Democracy cannot exist without justice and justice cannot exist without an independent judiciary. The judiciary is identified as the last bulwark against arbitrariness and all that can be broadly labeled as not only unjust but also immoral. The nation reveres judiciary on various vital issues affecting the country. In fact, the impression of the judiciary as final bastion against what is unjust is not of recent origin; it is discernible throughout the recorded history of mankind ¹.

The goal of the Indian Constitution is a “welfare idealism” covering a wide range of socio-economic aspirations of its people. The founding fathers believed that, the utility of the state would be best judged from its effect on the common man’s welfare. They pledged the country to the task of securing “to all its citizens, justice-social, economic and political; liberty, equality and dignity².

The judge without judicial activism can perhaps be described as a flower without a colour and fragrance; and a vehicle without fuel and wheels. In protecting the principles of ‘welfare state’ judiciary, should play an active role as a watching tower and judgments should be society oriented.

¹ Nixon M. Joseph v. Union of India AIR 1998, Kar 385 at 386
² see preamble of the Indian Constitution
The Indian judiciary has adopted an activist goal-oriented approach in the matter of interpretation of fundamental rights. The Supreme Court judiciary in India has undergone a radical change in the last few years.

5.1 NOTABLE JUDGMENTS - PRE VISHAKA SCENARIO

In interpreting the existing law, that is to say, what the law is, the courts are required to keep the particular situation in view and interpret the law so as to provide a solution to the particular problem to the extent possible. This is a legitimate exercise by the judiciary and its constitutional obligation by virtue of the role assigned to it in the constitutional scheme. The gaps in the existing law, which are filled by updating the law, result in the evolution of juristic principles.

Many women who have taken up the legal route to fight sexual harassment have failed to discover even a semblance of justice at the end of a dark tunnel. Take the case of Shehnaz Mudbhhatkal, who took up the challenge and paid the price, first hand.

Shehnaz Mudbhhatkal v. Saudi Arabian Air Lines (Writ petition decided by the Bombay High Court on January, 1999). Shehnaz was enjoying job as ground staff with a foreign Gulf-based airline, but things turned nightmarish with the arrival of a new station manager. He made passes, obscene remarks and propositions. She was detained late, on flimsy pretexts, and made to stay on, after 10 pm. Each time she refused his advances, she was given memos for mistakes she hadn’t made, denied promotions and assigned to the low level tasks.
Complaints to other superior officers didn’t really help. Matter reached a head when, at an office party, the station manager hid her handbag so she couldn’t leave, then grabbed her and thrust a cigarette into her mouth. Colleagues rescued Shehnaz that day. She flew to Saudi Arabia to inform about the sexual harassment she was facing. When she returned to Bombay, she found a pre-dated dismissal letter with a bunch of fabricated memos.

Shehnaz challenged her dismissal in the Labour Court, charging her employers with sexual harassment proceedings dragged on for several years. Even though the truth was completely in her favour. She had documents to prove many charges and her colleagues both male and female deposed in court in her favour. But the company began pressurising these people much that they came back to court and said they had signed the affidavits without reading them and they were able to disprove this too.

Finding that, they were on a weak legal wicket and were faced with an impartial and honest judge, the company kept petitioning the High Court and Supreme Court on technical points to delay the case. Thus it dragged on for 11 long years.

Meanwhile, Shehnaz’s husband, who held a semi-government job in the Gulf region, was threatened with dire consequences. He rushed back to India and began pressurising Shehnaz to withdraw the case, but she refused. Luckily, on 16 April 1996, the Labour Court awarded Shehnaz a favourable reinstatement
judgment: The company to reinstate the workman with full back wages and continuity of service with effect from 25-07-1985 (the date of her dismissal) with all attendant benefits. Saudi Airlines filed a petition in the High Court challenging the Labour Courts order. The single judge of the High Court upheld the Labour Courts findings that, she had been victimised by the management only because she refused to accede to the demands of her boss and directed the management to reinstate Shehnaz and pay full back wages. The management preferred an appeal to the Division Bench of the High Court but even this appeal was dismissed.

After thirteen years of litigation Shehnaz may be able to return to work. Of course she had savings and own house afford to fight against unjust dismissal and to prove sexual harassment though witnesses turned to hostile. What about the position of women who work to live?

5.1.1 An Analysis of Judgment of Bajaj

The duty of the police to investigate the matter, and of the court to take cognizance of the matter, if a prima facie case is made out. One cannot escape prosecution by saying that the allegations are not true. To test the veracity of the allegations and to try the case on the merits is the responsibility of the court. Such harm, which is expressly declared criminal by penal law, should not be characterized as “slight harm” attracting section 95 by Punjab and Haryana High Courts.
The harm caused was not slight as claimed by the respondent. Causing harm to the modesty of women cannot be slight.

Cri.L.J. 381.

In this case the victim and offender (both were Government officer’s) were present in a dinner at another Government officer’s residence on 18th July 1988. In the lawn, ladies and gentlemen were sitting in separate semicircles. The accused (K.P.S. Gill) crossed over to the ladies circle and called the victim (Bajaj) saying he wanted to talk to her over some matter. She went to him and when she was about to sit on a chair the accused drew that chair close to touch his chair. As she pulled the chair back to its place, the chair was again pulled by the accused. Realising that something was wrong, the victim moved away and sat at her original place between the ladies. The accused reached her and stood so close to her that he was only four inches away from her knees. He asked her to get up and come along with him. The victim objected saying, Mr Gill, how dare you, you are behaving in an abnoxious manner, go away from here. The accused again commanded the victim to get up and accompany him and blocked her way in such a manner that, she could not get up from the chair without touching him. She immediately drew her chair back, got up and tried to leave the place. On this the accused slapped her on her posterior in full gaze of all the ladies and gentlemen present.
On July 20, 1988, Mrs. Rupan Deol Bajaj, an officer of the Indian Administrative Service belonging to the Punjab cadre who was working as the special secretary, finance in the Punjab Government, lodged a complaint alleging commission of offences under Sections 341, 342, 352, 354, and 509 of the Indian Penal Code against Mr. K.P.S. Gill who was the Director General of Police of the State of Punjab.

A FIR was registered and a complaint to the Court of the Chief Judicial Magistrate was made. The High Court quashed the complaint and FIR. The Supreme Court reversed the judgment of the High Court and held that the FIR disclosed an offence under Sections 354 and 509 with law.

The Supreme Court held that the allegations prima facie disclose offences under Sections 354 and 509 of the Indian Penal Code because the alleged act of Mr. Gill slapping her posterior amounted to 'Outraging her modesty' for it was not only an affront to the normal sense of feminine decency but also an affront to her dignity.

5.1.2 Grounds on which High Court of Punjab and Haryana Quashed the Complaint

The following reasons weighed with the High Court in quashing the FIR and complaint:

i. The allegations made therein do not disclose any cognizable offence.

ii. The allegations are unnatural and improbable.
iii. The harm caused to Mrs. Bajaj is slight harm and did not entitle her to complain about the same in view of section 95 of the IPC.

iv. The investigation officer did not apply his mind to the allegations made in the FIR, for had he done so, he would have found that there was no reason to suspect commission of a cognizable offence, which was ‘sinequanon’ for starting an investigation under section 157 Cr.P.C.

iv. There was unreasonable and non-explained delay of 11 days in lodging the FIR.

5.1.3 Defence Pledged by Mr. K.P.S.Gill

i. Act causing slight harm

One of the grounds on which the Honourable High Court of Punjab and Haryana quashed the complaint was the fact that in their opinion the offence was so trivial and injury caused was so slight that it did not merit the intervention of the court.

Section 95 States: “Nothing is an offence by reason, that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm”.

Section 95 is intended to prevent penalization of negligible wrongs or offences of trivial character. Whether an act amounts to trivial or not would depend on...

a. The nature of the injury;
b. The position of the parties;
c. The knowledge or intention with which the offending act is done and
d. Other related circumstances.

It was held in the case of Mrs. Veeda Menezes v. Yusuf Khan Haji Ibrahim Khan\(^3\) that, there can be no absolute standard or degree of harm, which may be regarded as so slight that a person of ordinary sense and temper would complain of the harm. It cannot be judged solely by the measure of physical or other injury that acts causes.

Applying the above mentioned test to the facts of the case Supreme Court observed that;

i. Section 95 of IPC has in no manner applicable to the allegations made in the FIR.

ii. The respondent, Mr. Gill, the top most official of the State Police, indescently behaved.

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\(^3\) AIR 1966, SC 1773 : 1996 Cri. L. J 1489
iii. Mrs. Rupan Deol Bajaj, a senior lady IAS officer had raised objections to his behaviour, inspite of her raising objection the respondent continued with his behaviour in the presence of gentry.

iv. Though the physical harm was slight the act of being slapped on the posterior in the presence of gentry would cause immense mental trauma.

II Absence of mens rea

It needs to be looked into as to what exactly constitutes mens rea. The fundamental principle of criminal liability states that a person may not be convicted of a crime unless the prosecution has proved beyond reasonable doubt both:

i. that he has caused a certain event or that responsibility is to be attributed to him for the existence of the state of affairs, which is forbidden by criminal law.

ii. And that he had a defined state of mind in relation to the causing of the event or the existence of the state of affairs.

The event or state of affairs, is called the actus reus and the state of mind is called the mens rea of the crime.

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The Indian penal code has brought in mental element in sections 354 and 509 by using the words ‘intending to outrage or knowing it to be likely and intending to insult... intending that such word or sound shall be heard’.

Though, the course of this argument Mr. Tulsi, the Additional Solicitor General, appearing for Mr. K.P.S. Gill argued that, an element of *mens rea* is lacking in the act of respondent.

This argument prima facie appears fallacious, since, from the facts of the case it is clear that the respondent had every intention to do what he was doing.

### 5.1.4 Intention to Outrage the Modesty

The whole chain of events clearly establishes the fact that right from the beginning the respondent intended to outrage the modesty.

i. Mr. Gill asked Mrs. Bajaj to come and sit near him;

ii. Mr. Gill suddenly pulled the chair close to him, on which Mrs. Bajaj was about to sit.

iii. Mr. Gill again pulled it close to him, when Mrs. Bajaj tried to put the chair back to its original position.

iv. Realising something was wrong Mrs. Bajaj immediately left the place and went back to sit with ladies but was again confronted by Mr. Gill after 10 minutes.
v. In a rude voice he again called her to sit with him.

vi. When she tried to leave he blocked her way.

vii. When Mrs. Bajaj tried to turn back and leave, the respondent slapped on her posterior.

Which shows that the accused had an intention to commit the act. Supreme Court observed that, final act of slapping the posterior was covered under Section 354 of IPC and other acts and gestures were covered under section 509 of IPC.

The range of acts covered by sections 354 and 509 of the IPC, having the intention to insult / outrage the modesty of women is an essential element of both the sections. Intentions as in all criminal offences, has to be proved from the acts of the accused and the attendant facts and circumstances.

5.1.5 Modesty

Whether a woman has or has developed modesty, as that word is used in section 354 of IPC is a question of fact in each case and there is no abstract conception of modesty that can apply to all cases.

The word 'modesty' is not defined in the Indian penal code. The Shorter Oxford English Dictionary (Third Edition) defines the word 'modest' in relation to woman as follows:

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'Decorons in manner and conduct; not forward or lewd: shame fast'. Hence (in later use also of men) scrupulously chaste. Modesty, and in relation to woman, 'womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct'.

Webster's New International Dictionary of English Language (Second Edition) amplifies the definition of 'modest' by adding 'observing the proprieties free from undue familiarity, indecency, or lewdness'.

There is no question as to the fact that appellant did possess modesty, which was outraged.

In State of Punjab v. Major Singh⁶, learned Judge M.K. Mukherjee, went into the question of whether a female child 7½ months could be said to be possessed of modesty? It was held that, when any act done to or in the presence of woman is clearly suggestive of sex according to the common notions of mankind that must fall within the mischief of S 354. 'women' denotes a female human being of any age under section 10 of IPC. Hence the girl includes women.

5.1.6 Test of Outraging Modesty

In Bajaj v. K.P.S. Gill⁷, the Supreme Court held that; the ultimate test for ascertaining, whether modesty has been outraged is that the action of the offender could be perceived as one, which is capable of shocking the sense of decency of a

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⁶ AIR 1967, SC 63 : 1967 Cri. LJ 1
⁷ AIR 1996, SC 309
woman when the above test is applied in the present case, keeping in view the total fact situation, it cannot but held that the alleged act of Mr. Gill in slapping Mrs. Bajaj on her posterior amounted to 'outraging of her modesty' for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady-sexual over tones or not withstanding.

Bajaj case is an advance over earlier judgments in that it does not limit the understanding of modesty on the basis of sex. In State v. Major Sing, the court observed that;

The test of outraging of modesty must therefore be whether a reasonable man will think that the act of the offender was intended to or was known to be likely to outrage the modesty of the woman. In considering the question, he must imagine a woman to be a reasonable woman and keep in view all the circumstances concerning her, such as her station and way of life and the known notions of modesty of such a woman.

The trust of the judgment remained that "the essence of women’s modesty is sex". After Bajaj, an act capable of "shocking the sense of decency of woman" may amount to insulting or outraging the modesty of a woman whether it has 'sexual overtones or not'. Thus, in Bajaj, the concepts of modesty and privacy have been constructed in a more egalitarian manner, so that any other kind of harassment or inconvenience, be it in a woman's private or public life, may

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8 Supra Note 6
9 see also Giridhar Gopal, AIR 1953 MB 147).
10 Ibid.
account to an offence. Now, subtle instances of outraging modesty and intruding upon a woman's privacy can be addressed under the said provision. The fact that her sense of decency is shocked and she is compelled to seek the protection of the law, may now be sufficient to bring the act within the scope of the penal provisions.

Difference between outraging the modesty (s 354) and insulting the modesty (s 509). Essentially Courts have interpreted that where modesty has been outraged it is quite obvious that her modesty has also been insulted. So wherever an offence has been made out under S 354, S 509 has also been applied. Which seems a logical explanation, as it cannot be contemplated that former cannot go hand in hand without the latter. There is a distinction drawn on sentencing. Under Sec 354 maximum that can be awarded is imprisonment of 2 years coupled with fine whereas under Sec 509 it is imprisonment of 1 year coupled with fine, which reflects that 'outraging the modesty of woman' is considered a more heinous crime than 'insulting the modesty of woman'.

5.1.7 Significance of Bajaj Judgment

Supreme Court in Bajaj judgment has clarified certain issues as to what constitutes 'modesty' and how it is to be judged. It has relied on 'common notions of mankind' as to judge what is affront to women's dignity. Also this has been considered bearing in mind contemporary social standards.
It is important that the issue gets the attention it deserves, if a society fails to respect its women-folk then sanity is the first casualty. In the dynamics of today’s society the uncharitable approach towards women cannot be acceptable. Courts have effectively expanded the scope so as to safeguard women’s right’s. This case set a precedent for ground-breaking verdict in the case of Vishaka and reinforced the principle that nobody is above the rule of law and justice would be done. But it is a long awaiting judgment took almost 8 years for the disposal.

5.2 NOTABLE JUDGMENT – VISHAKA

The courts have been making judicial intervention in cases concerning violation of human rights and as an ongoing judicial process. Decisions on such matters as the right of the female employees not to be sexually harassed at the place of work as in the case of Vishaka and Apparel are pointers in that direction.

In human affairs there is a constant recurring cycle of change and experiment. A society changes as the norms acceptable to the society undergo a change. Old ideologies and old systems give place to new set of ideologies and new systems. The judges are required to be alive to this reality and while discharging their constitutional duties have to develop and expound the law on those lines acting within the bounds and limits set out for them in the constitution. Judicial creativity as a means of evolving new juristic principles for the development and growth of law, is an accepted and well recognised role of the judiciary.
5.2.1 An Analysis of Judgment of Vishaka


In 1985, Banvari Devi was appointed as a Saathin i.e., a female village level worker, under the women's development programme by the Government of Rajasthan. The project was initiated for the empowerment of women. As part of her work, she was expected to encourage people to send their children to school, to discourage child marriages, to help widows get their pension and other similar activities. In 1992, she was gang-raped by five 'upper-caste' men in revenge for her campaign against child marriage. The incident exposed both the hazards to which a working woman may be exposed in the course of her work and the urgent need to put into place safeguards that would prevent the occurrence of sexual harassment at work place, leading to the filing of writ petition before the Supreme Court in _Vishaka_ case (a class action by certain social activists and NGO's). The writ petition was filed in the Supreme Court with a three fold aim:

i. firstly, to assist in findings suitable methods for the realization of gender equality.

ii. secondly, to prevent sexual harassment and

iii. thirdly, to fill the vacuum in the existing legislation.
5.2.1.1 Supreme Court Observed

In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places the contents of International Conventions and norms (CEDAW) are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Arts 14, 15, 19 (1) (g) and 21 of the constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. This is implicit\(^{11}\) from Art 51(c) and the enabling power of the parliament to enact laws for implementing the International Conventions and norms by virtue of Art 253 read with Entry 14 of the Union List in Seventh Schedule of the Constitution. Article 73 also is relevant. It provides that the executive power of the Union shall extend to the matters with respect to which parliament has power to make laws. The executive power of the Union is, therefore, available till the parliament enact legislation to expressly provide measures needed to curb the evil.

Thus, the power of the court under Art 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. The progress made at each hearing culminated in the formulation of guidelines to which the Union of India gave its consent through the learned Solicitor General, indicating that these should be the guidelines and

norms declared by this court to govern the behaviour of the employers and all others at the work places to curb this social evil.

The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of the Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

i. to ensure that all persons are able to live securely under the Rule of Law;

ii. to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

iii. to administer the law impartially among persons and between persons and the State.

The Supreme Court Guidelines

The guidelines and norms prescribed by Supreme Court are as under:
Having regard to the definition of 'human rights' in S.2(d) of the Protection of Human Rights Act, 1993.

Taking note of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in work places and that enactment of such legislation will take considerable time.

It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

1. **Duty of the Employer or other responsible persons in work places and other institutions**

   It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment by taking all steps required.

2. **Definition**

   For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:
i. Physical contact and advances;

ii. a demand or request for sexual favours;

iii. sexually coloured remarks;

iv. showing pornography;

v. any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in Government, Public or Private enterprises such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive Steps

All employers or persons in charge of work place whether in the public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:
i. Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

ii. The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

v. As regards private employers steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

iv. Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings

Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority.

In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The
victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary Action

Where such conduct amounts to misconduct in employment as defined by the relevant services rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint Mechanism

Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer’s organization for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee

The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary a Complaints Committee, a special counselor or other support service, including the maintenance of confidentiality.

The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any
undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.

The Complaints Committee must make an annual report to the Government department concerned of the complaints and action taken by them.

The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government Department.

8. **Workers' Initiative**

Employees should be allowed to raise issues of sexual harassment at workers' meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. **Awareness**

Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.
10. Third Party Harassment

Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

Accordingly, we direct that the above guidelines and norms would be strictly observed in all work places for the preservation and enforcement of the right to gender equality of the working women. These directions would be binding and enforceable in law until suitable legislation is enacted to occupy the field. These Writ Petitions are disposed of, accordingly.

5.2.1.3 Subjective and Objective Test of Sexually Determined Behaviour

The guidelines define sexual harassment as including various types of unwelcome “sexually determined behaviour”.
In the case of Harris, the US Supreme Court held that the test for whether or not a hostile environment can be said to exist is both subjective and objective. The subjective test is whether the victim herself perceives the environment to be abusive. The objective test is whether the conduct or work environment is such that a "reasonable person would find it hostile or abusive".

This dual test is also found in the guidelines Article 2 requires it to be established that "the victim" has a reasonable apprehension that "in relation to her employment or work" the conduct can be humiliating and may constitute a health and safety problem. The reference to "the victim" means that the complainant will have to prove she has, subjectively, experienced such an apprehension,

The stipulation in Article 2 that the apprehension be "reasonable" means that the complainant will have to demonstrate that the conduct or circumstances were such that a reasonable person in her position would consider the conduct to be harassing – this is the objective test.

The significance of the subjective test is that it brings into consideration the complainant's individual perception of the conduct being complained against. People may have different perceptions of what constitutes behaviour that is insulting, embracing, demeaning or threatening to a woman at the work place. So in considering an allegation of sexual harassment, a court would have to test the conduct being complained of against same standard for what constitutes acceptable behaviour towards a woman at the work place. The subjective limb of the test ensures that the complainants individual temperament, age, socio-cultural
background and other factors inform the standard to be adopted by a court in a given case for what is or is not acceptable behaviour at the work place\textsuperscript{12}.

The objective limb also informs this standard but in different way. The objective test poses the question of whether in the given case it was reasonable for a person of the complaint’s temperament, socio-cultural background, age and other factors to have felt sexually harassed.

In other words, the subjective limb provides the point of view from which the conduct being complained against is to be judged, i.e., the complaint’s point of view, and objective limb provides the standard for judging whether a perception of sexual harassment was in the circumstances of the case reasonable given that point of view. In the case of \textit{Oncale}, decided by the US Supreme Court, this dual test was expressed as follows: the conduct should be judged from the perspective of a “reasonable person” (objective limb of the dual test) in the plaintiff’s position (subjective limb of the dual test).

The real social impact of work place behaviour often depends on a constellation of surrounding circumstances, expectations and relationships which are not fully captured by a simple recitations of the words used or the physical acts performed. For instance, physical contact such as kissing on the cheek to greet some one or patting some one on the cheek or shoulder, though acceptable when made by a friend in a social context or by a family member or even between an employer and employee of the same sex, might be sexually harassing at the work place or between opposite sex employer / employees. Similarly, comments about a

\textsuperscript{12} the lawyers collective women’s rights Initiative, “\textit{Law relating to sexual harassment at work place}” 2004, p.22
women figure or the telling of a sex related joke may be acceptable from a social acquaintance but not from an employer or coworker at the work place. In Cine fields and anchoring professions, certain physical acts are unavoidable, work place behaviour has to be accessed from surrounding circumstances and situations.

As regards the subjective test it may be noted that evidence as to the demeanor of the complainant immediately after the sexually harassing acts, say when she confides in a colleague or physchotherapist, can be submitted in establishing a complainant's subjective perception of the conduct being complained against.

5.2.1.4 “Unwelcomeness” of the Conduct

The guidelines define sexual harassment as “unwelcome” sexually determined behaviour and “unwelcome” physical, verbal or non-verbal conduct of a sexual nature. If a complainant satisfies the subjective – objective test, then it follows without more that the conduct was unwelcome to her. This is the case because, if it is reasonable for the woman in the circumstances of the case to have felt sexually harassed by certain conduct, then it cannot be said that such conduct was “welcome” to her; conversely, if it can be proved that a woman “welcomed”, i.e., invited or encouraged the conduct that she alleges to have been sexually harassing, then she would fail the subjective – objective test because if it is proved that she invited the conduct, then she cannot reasonably claim to have perceived it as demeaning, insulting or threatening.
It must be stressed that the presence of the word "unwelcome" in the definition of sexual harassment does not require a complainant to point to some overt act on her part that demonstrated to the alleged perpetrator that his conduct was unwelcome. If such a requirement were to be read into the definition of sexual harassment, it would produce serious tensions in the law. In the first place, an overt act on the part of the woman (that would demonstrate that the conduct is unwelcome) could be made by her only after she has been subjected to the unwelcome conduct, and the objective of the law regarding sexual harassment is to prevent the occurrence of such behaviour in the first place. Secondly, a hostile environment sexual harassment claim can be made by a person who is not herself the target of the actions being complained against and in such cases, it would be artificial to require the complainant to demonstrate that behaviour that was not directed at her was "unwelcome"\(^{13}\).

In the case of *Simpson*, the Canadian Court of appeal took the view that conduct may be found to be "unwelcome" in a sexual harassment case even if there is no overt expression of its being unwelcome on the part of the complainant. The Court said that for the purpose of assessing workplace sexual harassment, it must be borne in mind that an employee may apparently consent to conduct or comments on the part of a supervisor that are nonetheless unwelcome and constitute harassment. The Court held that, in a complaint against a supervisor, because of the power imbalance in an employee's relationship with a supervisor, and "the perceived consequences of objecting to a supervisor's behaviour,

\(^{13}\) *Ibid.*
particularly when the behaviour is not specifically directed to the employee (for example, making comments to or touching another employee), an employee may go along with the conduct because she feels constrained from objection, however, this would not establish that the behaviour was not unwelcome”.

In Read the Court ruled the fact that the victim either voices robust objection or elects to tolerate the harassment, however unwelcome and offensive, is irrelevant to determining whether or not there is a detriment to the victim of a hostile or demeaning work environment. In this case, it was also held that, it would not be a defence to a claim that the issue of sexual harassment was not raised earlier or in another forum as “many women, in particular, will put up with an environment in which unwelcome or offensive conduct is prevalent rather than run the risk of losing employment, getting offside with fellow workers, or having a confrontation with a dominant employer. For many, making a formal complaint will be the last resort”.

Another aspect to be considered on the issue of “unwelcomeness” and the subjective – objective test is that it provides the opening for a defence that the complainant did not perceive the conduct as humiliating or invited the conduct complained against. A defendant may attempt to establish this defence by pointing to a complainant’s way of dressing, her personal relationships with men, her manner of interacting with men, whether at the work place or socially, or her “reputation”, to argue that the acts complained against were not at the time
perceived by her to be sexually harassing. This is an unfortunate and painful requirement of the law for genuine complainants of sexual harassment.

5.2.1.5 The Cases to Oppose such a Defence

The cases to oppose such a defence on sexual offences in Indian Law should be cited where the courts have stated that inquiries into allegations of sexual offences should be conducted in a manner that avoids pain and embarrassment to the female victim\textsuperscript{14}.

Under Sec 62 (4) of the Human Rights Act (1993) of New Zealand, it is provided that, “where a person complains of sexual harassment, no account shall be taken of the person’s sexual experience or reputation”. Moreover, the Supreme Court of India has held in the case of \textit{State of Andhra Pradesh v. Gangula Satya Murthy} \textsuperscript{15}, in the context of a rape case that the sexual experience of a proscurtix is irrelevant to the determination of whether she was raped, and that even if she had sexual intercourse prior to the time of the rape, “she had every right to refuse to submit herself to sexual intercourse ... as she was not a vulnerable object or prey for being sexually assaulted by anyone”.


\textsuperscript{15} (1997)1 SCC 272.
5.2.1.6 Nexus Between the Sexual Harassment and the Employment

Under Article 2 of guidelines, acts of "unwelcome sexually behaviour" are said to be harassing when they are humiliating and may constitute a health and safety problem "in relation to (the victim's) employment or work". This means the complainant has to prove a nexus between the acts of harassment and her employment.

The fact that the humiliating conduct took place in the work place or while the complainant was engaged in work related activity, or the fact that the sexually harassing acts were perpetuated by a person with whom the complainant had to frequently interact at the work place, would be sufficient to establish the relationship of the conduct to the employment.

On the issue of nexus between the harassing acts and the victim's employment, the New Zealand Court of Appeal has held in Smith v. The Christchurch Press Company Limited\textsuperscript{16}, that such acts, even if committed by a coworker during the office lunch break and on premises outside the work place, amounted to sexual harassment at the work place. In this case, the victim was sexually harassed by a coworker when he invited her during the office lunch break to his home. The coworker argued that he ought not to have been dismissed for sexual harassment at the work place, as the incident had occurred away from the work place on his own time (i.e., during the lunch break) and was therefore unrelated to his employment. Rejecting this contention the court of Appeal upheld

\textsuperscript{16} ((2000) NZCA 341.)
the findings of the lower court that the nexus to employment was established by the fact that the perpetrator had taken the opportunity at work to approach the victim to invite her for lunch while she was going about her duties. It further emphasized, "the fact that the incident took place away from the premises during the lunch time does not remove the nexus between employment and the sexual harassment". According to the court, the necessary nexus existed where there was a clear relationship between the conduct and the employment and it was not so much a question of where the conduct occurred but rather its impact or potential impact on the employment17.

5.2.2 The Effect of the Vishaka Judgment

The Vishaka guidelines have the following effect:

- Guidelines amend service rules and standing orders to include the prohibition of sexual harassment. Accordingly the Industrial Employment (standing orders) Act (1946) and Central Civil Service Conduct Rules, which govern employment, were amended. The guidelines specifically provides that private employers ought to take steps towards the prohibitions contained in the standing orders.

- Guidelines create awareness of the rights of women employees.

- Guidelines allow disciplinary action to be taken if an act of sexual harassment at work place amounts to misconduct.

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17 Supra Note 12
• Guidelines allow the initiation of appropriate criminal action by making a complaint in case such conduct amounts to a specific offence.

• Guidelines set up a complaints committee which is headed by a woman, which is made up of at least 50% women and which includes an NGO member.

• Guidelines permit workers to raise issues of sexual harassment at worker's meetings and allow it to be affirmatively discussed at employer-employee meetings.

The guidelines are binding and enforceable in law until suitable legislation is enacted.

5.2.2.1 Does the Guidelines Apply against Private Employers

Article 2 of the guidelines in defining sexual harassment refers to both public and private enterprise, and article 3 of the guidelines expressly refer to private sector employers stipulating that 'all employers or persons in charge of work place whether in public or private sector should take appropriate steps to prevent sexual harassment'. Amongst the preventative steps that are to be followed under article 3 is a direction to 'private employers' to include rules prohibiting and penalizing sexual harassment under the Industrial Employment (standing orders) Act 1946.
Note: After the issuance of guidelines, the Central Civil Services Conduct Rules and the Industrial Employment (standing orders) Central Amendment Rules (1999) have been amended to include a prohibition against sexual harassment at the work place. Both amendments adopt the definition of sexual harassment contained in Art.2 of the guidelines.

5.2.3 The Limitations of Vishaka Judgment

There are certain limitations in Vishaka Judgment.

I. Safe work Place

The unorganized sector comprises the largest section of working women. Most of them do not have a well-defined work place. For instance, in case of hawkers and vendors, the streets become the work place; in case of journalists and social workers no fixed work place. Vishaka guidelines provides that, 'appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no woman employee should have reasonable grounds to believe that, she is disadvantaged in connection with her employment'. Thus, as noted above an employer can be held liable for the failure to provide a safe working environment and sexual harassment at the work place may constitute a health and safety problem.
In the advent of latest technology, (hi-tech mobile phones, cyber stalking) 'safe work place' definition is very difficult to define some times it is beyond the reach of employer to provide also.

II. Vicarious Liability of the Employer

The guidelines place too much faith on the employers and places on them the onus of resolving the matter of sexual harassment. Such a position does not recognise the fundamental conflict of interests between employer and employee, or management and worker. It is assumed that the employer has the best interests of the employee at heart and will do all that is need to establish and resolve a case of sexual harassment. In reality, this is far from the responsibility put on it by the Supreme Court guidelines. The employees assertion results in a conflict with the management which uses its power position to suppress the matter and pressurise not only the subordinates but also other authorities.

Vicarious liability of employer seems to have been conceived to fit a traditional office based employment scenario. In India most of the women are employed in unorganised sector. In some instances of work employment there is hardly no employer liability arises.

- Self employed women
- Social working women
- Migrant labour.
• Where teenage or any other age women is a employer and harassed by employees
• Women who establish their own nursing home.
• Sole proprietorships.

III Formation of Complaints Committee

The guidelines place too much trust on the employer for the formation of a complaints' Committee and assume that the employer is the best protector of employees interests.

For instance, in case of unorganized sector (which includes workers such as construction workers, beedi workers, domestic workers etc.,) constituting the Committee may be impossible.

5.2.4 Significance of Vishaka Judgment

The significant aspects of Vishaka judgment are:

Firstly, sexual harassment at the work place has been recognised as a serious problem. The Vishaka guidelines, which are enforceable in law, are a vindication of the struggle to get sexual harassment at work place the serious attention it deserves.

Secondly, the Vishaka judgment made it mandatory for all work places to adopt the guidelines. In addition, the judgment provides a comprehensive
definition of sexual harassment and a redressal mechanism for handling complaints.

Thirdly, the crux of the guidelines reminds one cannot take a woman casually. To treat her on equal terms, protect and honour the dignity of a woman at work place.

Fourthly, this judgment opened up the narrow understanding of sexual offences embodied in existing legal codes.

5.2.5 Survey Reports on Guidelines

Sexual Harassment at the Work Place in India Study Report\(^\text{18}\) stated that the biggest irony of the guidelines remains that although such guidelines arose as a response to the gang rape of a saathin in the State Development Programme, the remedies suggested may be of a little use to the victim herself.

National Commission for Women Survey Report\(^\text{19}\), revealed that, there is no difference of situation after the pronouncement of the verdict. A majority of the respondents (84.97 percent) were not aware of the Supreme Court's Judgment.

Other reports suggest that most of the Government/Public sector undertakings have been rather slow in implementing the directives. Many haven't even implemented them. The concerned organisations are not very serious about it, maintains the president, Mahila Dakshata Samiti.

\(^{18}\) International Labour Organisation, New Delhi

\(^{19}\) NCW conducted a survey after one year of the Supreme Court Verdict in the Vishaka
Again, in many cases it has been found that, the Committees within the organisations were set up only when there were serious allegations of sexual harassment. Even then, there were inordinate delays.

5.3 NOTABLE JUDGMENTS – POST VISHAKA SCENARIO

5.3.1 An Analysis of Judgment of Apparel Export

Apparel Export promotion council v. A.K. Chopra, AIR 1999 Supreme Court 625 (Dr. A.S.Anand, C.J.I and V.N.Kare J.) In this case Miss. X (name withheld) herein after referred to as complainant was working as a private secretary to the Chairman of the Apparel Export Promotion Council. It was alleged that on 12-08-1988, Mr. A.K.Chopra, hereinafter referred to as respondent tried to molest the complainant who was at the relevant time working as a clerk-cum-typist. She was not competent or trained to take dictations. The respondent, however, insisted that she should go with him to the Business Centre at Taj place Hotel for taking dictation from the Chairman and type out the matter. Under the pressure of the respondent, she went to take the dictation from the chairman. While the complainant was waiting for the director in the room, the respondent tried to sit too close to her and despite her objection did not give up his objectionable behaviour. She later on took dictation from the Director. The respondent told her to type it at the Business Centre of the Taj Palace Hotel, located in the basement of the Hotel. He offered to help her so that her typing was not found fault with by the Director. He volunteered to show her the Business Centre for getting the matter typed and taking advantage of the isolated place, again tried to sit close to her and touch her despite her objections. The draft typed
matter was corrected by Director (Finance) who asked the complainant to retype the same. The respondent again went with her to the Business Centre and repeated his overtures. The complainant told the respondent that she would leave the place if he continued to behave like that. The respondent did not stop. Though he went out from the Business Centre for a while, he again came back and resumed his objectionable acts. According to the complainant, the respondent had tried to molest her physically in the lift also while coming to the basement but she saved herself by pressing the emergency button, which made the door of the lift to open. On the next day, that is on 13th August 1988, the complainant was unable to meet the Director (personnel) for lodging her complaint against the respondent as he was busy. She succeeded in meeting him only on 17th August, 1988 and apart from narrating the whole incident to him orally submitted a written complaint also. The respondent was placed under suspension vide an order dated 18th August, 1988. A charge sheet was served on him to which he gave a reply denying the allegations and asserting that “the allegations were imaginary and motivated”.

Shri J.D. Giri, a Director of the Council, was appointed as an enquiry officer to enquire into the charges framed against the respondent. On behalf of the management with a view to prove the charges as many as six witnesses. The Enquiry Officer after considering the documentary and oral evidence and the circumstances of the case arrived at the conclusion that the respondent had acted against moral sanctions and that his acts against Ms. X did not withstand the test of decency and modesty. He, therefore, held the charges leveled against the respondent as proved.
5.3.1.1 Grounds of Enquiry Officer’s Report

The Enquiry Officer in his report recorded the following findings:

i. Intentions of Shri A.K.Chopra were ostensibly manifested in his actions and behaviour, despite reprimands from Miss X he continued to act against moral sanctions.

ii. Dictation and subsequent typing of the matter provided Shri A.K.Chopra necessary opportunity to take Miss X to the Business Centre a secluded place. Privacy in the Business Centre room made his ulterior motive explicit and clear.

iii. Any other conclusion on technical niceties which A.K.Chopra tried to purport did not withstand the test of decency and modesty.

The Enquiry Officer concluded that Miss X was molested by the respondent at Taj palace Hotel on 12th August, 1988 and that the respondent had tried to touch her person in the Business Centre with ulterior motives despite reprimands by her. The Disciplinary Authority agreeing with the report of the Enquiry Officer, imposed the penalty of removing him from service with immediate effect on 28th June, 1980.
The respondent, thereupon, filed writ petition in the High Court, challenging his removal from service as well as the decision of the staff committee dismissing his departmental appeal.

5.3.1.2 Judgment of High Court

The Learned single Judge allowing the writ petition opined “that … the petitioner tried to molest and not that the petitioner had in fact molested the complainant”. The learned single judge, therefore, disposed of the writ petition with a direction that “the respondent be reinstated in service but that he would not be entitled to receive any back wages. The appellant was directed to consider the period between the date of removal of the respondent from service and the date of reinstatement as the period spent on duty and to give him consequential promotion and all other benefits. It was, however, directed that the respondent be posted in any other office outside Delhi, at least for a period of two years.

5.3.1.3 Division Bench of High Court Judgment

The appellant being aggrieved by the order of reinstatement filed letters patent appeal No.27 of 1997 before the Division Bench of the High Court. The respondent also filed letters patent appeal No.79 of 197 claiming “back wages and appropriate posting”. Some of the lady employees of the management on coming to know about the judgment of the learned single judge, directing the reinstatement of the respondent, felt agitated and filed an application seeking intervention in the
pending LPA. The Division Bench vide judgment and order dated 15th July, 1997 reported in 1997 Lab IC 3445 (Delhi) dismissed the L.P.A. filed by the management against reinstatement of the respondent. The Division Bench agreed with the findings recorded by the learned single judge that the respondent had 'tried to molest' and that he had not 'actually molested' the complainant and that he had 'not managed' to make the slightest physical contact with the lady and went on to say that such an act of the respondent was not a sufficient ground for dismissal from service. Facts not considered by the High Court and Division Bench of the High Court:

Both the learned single judge and the Division Bench did not doubt the correctness of the following facts:

i. That Miss X was a subordinate employee while the respondent was the superior officer in the organization;

ii. That Miss X was not qualified to take any dictation and had so told the respondent;

iii. That the respondent pressurized her to come with him to Taj Palace Hotel to take dictation despite her protestation, with an ulterior design;

iv. That the respondent taking advantage of his position, tried to molest Miss X and inspite of her protestation, continued with his
activities which were against the moral sanctions and did not withstand the test of decency and modesty.

v. That the respondent tried to sit too close to Miss X with ulterior motives and all along Miss X kept reprimanding him but to no avail.

vi. That the respondent acted in a manner which demonstrated unwelcome sexual advances, both directly and by implication.

vii. That action of the respondent created an intimidated and hostile working environment in so far as Miss X is concerned.

Aggrieved by Judgment of the Division Bench, the appellant has filed appeal by special leave in Supreme Court.

5.3.1.4 Issues Before the Supreme Court

Other issues besides the nature of approach expected from the law courts to case involving sexual harassment are:

- Does an action of the superior against a female employee which is against moral sanctions and does not withstand test of decency and modesty not amount to sexual harassment?
- Is physical contact with the female employee an essential ingredient of such a charge?
• Does the allegation that the superior ‘tried to molest’ a female employee at the ‘place of work’, not constitute an act unbecoming of good conduct and behaviour expected from the superior?

5.3.1.5 Apex Court Judgment

A Division Bench headed by Chief Justice A.S. Anand while setting aside the judgment of Delhi High Court, relied on the holding and guidelines laid down in the Vishaka Judgment held that;

There is no gain saying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty – the two most precious Fundamental Rights guaranteed by the constitution of India. As early as in 1993 at the ILO Seminar held at Manila, it was recognized that sexual harassment of woman at the work place was a form of ‘gender discrimination against women’. The contents of the fundamental rights guaranteed in our constitution are of sufficient amplitude to encompass all facts of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate. The message of international instruments such as the Convention on the Elimination of all forms of Discrimination Against Women, 1979 (CEDAW) and the Beijing Declaration which directs all state parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The International
Covenant on Economic, social and cultural rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work, which may vitiate working environment. These international instruments cast an obligation on the Indian State to gender sensitise its laws and the courts are under an obligation to see that the message of the international instruments is not allowed to be drowned. This court has in numerous cases emphasised that while discussing constitutional requirements, courts and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those International Instruments. The courts are under an obligation to give due regard to International Conventions and Norms so when there is no inconsistency between them and there is a void in domestic law 20.

1. Test of Molestation

The observations made by the High Court to the effect that since the respondent did not “actually molest” her and therefore, his removal from service was not warranted rebel against realism and lose their sanctity and credibility.

Apex court pointed out that, in a case involving charge of sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression “molestation”. They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case. Where the evidence of the victim inspires confidence, as is the position in

the instant case, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the superior officer is wholly misplaced and mercy has no relevance.

2. Disciplinary Authority is the Sole Judge

The Supreme Court has done well, explained the power of judicial review of High Court;

The High Court appears to have over looked the settled position that in departmental proceedings, the Disciplinary Authority is the Sole Judge of facts and in case an appeal is presented to the Appellate Authority, the Appellate Authority has also the power and jurisdiction to re-appreciate the evidence and come to its own conclusion, on facts, being the sole fact finding authorities. Once findings of fact, based on appreciation of evidence are recorded, the High Court in writ jurisdiction may not normally interfere with those factual findings unless it finds that the recorded findings were based either on no evidence or that the findings were wholly perverse and legally untenable. The adequacy or inadequacy of the evidence is not permitted to be canvassed before the High Court. Since, the High Court does not sit as an appellate Authority, over the factual findings recorded during departmental proceedings, while exercising the power of judicial review, the High Court cannot normally speaking substitute its own conclusion, with regard to the guilt of the delinquent, for that of the departmental authorities. Even, in so far as imposition of penalty or punishment is concerned, unless the punishment or penalty imposed by the Disciplinary or the Departmental Appellate Authority, is either impermissible or such that it shocks the conscience of the High Court it should not normally substitute its own opinion and impose some other punishment or penalty. Both the learned single judge and the Division Bench of the High Court, ignored the well-settled principle that even though Judicial Review
of administrative action must remain flexible and its dimension not closed, yet the court in exercise of the power of Judicial Review is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence and have been arrived at through proceedings which cannot be faulted with for procedural illegalities or irregularities which vitiate the process by which the decision was arrived at. Judicial Review, it must be remembered, is directed not against the decision, but is confined to the examination of the decision-making process. Lord Haltom in Chief Constable of the North Wales Police v. Evans\textsuperscript{21}, observed;

"The purpose of Judicial Review is to ensure that the individual receive fair treatment, and not to ensure that the authority, after according fair treatment, reaches, on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court".

This landmark decision is most welcome and greatly laudable. The verdict is certain to go a great distance in inspiring the confidence in the country's legal system. How far it would be effective to secure women's dignity and modesty at work place in practice is to be proved.

5.3.2 Medha Kotwal Lele and others v. Union of India


\textsuperscript{21} (1982) 3 All ER 141.
While hearing a petition filed by Medha Kotwal, a teacher and a victim of sexual harassment the court took note of the alarming rise in sexual harassment cases in professional institutions and issued notice to a large number of bodies including the Bar Council of India, Institute of Chartered Accountants, All India Council of Technical Education, Medical Council of India, University Grants Commission and various other institutions to seek their view on enforcing, stringent measures to stop the menace within 6 weeks. The Court observed that its earlier guidelines of 1997, to deal with sexual harassment were not being complied by many states. Many states had not even constituted a complaints committee. The petitioner cited studies done by Gender Study Group and the Tata institute of Social Sciences to show that, an overwhelming majority of female students suffered from sexual harassment in the campus.

In this case the Apex Court has clarified that the complaints committee shall be deemed to be an inquiry authority for the purposes of the Central Civil Services (Conduct) Rules (1964) and that the complaints committee’s report shall be deemed to be an inquiry report. The Court ordered that similar amendments be carried out in the Industrial Employment (Standing Orders) Rules. Therefore, it may be said that the status of the Vishaka complaints committee has been upgraded from a body that conducts the preliminary inquiry to one, which conducts a regular inquiry.

For an enquiry to be proper, the principles of natural justice (PNJ) must be followed. If a workman is not given a proper hearing, this will be detrimental to
the idea of job security of the workman. In other words, in the absence of a proper domestic inquiry, the employee can be exploited and victimized by the employer.

5.3.3 NALCO - Bombay High Court Ongoing Case

In this case, the complainant was asked by the Complaints Committee for a physical demonstration of the incident to which she complied under duress. This was extremely humiliating and debasing for the complainant, and put her through undue trauma. It is of utmost importance that enquiry committees must follow all the principles of natural justice and ensure that the complainant is not victimized further on account of the proceedings.

The Bombay High Court scrapped the proceedings of the three-member committee probing charges of sexual harassment and molestation against the NALCO chief. The court found substance in the allegations of bias raised by the complainant against the existing committee. It held that an independent three member committee be appointed and that a fresh enquiry be held in Mumbai.

During pre-Vishaka Scenario, the courts recognised sexual harassment of women as a wrong under existing law. The Apex Court in Rupan Deol clarified certain issues as to 'modesty' which will be of immense help to the courts in deciding cases on these issues in future. It has relied on common notions of mankind as to judge what is affront to women's dignity. Also this has been considered bearing in mind contemporary social standards. In the Vishaka case,
the Supreme Court laid down guidelines and norms for effective enforcement of the basic human rights of gender equality and guarantee against sexual harassment at workplace.

In post *Vishaka* cases the Supreme Court drawn a distinction between molest and try to molest and held physical contact with an employee is not essential in sexual harassment charges. The powers of Complaints Committee have been increased and complaint committees are appointed, the report of Complaints Committee shall be deemed as enquiry report. But, it is a fact that majority of the work places including public and private Sectors not appointed complaints committees.

Judicial activism desires a judge to go beyond law and find out the habitation of justice. The concept of judicial activism is not new and successfully been exercised by common law countries. According to justice Krishna Iyer “Function of Court is not merely to interpret law, but to make it by imaginative sharing of the passion of the constitution for social justice”.

The constitution is the fundamental law of the land, which establishes the judiciary and empowers it to eliminate those acts of the legitimate and/or actions of the executive as are found to be unconstitutional. The courts are the guardians of the constitution framed by *we the people of India* and have to act according to their conscience to uphold to the constitution. The courts act for the people who have reposed confidence in them. The accountability of the judges is, therefore not only to their conscience but also to the people in whom the ultimate sovereignty vests.
Despite of the crucial role that has been played by the Apex Court by giving directions to the Central as well as the State Governments to enact a legislation dealing with the obnoxious and heinous problem of sexual harassment. The Government have not made any effort even to bring a bill in the legislature.

It is mainly because of the active role that has been played by the voluntary non-governmental organisations championing the cause of the judiciary rose beyond the expectations in providing relief to the harassed and victimised women. Hence the services and role of NGO’s in espousing the cause of sexually harassed women is considered to be very vital and a thorough discussion has been made in the next chapter.