

Strides Taken, Miles to Go: Evolution of PoSH Law and its Application Since 2013

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"I measure the progress of a community by the degree of progress which women have achieved."

— Bhim Rao Ambedkar

The Indian Constitution provides equal rights to women to work in a safe and equitable environment. In tandem with it, the Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("**PoSH Act**"), emerged as a law to protect women against workplace sexual harassment. The PoSH Act not only addresses immediate concerns related to sexual harassment but is also deeply rooted in constitutional values promoting gender equality. It underscores the imperative of safeguarding women's dignity and rights at the workplace, in alignment with the constitutional mandate to ensure that women can freely participate in the workforce without prejudice, fear, or discrimination.

Globally, employers are known to take matters of workplace discrimination rather seriously. Despite the robust framework of the PoSH Act, there remains certain gaps to be bridged in order to align it with the global standards. This article delves into the practical application of the PoSH Act and opportunities for its effective implementation to provide safer workplaces.

Vishaka Guidelines

The tribulation faced by Bhanwari Devi in voicing her opinion exposed a need to protect rights of women venturing into the workplace. This resulted the public interest litigation (PIL) filed in the matter *Vishaka v. State of Rajasthan*¹. In its judgment, the Supreme Court of India laid down the 'Vishaka Guidelines' which provided the initial safeguards for women against sexual harassment at the workplace. They were drafted by the Court with reliance on United Nations 'Convention on Elimination of All Forms

¹ (1997) 6 SCC 241

of Discrimination against Women² and defined sexual harassment as (1) unwelcome sexually determined behavior (directly or by implication) in the form of physical contact/advances, (2) Demands for sexual favors, (3) passing of sexually colored remarks, (4) showing of pornography, (5) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.³

In 2013, the Ministry of Women and Child Development in India enacted the PoSH Act and its corresponding rules. The Criminal Law (Amendment) Act, 2013 also criminalized sexual harassment, reinforcing a multifaceted approach to combatting sexual harassment. This provided legal safeguards against sexual harassment at the workplace and strengthened the case for equality.

The PoSH Act's applicability and its scope

The POSH Act is a gender biased law, which protects only female employees at the workplace against sexual harassment. The law outlines that obligations of employers to ensure gender sensitive workplaces. This includes multi-faceted requirement to formulate a policy to prevent sexual harassment, constitute an internal committee to address sexual harassment complaints, ensuring and facilitating due process in investigation of complaints, implementation of recommendations of the investigating committee and conducting awareness programs to educate employees regarding the law.

The primary objective of the POSH Act is the establishment of grievance redressal mechanisms at workplaces. For workplaces with at least 10 employees (including contract workers), this involves forming an Internal Committee ("**IC**"). The government has the responsibility to constitute a Local Committee ("**LC**") at the district level to address grievances which cannot be addressed by an IC. The IC and LC serve as vital forums for addressing and resolving complaints of sexual harassment at the workplace.

These committees are tasked with ensuring a fair and impartial investigation. By mandating the establishment of these committees, PoSH Act states the importance of creating safe and inclusive work environment while also ensuring provision for safe and effective grievance redressal mechanisms. This is through regulation of the investigation process to ensure an impartial outcome. However, in prescribing every step of the process, the law overlooks certain sensitive areas. This includes an

² United Nations 'Convention on Elimination of All Forms of Discrimination against Women, 1979, available at <<https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>> last accessed 26 October 2023

³ Ibid n.2

individual's preference to remain anonymous while filing a sexual harassment complaint. Such limitations impede effective usage of the law to secure justice.

Evolution of PoSH Act

a. **Expanded definitions:**

The evolution of the law has been marked by continuous refinement. PoSH Act defines sexual harassment in line with Vishaka Guidelines as "sexual harassment" includes any one or more of the following unwelcome acts or behaviour (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"⁴

Additionally, PoSH Act provides additional circumstances which if connected to any of the above acts amounting to sexual harassment which include (i) implied or explicit promise of preferential treatment in employment, (ii) implied or explicit threat of detrimental treatment in employment, (iii) Implied or explicit threat about present or future employment status, (iv) Interference with work or creating an intimidating or offensive or hostile work environment and (v) humiliating treatment likely to affect health and safety.⁵ Accordingly, the ambit of the term sexual harassment has been expanded under the law.

The PoSH Act also defines an 'aggrieved woman'⁶ as women of any age whether employed or not, in relation to a workplace or house who alleges to have been subjected to any act of sexual harassment. This definition was created with the aim of expanding the protections of PoSH Act to female customers and clients harassed at the 'workplace'⁷.

The case of **Pawan Kumar Niroula v. Union of India**⁸ saw the Calcutta High Court rule that PoSH was not limited to just women employees, customers and clients but extends to women students as well as under the definition under section 2 of PoSH 'aggrieved women' was not limited by age group and held that the school had to constitute an IC and allowed girl students to file complaints of harassment in their educational institutions.⁹

⁴ PoSH Act, s.2(n)

⁵ PoSH Act, s.3(2)

⁶ PoSH Act, s.2(a)

⁷ PoSH Act, s. 2(o)

⁸ WP. CT 86 of 2021

⁹ Pawan Kumar Niroula v. Union of India, WP. CT 86 of 2021

The definition of a workplace was expanded beyond the traditional office set-up under Vishaka Guidelines introducing the concept of 'extended workplaces' to include places frequently visited by employees, transportation (provided by employers), dwellings and homes.¹⁰ This was done to echo the Delhi High Court in the case of **Saurabh Kumar Mallick v. Comptroller & Auditor General of India**¹¹ where it was held that a narrow approach to the 'workplace' cannot be adopted to determine sexual harassment. Following this, in the case of **Sanjeev Mishra vs. Bank of Baroda**¹², the Rajasthan High Court further extended the definition of 'workplace harassment' to include online abuse as well. It determined that the scope of the PoSH Act extends to the digital age. It declared that instances of sexual harassment involving a female employee from one state being harassed by an employee of a branch office located in another state should be considered within the purview of the PoSH Act. The court emphasized that in the digital realm, such branch offices effectively constitute a unified workplace. Therefore, if a female employee experiences digital harassment from an employee in another state, she has the right to file a complaint under the provisions of the PoSH Act, ensuring that her rights and safety are upheld in the modern, interconnected work environment.

The Bombay High Court observed the inclusivity and deliberately expansive nature of the definition of 'workplace' within the context of the PoSH Act. Several high courts across India have echoed this interpretation, affirming that the term extends beyond the confines of an employer's physical office. It encompasses a spectrum of scenarios where a woman might face sexual harassment, including offices of contractors, virtual spaces (cyberspaces), modes of transportation, and work-related visits to outstation locations. This broad interpretation of the 'workplace' definition underscores the PoSH Act's comprehensive approach, ensuring that women's safety is protected across a wide range of professional contexts, including those in the digital and remote working era.¹³

While the term 'harasser' has not been defined within PoSH Act, the case of **Malabika Bhattacharjee v. Internal Complaints Committee, Vivekananda College and Ors**¹⁴ witnessed the Calcutta High Court clarify that sexual harassment complaints are not limited to just the opposite gender as cases against same gender offenders are also

¹⁰ s.2(o)

¹¹ Saurabh Kumar Mallick vs. the Comptroller & Auditor General of India, Civil Writ Petition No. 8649

¹² Sanjeev Mishra v. Bank of Baroda, S.B. Civil Writ Petition No. 150/2021

¹³ Jaya Kodate v Rashtrasant Tukdoji Maharaj Nagpur University, Writ Petition No 3449/2013

¹⁴ Malabika Bhattacharjee v. Internal Complaints Committee, Vivekananda College and Ors. 2021(1) SCT 431 (Calcutta)

maintainable. This was because nothing under PoSH Act which precludes a same gender complaint. Additionally, the court added that a person of same gender can hurt the modesty or dignity of a woman. The position of the Calcutta High Court reflects the definition of 'respondent' under PoSH Act which refers to a 'person' against whom the aggrieved woman has made a complaint.¹⁵

b. **Constitution of IC**

PoSH Act requires the employer/state authority to constitute an IC at each office or branch for any organization which employs ten or more employees to hear and redress grievances of sexual harassment.¹⁶ However, recent cases have highlighted lapses in implementation and resulted in Courts issuing directions to ensure effective compliance. In the case of **Amutha v. The Director of Medical and Rural Health Service**¹⁷, the Madras High Court remarked that an IC must be constituted in accordance with section 4 of PoSH Act and failures may incur penalties under section 26 of the Act. Similarly, in the case of **Aureliano Fernandes v. State of Goa**¹⁸, the Supreme Court issued a number of directions for the proper implementation of the PoSH Act provisions when it came to the constitution of the IC and LC which dealt with making information regarding the committees and their constitution accessible to victims easily. These directions intended to ensure that employers and authorities execute their mandatory obligations under PoSH Act. This case throws a light on the need for equitable enforcement of workplace sexual harassment laws, emphasizing the importance of providing all involved parties a fair and reasonable chance to present their case. It serves as a strong reminder of the necessity for diligent implementation and adherence to legal provisions, ultimately safeguarding the rights and dignity of individuals in professional settings.

Courts have adopted a strict interpretation of PoSH Act provisions when it comes to constitution of the IC. This was exemplified in the case of **Women in Cinema Collective vs State of Kerala**, where the Kerala High Court held that per section 2(o) (ii) of the PoSH Act, a workplace with 10 or more employees are mandatorily required to constitute an IC and deemed that even a film production unit will be a 'workplace' susceptible to section 4 of PoSH Act.¹⁹

¹⁵ s.2(m)

¹⁶ s.4

¹⁷ Amutha v. The Director of Medical and Rural Health Service MANU/TN/5600/2022

¹⁸ Aureliano Fernandes v. State of Goa and Others, Civil Appeal No.2482 of 2014

¹⁹ Women in Cinema Collective vs State Of Kerala WP(C) NO. 34273 OF 2018

If an IC is not constituted by employer in line with the provision of the PoSH Act, then courts may set aside any proceedings or reports on the ground that they have failed to provide complainants with an objective, neutral and insulated from possible intrusions inquiry. This will result in the court requiring a fresh inquiry into the matter with a reconstituted committee.²⁰ Similarly, in the case of **K. Hema Latha v. The State of Tamil Nadu and Others**²¹, an IC comprised solely of members of an administrative department of an educational institute saw its report rejected by the Madras High Court due to non-compliance with PoSH Act. The institution was directed to reconstitute the IC and submit a fresh report.

c. **Neutrality of external member**

In the matter of **Punjab and Sind Bank and Ors. v. Durgesh Kuwar**²², the Supreme Court held that there was a fundamental defect in the constitution of the IC as the external member on the IC was found not to be an independent third party in accordance with the provisions of section 4(2)(c) of the PoSH Act. In this case, it was noted that the external member on the IC was appearing on behalf of the employer (bank) as a panel lawyer and was therefore not independent. In this context, the SC observed that the purpose of having an external member is to ensure the presence of an independent person who can aid, advise and assist the IC. The Bombay High Court²³ set aside the report of the IC as it was observed that the external member on the IC was not a member of any non-governmental organization or association committed to the cause of women or a person familiar with the issues relating to sexual harassment.

d. **Preference of Appeal**

In the case of **DB Corp Ltd v. Shailja Naqvi**²⁴, the Delhi High Court stated that PoSH Act is intended to redress a serious social evil which causes untold trauma. Leading to the court finding that an aggrieved woman could not be expected to 'immediately avail their appellate remedies'. Furthermore, it was unethical 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 under section 18 of PoSH Act against the inquiry committee. Therefore, it was held that Limitation Act, 1963 would apply in respect of appeals which may be sought

²⁰ Ruchika Singh Chhabra v. Air France India and Another (2018 LLR 697)

²¹ K. Hema Latha v. The State of Tamil Nadu and Others (2018 LLR 447)

²² AIR 2020 SC 3040

²³ Ruchika Kedia v. Internal Complaints, Goa Institute of Management, Through Its President Prof. Annamika Sinha And Ors. 2020 SCC Online BOM 139

²⁴ DB Corp Ltd v. Shailja Naqvi, MANU/DE/2590/2022

under section 18 of PoSH Act. In contrast, the Madras High Court²⁵ upheld the single-judge's decision that a complaint of sexual harassment under the PoSH Act has to be filed within a period of three (3) months from the date on which sexual harassment took place. Ruling that a complaint filed ten months after the alleged incident was barred by limitation as maximum delay can only be three months.

e. **State obligations**

In the case of *Initiatives for Inclusion Foundation & Anr. v. Union of India*²⁶, the Supreme Court noted that there remains a significant lack of consistency in the enforcement of the PoSH Act by different state governments. This inconsistency is attributed not only to a lack of awareness but also to the absence of accountability and responsibility among authorities. To address these issues, the Supreme Court outlined comprehensive directives that each state must follow to minimize the existing gaps in the effective implementation of the *PoSH Act*. These include directives on requirement to co-ordinate between central and state government on implementation of PoSH Act, appointment of public authorities, training of authorities notified under PoSH Act, appointment of appropriate authorities to implement the law and preparing annual compliance reports.

f. **Criminal Action for sexual harassment**

In *Thabitha David v. Commissioner of Labour, Puducherry*²⁷ the Allahabad High court held that in the absence of proof if a prima facie case of sexual harassment could not be made out, then police authorities should refrain from entering into inquiry. Criminal laws are procedurally strict and unlike to the same, the PoSH Act enabled the non-interference of the police in the initial stages of the complaint.

Miles to go

Workplace sexual harassment impairs a woman's autonomy and her enjoyment of basic human rights. While PoSH Act aims to provide effective and efficient redressal to grievances there have been significant issues to overcome for effective implementation. While express protection is offered to female employees, PoSH Act remains silent on other employees who may fall victim to harassment. While the gender specific nature of PoSH Act has increased female participation against harassment, the

²⁵ Manonmaniam Sundaranar University v. P. Govindaraju MANU/TN/2894/2022

²⁶ Writ Petition (Civil) No. 1224 of 2017

²⁷ Thabitha David v. Commissioner of Labour, Puducherry; V. Parthiban, J., 2022 LLR 761

law does not address sexual harassment faced by individuals belonging to LGBTIQ communities.²⁸

It is no surprise that women often refrain from reporting incidences of harassment in fear of adverse reactions from their harassers, employers and members of the IC. Most victims feel that raising complaints results in social stigma, embarrassment or further harassment. While the law provides for confidentiality of information relating to PoSH Act, poor implementation has failed to secure confidence in the system.

The Human Rights Watch reported that employees (domestic workers, agricultural workers, factory workers etc.) feel their incidences of sexual harassment are 'trivial' and ignored. This showcase gaps in implementation of PoSH Act in all workplaces. This lack of access is accompanied by a lack of knowledge regarding the effective avenues of redressal, which cannot be solved by mere increases in awareness due to the fear of the social stigma, embarrassment and harassment. In the event of a successful complaint, victims are often threatened with false complaints from the employer, threats and pressure from the police.²⁹

In summary, the creation of PoSH Act is a step in the right direction when it comes to the recognition of sexual harassment in the workplace and the need for women to be granted protections. However, there are gaps in its implementation as has been highlighted which need to be addressed.

As the law completes its 10th anniversary, we congratulate the lawmakers and checkers on its progress. We look forward to further progressive developments in the law that provides a robust and uniform grievance redressal avenue trusted by employees to voice their concerns freely.

²⁸ Professional views expressed by Adv. Sonali Satpathy, on 9th June 2023 via LinkedIn <<https://www.linkedin.com/pulse/lapses-posh-act-enforcement-adv-sonali-satpathy>> last accessed 27th October 2023

²⁹ Human Rights Watch, "'No #MeToo for Women Like Us" Poor Enforcement of India's Sexual Harassment Law