



## Role of The Supreme Court in Evolving the Law on Sexual Harassment at Work Place

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### Abstract

*The Supreme Court's ruling in Vishakha v. State of Rajasthan has assumed significance in the current Indian Legal literature on the subject. The instant ruling may be rightly viewed as a milestone in this area. 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 in work settings, and no woman worker should have any reason to fear that she is being treated unfairly because of her gender in the workplace. The attitudes can be changed well through education, like change in curriculum at the school level by organizing social awareness camps, by evolving and gearing up State machinery for combating sexual harassment in the workplace. In this article, various issues and aspects related to sexual harassment at the workplace and the mechanisms to combat this evil have been dealt with. It is true that sexual harassment is one of the most important evils that have to be eliminated from this society in order to envisage a better tomorrow.*

**Key Words:** Academicians, Investigation, Pornography, Discriminatory, Disciplinary action, Complaints Committee

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### Introduction

Sexual harassment faced by women and children is a new anti-social evil in society. Women and children especially those belonging to the underprivileged class face sexual discrimination and violence unprecedentedly. Hence there is a need for urgent attention to this particular class of society i.e, the women and children in order to eliminate this kind of anti-social inhumane incidents from society.

In the Vishakha case, the Supreme Court of India has expressly admitted the same and hence it had to rally around the Right to Equality and the Right to Life under the Constitution,<sup>2</sup> as would the courts in the United States take refugees to the Civil Rights Act of 1964. The observations of the Supreme Court appear to have been made after scanning the international legal material on the subject. That is why these observations correspond to the International Convention prohibiting all kinds of discrimination against women besides what the Supreme Court of the United States observed in Meriter Saving Bank vs. Vinson<sup>3</sup>. This prompts one to

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<sup>2</sup> See, Constitution of India, Arts. 14, 15(3), 16, 19, 141

<sup>3</sup> 477 US 64 (1986)

study the legal issues generally arising out of sexual harassment in the United States. In consonance with the same, the Indian Supreme Court has certainly pointed out the acts that would constitute harassment of women if discovered in a workplace. To nip the evil in the bud the Court has laid down guidelines to prevent and investigate the cases of sexual harassment of women in the workplace.<sup>4</sup> It is debatable whether such guidelines alone would help us to fight sexual harassment in the workplace. Nonetheless, the Supreme Court of India has done the needful and the same should not pass incognito down the pages of sexual harassment jurisprudence in this country. The present study, therefore, desires to examine the syndrome of sexual harassment in the workplace and finally leave it to the wisdom of individual readers to decide whether or not there is a need to evolve our own jurisprudence on the subject underhand. The need arises because reverence of women is the hallmark of Indian cultural ethos and the meaning of the Right to Equality and Right to Life has to be searched within the parameters of the calculus of reverence and not exclusively looked into within the periphery of the economics of utilitarianism. An effort shall be made to analyse the literature on the subject and thus evaluate how far the criteria laid down by the courts within the Western setting might benefit us.

In *Vishakha vs. the State of Rajasthan*<sup>5</sup>, the Supreme Court considered it necessary and expedient for employers in the workplace as well as other responsible persons or institutions to observe certain guidelines to make sure the sexual harassment of women is prevented.

### **Duty of the Employer or other Responsible Persons in the Workplace and other Institutions**

Employers and other responsible parties in the workplace or other institutions must take all necessary measures to eliminate the potential for sexual harassment to occur, as well as to create avenues for investigation, resolution, and possible prosecution.

For this purpose, sexual harassment, whether directly or by implication, includes such unwelcome sexually determined behaviour as:

- (a) physical contact and advances;
- (b) a request for sexual favours;
- (c) sexually coloured remarks;
- (d) showing pornography;
- (e) any other verbal, non-verbal and physical conduct of sexual nature which is unwelcome.

Where any of these acts are committed in circumstances where the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work such treatment can be degrading and may pose a health and safety risk regardless of whether she is paid, honorarium, or volunteer. It is discriminatory when, for example, a woman has cause to believe that raising an objection will negatively affect her chances of being hired, promoted, or

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<sup>4</sup> Generally see LalitaParihareet. al., o.p.cit., Vol. XXXII, Nos. 1 & 2 (2006)

<sup>5</sup>See *supra* n.4 p.2

otherwise benefiting from her position in the workplace. There could be negative repercussions if the victim does not approve of the behaviour or if they try to object to it.

### **Preventive Steps**

Employers and supervisors in both the public and private sectors should take the necessary measures to prevent sexual harassment. Without limiting the scope of this commitment, they must perform the following actions:

- (a) Express prohibition of sexual harassment as defined above in the workplace should be notified, published, and disseminated in an appropriate manner;
- (b) The rules/regulations of government and public sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide appropriate penalties against the offender; and
- (c) Private employers should take steps to include the aforementioned prohibition.

### **Criminal Proceedings**

Where such conduct amounts to specific malfeasance under the Indian Penal Code or under any other law, the employer shall take appropriate action in accordance with the 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 choice of requesting their own transfer or the transfer of the harasser.

### **Disciplinary Action**

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

### **Complaint Mechanism**

Whether or not such a deed constitutes an offence under the law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organization for the amelioration of the complaint made by the victim. Such a complaint procedure must provide timely resolution of complaints.

### **Complaints Committee**

The complaint mechanism referred to as above, should be adequate to provide, where necessary, a Complaints Committee, a Special Counsellor or other support service, including the maintenance of confidentiality.

The head of the Complaints Committee should be a woman and also, not less than half of its members should be women. Further, such Complaints Committee should involve a third party, either an NGO or another body, which is familiar with the issue of sexual harassment. That would help to prevent the possibility of any undue pressure or influence from senior levels.

The Complaints Committee shall provide an annual report to the relevant government agency detailing the complaints received and actions taken in response.

The employee and the person in charge will also report on compliance with the aforementioned rules, including the Complaints Committee's reports to the government agency.

### **Worker's Initiative**

Employees should be permitted to report sexual harassment concerns at workers' meetings and other suitable forums, and sexual harassment should be a topic of discussion in employer-employee meetings.

### **Awareness**

Creating awareness of the rights of female employees in this regard should include prominently publicising the rules (and relevant legislation when established) in an acceptable manner.

### **Third-Party Harassment**

When sexual harassment happens due to the actions or omissions of a third party or outsider, the employer and person in authority will take all necessary and reasonable efforts to provide support and preventative measures for the victim.

### **Private Sector**

The Central/State Governments are requested to contemplate adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also obeyed by employers in the private sector.

### **Right Under the Protection of Human Rights Act, 1993**

These guidelines will not prejudice any right existing under the Protection of Human Rights Act, 1993.

### **Binding Nature**

It was instructed by the Court that the norms and guidelines would be strictly observed in all workplaces for the preservation and enforcement of the Right to Gender Equality of working women. These directions would be valid and enforceable in law until suitable legislation is enacted to occupy the field.

The Supreme Court followed suit in *Apparel Export Promotion Council vs. A.K. Chopra*<sup>6</sup> whose facts are as under:

Respondent served as Private Secretary to the Chairman of the Apparel Export Promotion Council, who is the appellant in this case. On 10.8.2010, he allegedly attempted to molest a female Council employee, Miss X (name withheld), who was working as a Clerk-cum-Typist at the time. She lacked the ability and training to take dictations. However, the respondent requested that she accompany him to the Business Centre at the Taj Palace Hotel to take dictation from the Chairman and write out the matter. Under pressure from the respondent, she went to the Chairman to take dictation. While Miss X was waiting for the Director in the room, the respondent tried to sit too close to her and did not give up his objectionable behaviour despite her objection. She later took the Director's dictation. The respondent instructed her to type it at the hotel's Business Centre, which is located in the hotel's basement. He offered to

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<sup>6</sup> (1999) 1 SCC 759: 1999 SCC (L&S) 405

assist her so that the Director would not find fault with her typing. He volunteered to show her the Business Centre so that she could have the document written, took advantage of the secluded location, and again attempted to sit near to her and touch her despite her objections. The Director (Finance) corrected the typed draught and requested that Miss X should retype it. The response accompanied her to the Business Centre once more and continued his advances. Miss X informed the responder that she would depart "if he continued to behave in such a manner." Although the responder left the Business Centre for a brief period, he returned and repeated his undesirable behaviour. In the appeal *Export Promotion Council vs. A.K. Chopra*<sup>7</sup>, it was held by the Court that where any of the Acts mentioned in the definition of sexual harassment in *Vishakha vs. the State of Rajasthan* is committed in circumstances where the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work, such conduct can be humiliating and may pose health and safety concerns. Consequences may be incurred if the victim does not consent to the questionable action or raises objections to it. The Supreme Court in all such cases has touched a very sensitive note.

Miss X claims that the respondent attempted to molest her physically in the elevator on the way to the basement, but she escaped by hitting the emergency button., which made the door of the lift open. On the next day, that is on 16<sup>th</sup> August 1988, Miss X was not able to meet the Director (Personnel) for filing her complaint against the respondent because he was busy. She succeeded in meeting him only on 17<sup>th</sup> August, 1988 and apart from narrating the whole incident to him orally, submitted a written complaint. The respondent was suspended pursuant to an order dated August 18, 1988. A charge sheet was served on him to which he gave a reply negating the allegations and stressing "the allegations were imaginary and motivated". The appointment of an Enquiry Officer to investigate the charges were brought against the respondent. The Enquiry Officer determined that Miss X was molested by the respondent at the Taj Palace Hotel on August 12, 1988, and that the respondent attempted to touch her in the Business Centre with ulterior intent despite her protests. The Disciplinary Authority agreeing with the report of the Enquiry Officer imposed the penalty of removing him from service with effect from 18<sup>th</sup> June, 1989. The appointment of an Enquiry Officer to investigate the charges brought against the respondent. The Enquiry Officer determined that Miss X was molested by the respondent at the Taj Palace Hotel on August 12, 1988, and that the respondent attempted to touch her in the Business Centre with ulterior intent despite her protests. The Staff Committee considered the entire issue and came to the conclusion that the order terminating the services of the respondent was legal, proper and valid. The appeal was terminated and the removal of the respondent for creating "sexual harassment" to Miss X was upheld. The respondent, thereupon, filed a writ petition in the High Court challenging the report of the Enquiry Officer, as well as the decision of the Staff Committee dismissing his departmental appeal.

The Judge allowing the writ petition opined:

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<sup>7</sup> (1999) 1 SCC 759: 1999 SCC (L&S) 405

*that the petitioner attempted to molest the complainant, but not that the petitioner really molested the complainant. The Court 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 ordered to count the time between the respondent's dismissal and reinstatement as time spent on duty and to provide him with a promotion and other perks as a result. However, it was ordered that the respondent be sent to any office outside of Delhi for at least two years. The appellant being aggrieved by the order of reinstatement filed letters of patent appeal before the Division Bench of the High Court. The Division Bench dismissed the LPA filed by the appellant against the reinstatement of the respondent, the Division Bench agreed with the findings recorded by the learned Single Judge that the respondent had "attempted" to molest Miss X, but that he had not "actually molested" her, and that he had "failed to make even the slightest physical contact with the lady," and that such an act was not enough grounds for his dismissal. It was held by the Court that:

Where any of the acts mentioned in the definition of sexual harassment in Vishakha vs. the State of Rajasthan (*Supra*) is committed in circumstances hereunder the victim's employment or work whether she is drawing a salary, honorarium or voluntary, whether, in government, public or private enterprise, such. This behaviour can be humiliating and may pose a health and safety risk. It is discriminatory, for example, if the woman has reasonable reasons to assume that her objection would disadvantage her in relation to her employment or work, including recruitment or promotion, or if it creates an intimidating work environment. If the victim does not consent to or oppose to the action in question, there may be negative repercussions. In Nilabati Behera vs. State of Orissa<sup>8</sup> a provision in the International Covenant on Civil and Political Rights was taken recourse to, to support the view that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right as a public law remedy under Article 32 distinct from the private law remedy in tort. There is no reason why these international conventions and norms cannot, therefore, be used for construing the Fundamental Rights expressly guaranteed under the Constitution which embodies the concept of gender equality in all realms of human activity.

The Supreme Court in all such cases has touched a very sensitive note and admitted the fact that sexual harassment at the workplace is not only humiliating but may also constitute health and safety problems. Reporting a crime and misconduct puts the female employee in a disadvantageous position in connection with her employment (recruitment or promotion) and also creates a hostile environment, which is discriminatory. It was directed by the Court that appropriate preventive steps should be taken by employers to prevent such harassment and the creation of a hostile environment, it was further directed that the guidelines and norms laid down by the Court should be included in the regulations of the government, public sector and in the Industrial Employment (Standing Orders) Act, 1946.

If according to any employer or the person in charge, conduct amounted to misconduct, disciplinary action/criminal proceedings (if it falls within the definition of a specific offence) can be initiated ensuring that victims are not victimized or discriminated against while dealing with complaints of sexual harassment.

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<sup>8</sup> 1993 SCC (Cri) 527

Judicial activism is markedly apparent while Supreme Court decided the case of State of A.P. vs. Bodem Sundara Rao<sup>9</sup>, where the High Court of Andhra Pradesh had awarded a meager sentence and the case came before the Supreme Court. The Apex Court expressed its sensitivity in the words that crimes against women are on the rise. The imposition of a punishment that is woefully inadequate and specifically against the mandate of the legislature is not only unjust to the victim of the crime and to society as a whole, but it can also encourage a criminal. The courts must not only keep in view the rights of the criminal but also the rights of the victims of the crime and the society at large while considering the imposition of the appropriate punishment.

In Rupan Deol Bajaj v. Kanwar Pal Singh Gill<sup>10</sup> the Supreme Court again expressed the seriousness of the problem. In this case, the FIR and private complaint filed in the Court of Chief Judicial Magistrate, Chandigarh were quashed by the High Court of Punjab and Haryana where the victim was a senior IAS officer and the accused was a senior Police Officer. The Supreme Court set aside the order of the High Court and observed that the sequence of events culminating in slapping on the posterior of a woman in a public function disclosed in the FIR amounted to a prima facie offence under Sections 354 and 509 of the Indian Penal Code.

### **Comparative Position in the USA and the UK**

The first successful claim in sexual harassment is Walker vs. Northumberland Country Council<sup>11</sup>, where psychiatric damages were awarded by the English Court arising out of occupational stress. In such a case action may be initiated against an employer for negligence. Mental harassment is different from physical contact theory.

The insult (harm) may be caused by verbal insult and may occur at the mental level. The legal response is articulated and rigorously pursued.

England—154 of Cr.; Justice and Public Order Act, 1994 has inserted a new Section 4-A into the Public Order Act, 1994. Threatening, abusive or insulting words or behaviour or objectionable behaviour.

These provisions were designed primarily to deal with incidents of racial violence and racial harassment.

In the USA it was only in 1980 that the United States Equal Employment Opportunities Commission defined sexual harassment. It is basically the same definition as was adopted by the Convention on the Elimination of All Forms of Discrimination Against Women (1979). Thirdly, where such conduct has the effect or purpose of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

In the United States of America, the legislation is not sufficient to deal with the problem. The Federal Criminal Code, 1986 punishes sexual contact and harassment at the workplace as sexual harassment is a form of sex discrimination. In Meritor Savings Bank vs. Vinson

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<sup>9</sup>(1995) 6 SCC 230, 232.

<sup>10</sup> (1995) 6 SCC 194: AIR 1996 SC 309.

<sup>11</sup>(1995) IRLR 35.

(Michell)<sup>12</sup>, the legal issue facing sexual harassment is a form of sex discrimination that is actionable under Title VIIth. The Court's decision set a precedent for sexual harassment cases involving hostile work environment claims where the victim suffers no tangible or economic loss. An important point made by the Court is that an employee's apparent consent to sexual activity does not necessarily negate a claim of sexual harassment. The employees' submission to a sexual relationship cannot be considered truly voluntary if the harasser has the power to fire, demote, or blackball an employee, or deny raises, bonuses or promotions. The Court's ruling firmly established the working definition of sexual harassment and the kinds of workplace conduct that may be actionable under Title VIIth. Judiciary has been vigilant about the problem. The interest of the State was upheld by the Court as the employer to improve efficiency by eliminating adverse conditions in place of work.<sup>13</sup> The US Supreme Court agreed with the argument of the American Civil Liberties Union (the appellant in this case) that same-sex sexual harassment is equally covered under Title VIIth of the Civil Rights Act of 1964 and that motive of harassment is of no relevance<sup>14</sup>, The Supreme Court and the Equal Employment Opportunity Commission recognize two types of sexual harassment claims under Title VIIth.

One type is the economic "quid pro quo" sexual harassment i.e. unwanted sexual advances, request for sexual favours and other physical or verbal conduct of sexual nature in exchange for a job benefit and the other type is "hostile environment" sexual harassment which occurs when the harassment has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.<sup>15</sup> The position of women in the USA is not normal as stated by Prof. Cynthia Bowman in an article<sup>16</sup> that one of eight American women have been raped in offices, public places or their homes. About the instinct behind rape, the study of Diana Russel<sup>17</sup> reveals that there is rape testing by which miscreants test the vulnerability of victims and their resistance. The well-known case of President Bill Clinton (USA) and Monica reveals the problem at the highest desk. As per the report of the US Merit System Promotion Board, 42 per cent of women institutes establishes that 20 to 60 per cent face verbal harassment, 50 to 60 per cent complain of objectionable flirtation and invitations of dates, pinching and so on<sup>18</sup>.

The European Commission Recommendations on the Protection of the Dignity of Men and Women at the workplace reveals ... conduct of sexual nature or other conduct based on sex affecting the dignity of women and men at work ... unacceptable if a) such conduct is unwanted, unreasonable and offensive to the recipient, b) is used ... as a basis for an

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<sup>12</sup> Ss. 2241, 2243, 2244

<sup>13</sup> Rankin v. M.C. Pherson, 483 US 388.

<sup>14</sup> Joseph Oncal's v. Sundowner Offshore, Services of Richard J. Townshend Smith, Discrimination Law: Tex Cases and Materials, 237 (1988).

<sup>15</sup> *Supra* n. 13,

<sup>16</sup> Prof. Cynthia Bowman, "Street Harassment and the Informal Ghettoization of Women", 106 Harvard Law Review (1993).

<sup>17</sup> Diana Russel, Politics of Rape (1975).

<sup>18</sup> BabaraGuttack, Sex in the Workplaces.

(employment decision) and c) such conduct creates an intimidating, hostile or humiliating work environment for the recipient<sup>19</sup>.

In the United Kingdom, the Sexual Offences Act, 1965 used the expression “incident assault” for punishing the sexual harassment occurring in the general community<sup>20</sup>. Recently legislated, the Sexual Offences Act, 2003 uses the expression “sexual assault” to describe the sexual touching by the accused without the consent of the victim<sup>21</sup>. However, discrimination on sex is prohibited under the Sex Discrimination Act, 1975.

Sections 6(2)(a) and (b) deal with quid pro quo forms of sexual harassment. The Act holds the employer liable whether or not the harassment was done with his knowledge or approval<sup>22</sup>. In the famous case of *Strathclyde Regional Council vs. Porcelli*<sup>23</sup>, the distinction was drawn between the situation of harassment and sexual harassment. In this case, a campaign to drive Mrs. Porcelli to leave the school was started. The Court held that it is a case of mere harassment because the sex factor is missing in it. The European Economic Community has adopted several instruments to face the problem of sexual harassment and exploitation of women.

#### **Facts of D.S. Grewal VS. Vimmi Joshi<sup>24</sup>**

Respondent I, a female, was employed as a teacher in an Army Public School. She was subsequently appointed as Principal. Appellant, (D.S. Grewal) DSG, was the Chairman of the School and the other appellant, (Hitendra Bahadur) HB, was the Vice-Chairman. HB, while on official duty at a distant place, wrote a letter to Respondent I expressing that he had “fallen in love with” her. Apart from admiring Respondent I’s qualities and beauty, HB, concluded the letter with the following invitation of help to her, “May I extend my hands towards you the imposition of a punishment that is grossly insufficient and explicitly against the mandate of the government is not only unjust to the victim of the crime and to society as a whole, but it can also encourage criminal behaviour. Apart from this, Respondent I also alleged that HB was making advances towards her.

Respondent I’s services were terminated after receipt of two anonymous complaints. The High Court held that it was a clear-cut case of sexual harassment and therefore directed Army Authorities to take disciplinary action against appellants, DSG and HB. The Supreme Court however found that the school authorities had not constituted a Complaints Committee, as directed in the *Vishakha* case, to look into the grievance made by Respondent I.

- (i) Before the High Court, the appellants submitted counter-affidavits arguing, among other things: That the order of termination has nothing to do with the alleged sexual harassment.
- (ii) Writing a letter merely appreciable in nature and by reason thereof no sexual harassment was caused by Hitendra Bahadur.

<sup>19</sup> European Commission Recommendation on the Protection of Dignity of Men and Women at Work, 91/131/EECDJL47/1/1999

<sup>20</sup> S. 14 of the Sexual Offences Act, 1956

<sup>21</sup> S. 3 of the Sexual Offences Act, 2003.

<sup>22</sup> S. 41(1) of the Sex Discrimination Act, 1975.

<sup>23</sup> 1986 IRLR 134

<sup>24</sup> (2009) 2 SCC 2010

- (iii) Hitendra Bahadur has nothing to do with the management of the school and the letter having been sent from Sonamarg cannot be said to have any sexual harassment at the workplace of the first respondent.

In the words of the High Court, "Therefore, the Secretary, Ministry of Defence, Government of India and the Chief of the Army Staff are directed to take disciplinary action against these. As the instance of sexual harassment is obvious from the wording of the letter and the acknowledgement by both officers, the petitioner's employment has been terminated.

We are passing this order in view of the law laid down by the Hon'ble Apex Court in *Vishakha vs. the State of Rajasthan*<sup>25</sup>.

The status of the disciplinary action taken in such a serious situation, which may even require court martial proceedings against these two officers, shall be reported to this Court within two months of the date on which a certified copy of this order is produced." The Apex Court furthermore placed on record that a first information report was also lodged against Respondent I by the School Management alleging financial irregularities. After an investigation was carried out on this behalf, a final report was submitted vindicating her and the report has been accepted by the Chief Judicial Magistrate, Pithoragarh by an order dated 13.2.2006.

However, indisputably, in terms of the judgment of the Supreme Court in *Vishakha*, certain guidelines have been laid down by the Court till appropriate legislation is made in this responsibility, including disciplinary action, the complaint system, and the complaints Committee.

The Supreme Court, in modification, of the order passed by the High Court, directed:

"In the absence of a Complaints Committee, which was required by law, the High Court may appoint a three-member committee led by a woman, and in the case that such a committee is not established, the High Court may appoint a five-member committee. It is found that the writ petitioner was subjected to sexual harassment, the report thereof may be sent to the Army Authorities for initiation of disciplinary action against the appellants herein on the basis thereof. All expenses that may be spent in this regard will be covered by the Army Authorities."

### Conclusion

The condition of women and children in society is suppressed and marginalized. They have to face various issues and challenges in order to attain a life of dignity and contentment. Sexual harassment is one of the most important evils that occludes the well-being of an individual and it has to be eliminated from this society in order to envisage a better tomorrow.

**CITE THIS ARTICLE:** Ms. Akhila S. Rajan, Role of The Supreme Court in Evolving the Law on Sexual Harassment at Work Place, *Justice and Law Bulletin*, 1(3), pp. 9-18

<sup>25</sup> (1997) 6 SCC 241: 1997 SCC (Cri) 932.*supra* n.4 p.2