."

4.7 Petitioner No. 1 has experienced these challenges first hand as the Presiding Officer of the ICC at her former workplace. As a private employee, she felt she was targeted and unfairly dealt with due to the decisions taken by her as the Presiding Officer. Deeply aggrieved at the state of affairs in the private sector regarding the Prevention of Sexual Harassment Act, she approached Petitioner no. 2. Petitioner no. 2, having heard similar problems raised by other ICC members she has interacted with in the course of her profession, was equally concerned. Thus, they have studied the position of ICC members in the Act and identified legal deficiencies with respect to them in the Act.

4.8 By way of abundant precaution, Petitioner No. 1 states that she has got no personal interest in the filing of this Petition and that this Petition does not seek any

relief in relation thereof. She is committed to abiding by the provisions of Article 51A (e) of the Constitution of India, which for the sake of convenience is quoted hereunder:

51A. Fundamental duties.—It shall be the duty of every citizen—

... ..

(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;

4.9 Petitioner No. 1, being a former member of the ICC, is full aware of this constraints which such members face arising out of conflict of interest of private employment and the statutory obligations conferred under the POSH Act. As a concerned citizen of India, and a person who fervently abides by the Fundamental Duties prescribed by the Constitution of India, it becomes the obligation of Petitioner No. 1, to bring these critical facts related to women before this Hon'ble Court.

4.10 Accordingly, this Petition is being filed seeking necessary relief in relation thereof.

4.11 The Grounds, with specific provisions of law and specific evidence in the matter are placed hereunder:

5.0 GROUNDS:

5.1 GROUND NO. 1: The members of Internal Complaints Committees should be treated as public functionaries while discharging their duties under the Prevention of Sexual Harassment Act, 2013:

A. The Prevention of Sexual Harassment at the Workplace Act, 2013 provides for the establishment of Internal Complaints Committees (hereinafter "ICCs") to investigate into allegations of sexual harassment in workplaces with more than 10 employees. **Section 4** provides for the Constitution of ICCs:

(1) Every employer of a workplace shall, by an order in writing, constitute a Committee to be known as the "Internal Complaints Committee":

Provided that where the offices or administrative units of the workplace are located at different places or divisional or sub-divisional level, the Internal

Committee shall be constituted at all administrative units or offices.

(2) The Internal Committees shall consist of the following members to be nominated by the employer, namely:—

(a) a Presiding Officer who shall be a woman employed at a senior level at workplace from amongst the employees:

Provided that in case a senior level woman employee is not available, the Presiding Officer shall be nominated from other offices or administrative units of the workplace referred to in sub-section(1):

Provided further that in case the other offices or administrative units of the workplace do not have a senior level woman employee, the Presiding Officer shall be nominated from any other workplace of the same employer or other department or organisation;

(b) not less than two Members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge;

(c) one member from amongst non-governmental organisations or associations committed to the cause

of women or a person familiar with the issues relating to sexual harassment:

Provided that at least one-half of the total Members so nominated shall be women.

(3) The Presiding Officer and every Member of the Internal Committee shall hold office for such period, not exceeding three years, from the date of their nomination as may be specified by the employer.

(4) The Member appointed from amongst the non-governmental organisations or associations shall be paid such fees or allowances for holding the proceedings of the Internal Committee, by the employer, as may be prescribed.

(5) Where the Presiding Officer or any Member of the Internal Committee,—

(a) contravenes the provisions of section 16; or

(b) has been convicted for an offence or an inquiry into an offence under any law for the time being in force is pending against him; or

(c) he has been found guilty in any disciplinary proceedings or a disciplinary proceeding is pending against him; or

(d) has so abused his position as to render his continuance in office prejudicial to the public interest,

such Presiding Officer or Member, as the case may be, shall be removed from the Committee and the vacancy so created or any casual vacancy shall be filled by fresh nomination in accordance with the provisions of this section.

B. In Section 11(3) of the Act, such a Committee has been conferred the powers of a civil court:

“For the purpose of making an inquiry under subsection (/), the Internal Committee or the Local Committee, as the case may be, **shall have the same powers as are vested in a civil court** under the Code of Civil Procedure, 1908 when trying a suit in respect of the following matters, namely: --

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents; and

(c) any other matter which may be prescribed.”

(Emphasis supplied).

C. From the above it is evident that the legislative intent of the Prevention of Sexual Harassment Act is to impart statutory duties on Members of ICCs in the nature of a judicial office. That ICC members are akin to judges is further corroborated by the definition of a Judge which is provided in Section 19 of the IPC. The provision is quoted hereunder:

“19. Judge.- The word "Judge" denotes not only every person who is officially designated as a Judge, **but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment,** or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, **or who is one of a body of persons, which body of persons is empowered by law to give such a judgment.”**

(Emphasis supplied).

D. From the above it can be surmised that the POSH Act intended for the Internal Complaints Committee to function as an adjudicatory body. Under Section 19 of the

IPC, ICC members can be considered as judge. Section 11 of the Act confers upon it powers to make an inquiry into a complaint of sexual harassment. Section 18 of the Act provides for an appeal against the decision of the ICC, and in the absence of such appeal, the decision of the ICC is definitive. Thus, the POSH Act empowers ICC members to pass definitive judgments, which can be appealed against, thereby treating them as 'judges'. Further, ICC members are judges for the purpose of the Indian Penal Code.

E. Judicial independence is a cardinal principle of all legal systems of the world as justice must not only be done but also be seen to be done. It is well accepted that without a free, fair and fearless judiciary there can be no justice. Article 50 of the Constitution expressly recognises the separation of powers doctrine, which is quintessential for an independent judiciary. Similarly, by adopting a system of an independent and integrated judiciary with the salaries of judges charged on the Consolidated Fund of India, the Constituent Assembly recognised that for justice to be done, the independence of the judges must be secured.

F. The Petitioners submit that the principle of judicial independence has been vitiated under the POSH Act. It has created an anomalous situation where private sector employees are expected to function like a court without being provided the requisite safeguards. Unlike their public sector counterparts, they can be terminated at random, with a mere 3-month severance pay or even without any such way in certain cases. The principles of natural justice do not apply to them and they are expected to submit to the whims and fancies of their employers.

G. The Justice Verma Committee Report of 2013 also critiqued the Bill on similar grounds while recommending the setting up of an Employment Tribunal. The relevant portion is quoted hereunder:

"We are of the view that the present structure mandating the setting up of an Internal Complaints Committee to which any complaint must be filed is counter-productive to the ends sought to be met. While each employer may opt for an internal mechanism for redressal of complaints of sexual harassment, it would better serve the ends sought to be achieved to set up a separate Tribunal to be

termed as the Employment Tribunal to receive and adjudicate all complaints.

*It is our apprehension that the in-house dealing of all grievances would dissuade women from filing complaints and **may promote a culture of suppression of legitimate complaints in order to avoid the concerned establishment falling into disrepute.** Consequently the setting up of a Tribunal as proposed herein would obviate the need for both the Internal Complaints Committee as well as the Local Complaints Committee as envisaged under the present Sexual Harassment Bill.”*

H. Thus, the present law as it stands leaves room for arm twisting of ICC members by the senior management of the company in the form of arbitrary transfers, termination, victimisation in unrelated areas of work etc. This risk of this form of retribution is more likely in cases where the respondent is a senior official with considerable influence in the Company. This conflict of interest, where the ICC members are on the payroll of the company and may have to take decisions against their seniors, creates a precarious situation for ICC Members as well as for women members at the workplace. It further defeats the objective of the Act, which is:

“to provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment”

I. Therefore, in order to reflect the true spirit of the Vishaka guidelines and India’s international obligations under the CEDAW, ICC members must be provided robust safeguards similar to those of judicial officers.

5.2 GROUND NO. 2: The members of Internal Complaints Committees must be treated as public functionaries while discharging their duties under the Prevention of Sexual Harassment Act, 2013:

A. The Petitioners submit that while discharging their functions under the POSH Act, private employees are acting in the capacity of public functionaries. ICC Members fall within the definition of ‘public servants’ under Section 21(3) of the Indian Penal Code, 1860, which is quoted hereunder:

“21. ‘Public servant’.—The words ‘public servant’ denote a person falling under any of the descriptions hereinafter following; namely:

*Every Judge including **any person empowered by law to discharge**, whether by himself or as a*

*member of any body of persons, **any adjudicatory functions**" (Emphasis supplied)*

B. Explanation 1 of the provision throws more light on the status of a public servant:

*Explanation 1.--Persons falling under any of the above descriptions are public servants, **whether appointed by the Government or not.**" (emphasis supplied)*

C. From the above it is evident that a private employee acts as a public functionary while discharging his/her duty under the POSH Act. Thus, it follows that an ICC member must have the same safeguards provided to public officials. These safeguards include *inter alia* protection from arbitrary termination by following the principles of natural justice.

D. It must also be noted that as a public servant, ICC members can be held liable to criminal action for not discharging their duties adequately. An example of this is found in Section 166:

"166. Public servant disobeying law, with intent to cause injury to any person.—

Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

E. This highlights the vulnerable position of an ICC Member. An ICC member can be arm twisted by the senior management to deliver a certain decision and can then be held criminally liable for the same. In light of this, it becomes all the more imperative to ensure that ICC Members are provided grievance redressal mechanisms, protection from arbitrary termination, monitoring by the State to ensure they do not face any form of overt or covert harassment etc. Being designated as part of the ICC should not be considered a punishment posting rather a matter of pride as one is operating in the service of the public to end the menace of sexual harassment. Such safeguards will strengthen the implementation of the POSH law and provide for substantial relief.

5.3 GROUND NO. 3: POSH Act creates an discrimination where the ICC members of a Government Department or a Public Sector Department have the protection of natural justice whereas similarly placed Members of ICC in private sector do not have any such protection:

A. The Petitioners submit that the POSH Act creates an arbitrary classification of ICC members in the private sector who are more vulnerable than their public sector counter parts. This is discriminatory and antithetical to their rights under Article 14.

Article 14 of the Constitution of India is reproduced hereunder:

*"14. Equality before law The State shall not deny to any person equality before the law or the **equal protection of the laws** within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."*

B. In the case of ***State of West Bengal vs. Anwar Ali Sarkar***, (AIR 1952 SC 75) the Hon'ble Supreme Court discussed the 'Test of Reasonable Classification' to determine whether a classification of people is violative of Article 14. The relevant portion of the judgment is quoted hereunder:

*"The **classification must not be arbitrary but must be rational**, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the **classification must be founded on an intelligible differentia** which distinguishes those that are grouped together from others and (2) that that **differentia must have a rational relation to the object sought to be achieved by the Act**. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them."*

C. From the aforesaid decision it can be surmised that the test of reasonable classification has two requirements. First, the classification must be founded on intelligible differentia and second, the differentia must have a rational relation to the object sought to be achieved by the legislation.

D. The Petitioners submit that the effect of the POSH Act has been to create two groups of people: ICC members in the public sector and ICC members in the private sector. ICC members in public sector have more protection and safeguards as opposed to their private sector counterparts.

E. Position of ICC Members in the Public Sector

Inherently, by virtue of their position, public sector employees have certain safeguards such as:

1. A fixed tenure
2. protection from arbitrary termination
3. a right to be heard in case of departmental enquiries and the application of principles of natural justice
4. periodic, timely promotions
5. existence of tribunals for grievance redressal such as Central Administrative Tribunals *inter alia*

F. Moreover, the Ministry of Personnel, Public Grievances and Pensions has taken out multiple notifications to address issues that arise from the implementation of the Act. For instance, in the Department of Personnel and Training Notification no. 11013/2/2014-Estt (A-III) Ministry of Personnel, Public Grievances and Pensions, hereto annexed and marked as **EXHIBIT-'E'**, there is a

direction to deal with threats or intimidation, which is quoted hereunder:

Special provisions to deal with threats or intimidation

30. Disciplinary Authority may also dispense with inquiry under Rule I 9(ii), and action may be taken without the inquiry when the Disciplinary Authority concludes that it is not reasonably practicable to hold such an inquiry. The circumstances leading to such a conclusion may exist either before the inquiry is commenced or may develop in the course of the inquiry. Such situation would be deemed to have arisen:

threatens or intimidates witnesses who are likely to give evidence against him with fear of reprisal in order to prevent them from doing so; or

where the Government servant himself or with or through others threatens, intimidates and terrorizes the Disciplinary Authority, Members of the Committee, the Presenting Officer or members of their family.

Disciplinary Authority is not expected to dispense with the inquiry lightly, arbitrarily or with ulterior motive or merely because the case against the Government servant is weak.

G. In the Department of Personnel and Training Notification no. 11013/2/2014-Estt (A-III), hereto annexed and marked as **EXHIBIT-'F'**, issues regarding

the seniority of the Chairperson are dealt with. It reiterates the position of law as held by the Hon'ble Allahabad High Court in **Shobha Goswami v. State of Uttar Pradesh** MANU/UP/0968/2015. Further, it provides for safeguards, such as transfer of the suspected officer to provide for fair inquiry, which is quoted hereunder:

“Further, to ensure fair inquiry, Ministries/ Departments may also consider transferring the suspect officer/ charged officer to another office to obviate any risk of that officer using the authority of his office to influence the proceedings of the Complaints Committee.”

H. Position of ICC Members in the Private Sector

On the other hand, since ICC members in private workplaces serve at the pleasure of their master, they can be dismissed anytime. The 'hire-and-fire' rule forms part of the basic tenets of the 'Master-Servant' relationship. In a private sector, if an employee has been terminated from his/her service, he/she has no remedy other than the right to claim three months' salary or severance, as the case may be. He/she has no recourse to the principles of natural justice or challenge her dismissal in an appropriate forum.

I. The above position of law has been clarified by the Hon'ble Delhi High Court in the case of **Shri Naresh Kumar vs. Shri Hiroshi Maniwa**, wherein it was held as under:

“6. In view of the above discussion pertaining to the ratio of the judgment of the Supreme Court in the case of S.S. Shetty (supra), **there cannot be granted relief to the plaintiff of declaring the termination of the plaintiff as illegal and void inasmuch as even if the termination is illegal and void, then, at best the plaintiff is entitled to three months' salary for the notice period and which can be the only maximum liability** upon the defendant no. 7. Thus the only relief which the plaintiff is entitled to is that he would be paid three months' salary...”

J. Therefore, if an ICC Member in the private sector, who is discharging his/her duties, is suddenly terminated from service by the management, she will have no legal recourse whatsoever other than claiming the contractual severance sums from her employers.

K. An unintended consequence of this is that if the strict actions of an ICC Member ruffles feathers in the upper echelons of a private company, they can choose to

simpliciter terminate her on extraneous grounds, which may have no relation on the performance of her duties under the POSH Act. Thus, they can overtly claim that her termination was done for 'miscellaneous reasons' while actually, the covert agenda was to inflict retribution upon her on account of her actions as an ICC Member.

L. Due to reasons abovementioned, private sector ICC members are more vulnerable than public sector ICC members. The law is irrational in this regard, as there is **no rational nexus** between creating differential standards for public and private sector ICC members and achieving the Act's objective of creating safe workspaces. In fact, this is contrary to the objective of the Act as private sector employees are placed in a disadvantageous position. Thus, such arbitrariness is violative of Article 14 and must be addressed.

5.4 GROUND NO. 4: The Local Complaints Committee which performs same functions as the ICC can take independent decisions without fear and favour, however, the ICC does not command such privilege as the members work under the private management:

A. The Petitioners submit that the Act establishes two mechanisms for resolution of sexual harassment grievances in the form of Internal Complaints Committees and Local Complaints Committees. The Composition of the Local Complaints Committee is provided in Section 7, which is quoted hereunder:

7. (I) The Local Complaints Committee shall consist of the following members to be nominated by the District Officer, namely:-

(a) a Chairperson to be nominated from amongst the eminent women in the field of social work and committed to the cause of women;

(b) one Member to be nominated from amongst the women working in block, taluka or tehsil or ward or municipality in the district;

(c) two Members, of whom at least one shall be a woman, to be nominated from amongst such non-governmental organisations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment, which may be prescribed: Provided that at least one of the nominees should, preferably, have a background in law or legal knowledge:

Provided further that at least one of the nominees shall be a woman belonging to the Scheduled Castes or the Scheduled Tribes or the Other Backward Classes or minority community notified by the Central Government, from time to time;

(d) the concerned officer dealing with the social welfare or women and child development in the district, shall be a member ex officio.

B. The abovementioned provisions make it apparent that the members of the Local Complaints Committees, which have the same powers as the ICCs, are provided with independence in their functioning. On the other hand, ICC members, being in-house and on the payroll of the Company, are shackled by the dictums of the senior management. Thus, an absurd situation arises where the Local Complaints Committee is in a position to take decisions without fear or favour, while the Internal Complaints Committee has been neglected and no safeguards have been provided to it.

C. The Petitioners submit this is also an arbitrary classification, which discriminates against Internal Complaints Committee members and is antithetical to the spirit of Article 14.

5.5 GROUND NO. 5: Right to a safe work environment is a fundamental right under Article 21 – such protection must be extended to ICC Members – the lack of safeguards violates their right to a safe workplace

A. Article 19(1)(g) of the Constitution states “all citizens have the right to practise any profession, or to carry on any occupation, trade or business.” The freedom to practice any profession is a fundamental right guaranteed by the Constitution. In **Visakha v. State of Rajasthan**, the Hon’ble Supreme Court unanimously held that:

“The fundamental right to carry on any occupation, trade or profession depends on the availability of a “safe” working environment. Right to life means life with dignity.”

B. Similarly, the POSH Act acknowledges, in its objects and reasons:

“...the 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.”

C. Thus, it is an established position of law that the freedom to practice any profession includes the right to a safe work environment.

D. The Petitioners submit that while the POSH Act seeks to provide for a safe environment for victims of sexual harassment, it overlooks the safety of ICC Members. The Act fails to address the vulnerability of ICC Members to undue harassment or pressure by senior officials in the workplace. As per the Act, a ICC Members is required to conduct fair and impartial inquiry and decision making while looking into cases of sexual harassment. This includes taking decisions against key managerial personnel who hold important positions in the company and exert considerable influence in its affairs. Thus, circumstances may arise where an officer may be compelled, in the discharge of his/her duty as a ICC Members and in the interests of justice, to take decisions that may conflict with the commercial interests of the company or the views of the senior management. This may lead to exertion of undue influence over the proceedings of the functioning of the Internal Complaints Committee (hereinafter "ICC") and ICC Members. It may also result in retribution through extraneous channels.

E. The Petitioners submit that the right to a safe environment extends not only to victims of sexual harassment but also to the officers of the Internal Complaints Committee, who are tasked with the statutory duty to pass orders against sexual harassment at the workplace. In order to discharge such duties, ICC Members must be able to act without fear or favour.

F. The Petitioner submits that the aforementioned conduct violates the ICC Members' right to a safe workplace. Apprehension of threats, harassment, falling into disfavour with the management, etc. prevents ICC Members from feeling safe in their workplace. This results in a grave violation of their fundamental right to practice any profession under Article 19(1)(g).

5.6 GROUND NO. 6: Measures need to be taken by the State to ensure the Prevention of Sexual Harassment Act is implemented in substance and spirit

A. In **Medha Kotwal Lele vs. Union of India, Civil Misc. Writ Petition No. 31659 of 2015**, the Hon'ble Supreme Court observed:

*"13. The implementation of the guidelines in Vishaka has to **be not only in form but substance and spirit** so as to make available safe and secure environment to women at the workplace in every aspect and thereby enabling the working women to work with dignity, decency and due respect."*

B. In the Report by Justice JS Verma Committee, it notes:

"we have arrived at the conclusion that, read as a whole, the Sexual Harassment Bill is unsatisfactory. While the Sexual Harassment Bill purports to be in effectuation of the Hon'ble Supreme Court's dictum in **Vishakha v. State of Rajasthan (1997) 6 SCC 241**, it is clear from a reading of the said Bill **that the spirit of the judgment in Vishakha is not adequately reflected.**"

C. In light of the above and the issues raised by the Petitioners, it becomes imperative that steps are taken to assess the functioning of the Complaints Committees established under the Act.

D. The Petitioners submit certain steps must be taken, such as:

1. Setting up a Commission to assess the problems of implementation that arise under the Act, such as:
 - a. Rights of ICC members, particularly in the private sector
 - b. Protection from persecution and harassment of ICC members
2. The State must conduct periodic appraisals regarding the functioning of ICCs and LCCs
3. Companies must be mandated to submit an annual report regarding the operations of their internal complaints committees
4. Declaring that the principles of natural justice will apply to ICC members as they are judges/public servants/discharging a statutory duty
5. In case of termination or any adverse action against a serving or former ICC Member, the Company/Workplace must send an intimation to the National Commission for Women and the Ministry of Women and Child Development explaining the reasons for such actions and establish that it is unrelated to their work as an ICC member.

6.0 SOURCE OF INFORMATION:

The Petitioners submit that they have used information available in the internet and also the personal experiences in relation to the implementation of the POSH Act.

7. NATURE AND EXTENT OF INJURY CAUSED/APPREHENDED:

The malaise of sexual harassment reared its ugly head in the public once again with last year's #MeToo movement. Indian women's participation in the labour force has drastically fallen to a mere 23.3% in 2017-18 as per the National Sample Survey Office. Former IMF Chief Christine Lagarde estimated that if women formed 50% of the workforce, India's GDP would grow by 27%. Sexual harassment is unconstitutional and criminal and if not seriously combated can be extremely detrimental to the psyche and safety of women, the workplace and the economy. It may also lead to dissatisfaction with existing legal structures, which result in social media trials and create a general atmosphere of disaffection and disenchantment with the law. Thus, it is imperative that the Court intervenes to strengthen the workings of this law.

8. ANY REPRESENTATION ETC. MADE:

The Petitioner no. 1 had made a representation bearing the date of 27th August, 2019 to the Ministry of Women and Child Development. However, no reply has been received nor any action taken.

9. DELAY, IF ANY, IN FILING THE PETITION AND EXPLANATION THEREOF:-

The Petitioner humbly submits that there is no delay in filing this Public Interest Litigation as this is an on-going public issue.

10. DOCUMENTS RELIED UPON.

The Petitioner would rely upon such documents which have been annexed and mentioned in the Index.

11. RELIEF(S) PRAYED FOR :-

The Petitioner prays for the issuance of appropriate writs, particularly writ of mandamus as under:

12. RELIEF(S) PRAYED FOR :-

The Petitioners therefore pray for the issuance of appropriate writs, particularly writ of mandamus as under:

(A) THAT this Hon'ble Court declare that the service conditions of ICC members are protected by the principles of natural justice.

(B) THAT this Hon'ble Court declare that ICC members are public servants and have the same protection as their counterparts in the public sector.

(C) THAT this Hon'ble Court pass guidelines, which may include the following:

1. The POSH officer should have stability of tenure - any premature removal should be supported by a valid reason and effected by means of a reasoned order;

2. Since the district complaints committee is constituted by the State Government to look into appeals from decisions of internal complaints committees, let this District Complaints Committee also have the power to enquire into cases where a posh officer has to be removed from the position and employment has to be terminated

3. Any proposal to dismiss or terminate a POSH Officer from the employment of the private workplace (whether a company, partnership or proprietorship) must be placed before the Local Complaints Committee constituted under Section 6 of the POSH Act, 2013. Further the POSH Officer in question must be given a right of hearing before the Local Complaints Committee prior to any action being taken by the employer;

4. While the principle of 'hire and fire' is an intrinsic part of the master-servant relationship, the circumstances must change when the private 'servant' is tasked with performing a sensitive statutory function. It is needless to add that the act of conducting an inquiry within the meaning of the Act is a statutory function being discharged by a private person. This is

effectively tantamount to performing a public duty. Furthermore, the POSH Act of 2013 is an instrument of public policy intended to create a safer workplace for women, irrespective of whether they are employed in private or public sector.

5. Any indirect action to terminate a POSH Officer without any reasons should be deemed to be an act of vengeance and reprisal and the workplace employer should be subject to heavy penalties unless he is able to justify the move with valid reasons.

(D) THAT this Hon'ble Court set up a commission to review the deficiencies in the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and make recommendations for protection of ICC members on the following issues:

- a. Rights of ICC members, particularly in the private sector
- b. Protection from persecution and harassment of ICC members

(E) THAT this Hon'ble Court direct all companies to intimate to the National Commission of Women and their respective Local Complaints Committee any adverse action taken against any ICC Members.

(F) THAT the Hon'ble Court directs the National Commission of Women to keep a watch, and intervene where required, in cases where the employment of the ICC member is sought to be terminated by the employer

during his/her tenure or within 5 years of the end of his/her tenure.

(G) THAT this Hon'ble Court direct the State to set up an external grievance redressal committee to address the grievances of ICC Members and conduct periodic appraisals of the performance of Internal Complaints Committees in Workplaces.

(H) ANY other relief order which this Hon'ble Court may deem fit to pass in the interest of justice.

11. INTERIM ORDER, IF PRAYED FOR :-

The Petitioner prays for the issuance of interim orders as under:

A. THAT till the time this Petition is disposed of, the Impugned Circular dated 21st June, 2019 be stayed.

12. CAVEAT :-

The Petitioner humbly submits that he has not received any notice of caveat from any of the Respondents in this matter.

PETITIONER NO.1

ADVOCATE FOR PETITIONERS PETITIONER NO.2

PLACE: Mumbai

DATED: August, 2019