

## HR Law Hotline

October 23, 2023

### INDIA'S LAW ON PREVENTION OF SEXUAL HARASSMENT AT WORKPLACE: ANALYSIS OF RECENT CASE LAWS - PART 5

India's law on prevention of workplace sexual harassment continues to see developments from courts considering workplaces restarting through hybrid mode after some post-Covid normalcy. Previously we discussed how even at virtual workspaces there were cases of sexual harassment.

Following our previous legal alerts we share *Part 5* of our analysis of the recent and pertinent case laws on Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (PoSH Act) related aspects.

#### 1. DIFFERENT APPROACHES TOWARDS LIMITATION PERIOD

(a) The Delhi High Court dealt with a question whether Section 5 of the Limitation Act, 1963 will apply to appeals under Section 18 of the PoSH Act regarding condonation of delay.<sup>1</sup> Asserting the PoSH Act is an ameliorative statute that is intended to redress a serious social evil as victims of sexual harassment at the workplace suffer untold trauma (be it mental, physical and spiritual). The Court held that it cannot be expected from a victim of sexual harassment to immediately move a court seeking appellate remedies. It will be completely antithetical and harmful to the very scope and purpose of PoSH Act if a court or tribunal refuses to condone a delay of as little as 36 days in an appeal under Section 18 of the PoSH Act against the report of the inquiry committee. Thus, the Court held that Section 5 of the Limitation Act would apply in respect of appeals which may be sought to be preferred under Section 18 of the PoSH Act.

(b) On the contrary, the Madurai Bench of the Madras High Court has upheld single-judge's decision holding that a complaint of sexual harassment under the PoSH Act has to be filed within a period of three months from the date on which sexual harassment is alleged to have taken place.<sup>2</sup> Accordingly, a complaint filed ten months after the alleged incident was held to be barred by limitation as maximum delay can be only of three months.

#### 2. APPLICATION OF POSH ACT IN COMPLAINTS FILED BY STUDENTS

The Calcutta High Court came across an interesting issue pertaining to application of PoSH Act in complaints filed by students.<sup>3</sup> It held that provisions of the PoSH Act can be availed by girl students at a school. The petitioner was a teacher at school against whom multiple girl students through the Principal filed complaints of sexual harassment. The court noted that the definition of 'aggrieved woman' as defined under Section 2(a) of the PoSH Act refers to an aggrieved woman in relation to a workplace, a woman, of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent. Thus, the PoSH Act applies even if a complaint of sexual harassment has been filed by students.

#### 3. STRICT COMPLIANCE OF THE PROCEDURAL REQUIREMENTS

(a) The Madras High Court emphasised that there should be strict compliance with each and every procedural requirement posited by the PoSH Act.<sup>4</sup> It stressed that as per Section 4 of the PoSH Act, every employer shall constitute an Internal Complaints Committee (ICC) headed by a woman employed at a senior level at workplace from amongst the employees along with two other members and apart from that, one member from non-governmental organisations. One-half of the total members should be women. If any employer fails to constitute an ICC as required under sub-section (1) of Section 4, it is liable to be punished as per Section 26 of the PoSH Act.

(b) The Calcutta High Court has stated that the inquiry report based on inquiry by the ICC cannot be said to be merely a preliminary investigation report and ICC has to follow the principles of natural justice.<sup>5</sup> It stated that upon a complaint of sexual harassment being made, a copy of the complaint is to be forwarded to the employee against whom the complaint is made. The employee gets an opportunity to file his reply to the complaint. The complainant as well as the respondent/employee gets opportunity to adduce oral as well as documentary evidences in support of their respective contentions. The inquiry by ICC is to be made by following the principles of natural justice. The ICC is also vested with the powers of the civil court in respect of certain matters regarding evidence of witnesses. An aggrieved party also has a right to file an appeal against the ICC's report. An inquiry conducted by the ICC is a full-fledged inquiry wherein the parties get ample opportunities to prove their contentions and a finality is also attached to such inquiry. The PoSH Act also mandates the employer to act on the recommendations of the ICC. Hence, the inquiry report cannot be said to be merely a preliminary investigation report. The order of punishment has to be passed by following principles of natural justice.

(c) The Madras High Court affirmed that the Presiding Officer of the ICC must be a higher level officer in accordance with Section 4 of the PoSH Act.<sup>6</sup> It directed the employer to appoint a higher level woman officer as Presiding Officer of the ICC in accordance with Section 4(2)(a) of the PoSH Act, 2013 and proceed with the inquiry in accordance with

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the provisions of the PoSH Act. The Court further directed employers to furnish the copies of the complaints and all other relevant documents to the accused on reconstitution of the ICC by appointing a higher-level officer as Presiding Officer. The ICC constituted in accordance with Section 4 of the PoSH Act should continue the inquiry proceedings by affording opportunity to all the parties and by following the procedures as contemplated. It asked the accused writ petitioner to cooperate for the early disposal of the inquiry proceedings by the ICC.

(d) The Uttarakhand High Court has stressed on the importance of principles of natural justice to be followed by ICC for departmental enquiries.<sup>7</sup> It commented that principles of natural justice are not a ritual, they are not even a mere formality - they must be followed in letter and spirit.

(e) The Bombay High Court held that disciplinary authority is required to consider the report of the ICC as fact-finding preliminary report and then conduct disciplinary proceedings as per the relevant applicable service rules, by drawing a charge sheet.<sup>8</sup>

#### 4. PRIMA FACIE CASE OF SEXUAL HARASSMENT HAS TO BE MADE OUT FOR THE POSH ACT TO APPLY

(a) The Allahabad High Court was of the opinion that in absence of *prima facie* case of sexual harassment being made out, the police authorities cannot enter into inquiry of preliminary investigation for sexual harassment contemplated under the PoSH Act.<sup>9</sup> Victims in such cases can approach the appropriate magistrate as contemplated under the Criminal Procedure Code through which it ensures strict separation between the criminal laws and the PoSH Act. As per the court, criminal justice system cannot be utilised for PoSH cases through mobility and cannot be merged qua the procedural jurisprudence of both.

(b) The Madras High Court held that sexual harassment cannot be established in the absence of sufficient proof.<sup>10</sup> It observed that the averments have to make out a tangible case to prove sexual harassment by duly establishing the cause of action worthy enough for the court to adjudicate upon the alleged grievances of sexual harassment.

#### 5. DISMISSAL IN CASES OF SEXUAL HARASSMENT

The Gujarat High Court held that dismissal is justified on proved charges of sexual harassment.<sup>11</sup> It upheld that the presiding officer of the ICC under PoSH Act must be a woman employed at a senior level. Further, it observed that the aggrieved woman who is subjected to sexual harassment can be of any age group.

#### 6. ORGANISATIONS ENGAGING AT LEAST 10 EMPLOYEES TO CONSTITUTE ICC

In a writ petition filed by Women in Cinema Collective (petitioner)<sup>12</sup> the Kerala High Court, held that there did, for a fact, exist an employer-employee relationship between the actors and their respective production units, and that the film production units served as their "workplace" as defined under Sec. 2(o)(ii)<sup>13</sup> of the PoSH Act. The petitioner brought to the notice of the Court that the Association of Malayalam Movie Artists (respondent) had failed to set up ICC as per Sec. 4 of the PoSH Act to deal with cases of sexual harassment, and as such, wanted the court to direct them to set it up. While the petitioner contended that the absence of the ICC was *illegal, arbitrary and violative of their fundamental rights*, the respondent altogether denied being governed by the provisions of the PoSH Act since on the belief that it was neither a "workplace" nor there existed an employer-employee relationship between the members and the organisations. The Court held that the production unit of each film industry is an establishment employing actor artists and other workers and therefore, such production units have to maintain an ICC, if they are engaging more than 10 workers, as is contemplated under the PoSH Act. Any organisation, apart from the political parties, are duty bound to maintain ICC, if they are engaging 10 or more workers for managing the office establishments irrespective of whether the female workers are employed by such office establishments for wages.

#### 7. EXPRESS ACTS OF SEXUAL HARASSMENT NOT MANDATORY TO INTERPRET THE ACT OR BEHAVIOUR AS SEXUAL HARASSMENT

The Tripura High Court observed<sup>14</sup> that the express mentioning of instances of sexual harassment is not mandatory in the victim's complaint under the PoSH Act. The Court pointed out that the definition of sexual harassment as provided under Sec. 2(n) of the PoSH Act is not exhaustive, but rather an inclusive one. Adding to that, the Court further held that the "acts or behaviours" as mentioned in Sec. 2(n)<sup>15</sup> of the PoSH Act was to ensure that acts of sexual harassment, whether done directly or by implication, are included within its ambit. It was then observed that given the broad ambit of the definition, an express instance of sexual harassment in the complaint was not necessary. During the inquiry by the ICC, it was revealed that the petitioner had called the complainant to his chamber post the working hours and made remarks on her looks and tried putting his hand around her. The Court concluded it was an unwelcoming act to be interpreted as sexual harassment within the meaning of Sec. 2(n).

#### CONCLUSION

Various courts continue to discuss and interpret the provisions of the PoSH Act. The evolved employment scenarios are presenting newer challenges with respect to different aspects in a workplace. Such challenges like sexual harassment require concerted efforts from the employers and the ICC to deal with the complaints received. In light of the same, the decisions by different courts need to be taken note of and carefully analysed by the employer and the ICC, in view of the sensitivities involved in relation to the topic of sexual harassment at the workplace.

– HR Law Team

You can direct your queries or comments to the authors.

<sup>1</sup>DB Corp Ltd v. Shailja Naqvi, MANU/DE/2590/2022

<sup>2</sup>Manonmanium Sundaranar University v. P. Govindaraju MANU/TN/2894/2022

<sup>3</sup>Pawan Kumar Niroula v. Union of India, 2022 LIVELAW CAL (15)

<sup>4</sup>Amutha v. The Director of Medical and Rural Health Service MANU/TN/5600/2022

<sup>5</sup>Pradip Mandal v. Metal Scrap Trade Corporation Ltd. and Ors. MANU/WB/0828/2022

<sup>6</sup>S. Vinukumar v. The Government of Tamil Nadu And Ors. MANU/TN/3163/2022

<sup>7</sup>Dheeraj Singh Bisht v. Chairman Cum Managing Director Writ Petition (S/S) No. 314 of 2021

<sup>8</sup>Laxman B. Panmand v. Nuclear Power Corpn. of India Ltd., 2022 SCC OnLine Bom 893

<sup>9</sup>Vashudha Khanna v. State Government of U.P., Criminal Misc. Writ Petition No. - 2904 of 2022

<sup>10</sup>Thabitha David v. Commissioner of Labour, Puducherry; V. Parthiban, J., 2022 LLR 761

<sup>11</sup>Vimalkant Bhanuprasad Shrimali v. IDMC Limited, 2022 LLR 848

<sup>12</sup>*Women in Cinema Collective vs State Of Kerala* WP(C) NO. 34273 OF 2018

<sup>13</sup>Sec. 2(o) of PoSH Act defines workplace to include—

(i) any department, organisation, undertaking, establishment, enterprise, institution, office, branch or unit which is established, owned, controlled or wholly or substantially financed by funds provided directly or indirectly by the appropriate Government or the local authority or a Government company or a corporation or a co-operative society;

(ii) any private sector organisation or a private venture, undertaking, enterprise, institution, establishment, society, trust, non-governmental organisation, unit or service provider carrying on commercial, professional, vocational, educational, entertainment, industrial, health services or financial activities including production, supply, sale, distribution or service;

(iii) hospitals or nursing homes;

(iv) any sports institute, stadium, sports complex or competition or games venue, whether residential or not used for training, sports or other activities relating thereto;

(v) any place visited by the employee arising out of or during the course of employment including transportation by the employer for undertaking such journey;

(vi) a dwelling place or a house

<sup>14</sup>Vinay Kumar Rai v. Union of India WP(C) No.596/2019

<sup>15</sup>Sec. 2(n) of PoSH Act defines sexual harassment as any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely:— (i) physical contact and advances; or (ii) a demand or request for sexual favours; or (iii) making sexually coloured remarks; or (iv) showing pornography; or (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature

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