

## HR Law Hotline

March 09, 2020

### INDIA'S LAW ON PREVENTION OF SEXUAL HARASSMENT AT WORKPLACE: ANALYSIS OF RECENT CASE LAWS - PART 2

India continues to see a rise in sexual harassment complaints and related litigation, largely due to its Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 of India ("POSH Act") followed by the #MeToo revolution. We are writing this legal alert analysing the important case laws, following our previous [legal alert](#).

#### 1. WIDER INTERPRETATION OF WHAT CONSTITUTES SEXUAL HARASSMENT

In a case before the High Court of Bombay<sup>1</sup>, the court disagreed with the decision of the Internal Complaints Committee ("IC") who had concluded that the complaint filed by the woman amounts to misconduct and misbehaviour, rather than sexual harassment. The complainant claimed that her subordinate used abusive and unprofessional language against her. The court observed that the IC had failed to take into consideration the additional circumstances provided under Section 3(2) of the POSH Act which also amounted to sexual harassment including creation of an intimidating or hostile environment for women and humiliating treatment likely to affect health and safety of a woman.

#### 2. EMPLOYER'S FAILURE TO CONSTITUTE THE IC

The Madhya Pradesh High Court imposed a fine of INR 50,000 (approx. US\$ 700) on the petitioner, a renowned hospital in Indore, for not having constituted an IC. As per the POSH Act, every employer having at least 10 employees is required to constitute an IC at each of its workplaces to investigate complaints pertaining to workplace sexual harassment of women.<sup>2</sup> The court also directed the hospital to pay a compensation of INR 2.5 million (approx. US\$ 35,000) to the complainant for the pain & suffering, loss of reputation, emotional distress and loss of salary, which had resulted in deprivation of the complainant's right to live with dignity.

#### 3. NEED OF AN EXTERNAL MEMBER TO FORM THE IC

The Punjab and Haryana High Court ordered the employer to re-constitute the IC since there was no external member.<sup>3</sup> As per the POSH Act, the IC should have an external member who is a person associated with a non-governmental organisation or association committed to the cause of women or a person who is familiar with issues relating to sexual harassment.

#### 4. EXTENT OF EXTENDED 'WORKPLACE' UNDER POSH ACT

The High Court of Calcutta held that the Privy Lounge, Bar-cum-Restaurant at a mall, where the incident of sexual harassment was alleged to have taken place between two fellow students of IIM, Calcutta, cannot be termed as a 'workplace' under the POSH Act. Therefore, the court directed the Counselling Officer of IIM, Calcutta to mediate and settle the matter.<sup>4</sup>

#### 5. CONFLICT OF INTEREST AMONGST IC MEMBERS

In a case before the High Court of Delhi, the court ruled that a mere apprehension of bias would not be sufficient to exclude a member from the IC. Citing certain previous decisions of the Supreme Court in this respect, the court pointed out that it would be necessary to establish a real likelihood of bias rather than a mere apprehension. The court also said that *"if right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the inquiry."*<sup>5</sup> In this case, since the Presiding Officer of the IC was a witness to the incident, she recused herself from handling the complaint. With respect to the rest of the IC members, there was not even a remote suspicion that any of them had any personal interest which would conflict with their obligations to conduct a fair inquiry under the POSH Act. Therefore, the court held that there was no need to re-constitute the IC.

Please also see our recent article titled ["POSH Committee - Dealing with bias and conflict of interest"](#) which may be viewed [here](#).

#### 6. IMPROPER INVESTIGATION PROCEDURE CAN VITIATE THE INQUIRY

The Kerala High Court set aside the order of the IC to terminate the accused since it had not followed the procedure set out under law while conducting the inquiry.<sup>6</sup> In this case, the accused was not provided with a copy of the complaint nor the findings of the IC after completion of the inquiry.

In a similar case before the High Court of Calcutta, the court held that since the respondent was not given an opportunity to cross-examine the complainant, proper investigation procedure has not been followed<sup>7</sup>. Although the complaint arose before the POSH Act was enacted, the court observed that neither the landmark Supreme Court decision in *Vishaka v. State of Rajasthan* (1997) nor the provisions of Section 11 of the POSH Act conceives a situation of denying the accused an opportunity of hearing what the victim has to say against the respondent or the opportunity to cross-examine the complainant. In this case, the investigating authority had not recorded any reason as to why it would not be feasible to allow the victim to record her statement in the presence of the alleged offender

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and also as to why the respondent has been denied the opportunity to cross-examine the complainant. The court observed that *'the right of cross-examination has invariably been recognised as a basic right of an accused in proceedings, whether it be criminal or departmental'*. If an inquiry is conducted without extending the opportunity of cross-examination to a delinquent and findings are adverse to the interests of such party, the delinquent can legitimately raise a claim of having been denied the 'reasonable opportunity' to defend himself. If the allegation is found to be correct, the proceedings would stand vitiated.

## 7. NEED TO COMPLY WITH THE EMPLOYER'S SERVICE RULES

In a case before the High Court of Calcutta, the court set aside the order of the IC on the ground of procedural impropriety and violation of principles of natural justice.<sup>8</sup> In this case, the petitioner had alleged that the respondent humiliated and mentally harassed her. Basis the investigations, the IC made a decision in favour of the petitioner. However, the court observed that where there is a procedure prescribed for inquiry under the service rules (HR policies) of the employer, it should be complied with by the employer in addition to the procedure prescribed under the POSH Act.

## 8. LIMITATION PERIOD FOR COMPLAINT UNDER POSH ACT

In a case before the High Court of Delhi, the order of the Local Complaints Committee (LC) dismissing the complaint was challenged. The LC had dismissed the complaint on the ground that the complaint was filed beyond the limitation period of three months prescribed under Section 9 of the POSH Act. However, the complainant submitted before the court that there were certain previous correspondences which were filed with the employer within the limitation period and that the complaint was brought to the notice of the employer within the limitation period. Since such documents/information were not furnished to the LC while deciding upon the matter being barred by limitation period, the court relegated the parties to the LC by giving the complainant an opportunity to file such communications before the LC, enabling the LC to make an informed fresh decision on the issue of limitation.<sup>9</sup>

## 9. CRIMINAL PROCEEDINGS BESIDES REMEDY UNDER THE POSH ACT

The High Court of Jammu & Kashmir held that the POSH Act does not bar the complainant from seeking remedy under the Ranbir Penal Code (equivalent to the Indian Penal Code (IPC)) just because the matter has already been taken cognizance of by the IC constituted under the provisions of the POSH Act.<sup>10</sup>

However, the High Court of Karnataka has clarified that initiating criminal prosecution under Section 354 of the IPC in respect of a matter which has already been investigated by the IC on the same facts and evidences and was found to be no claim of sexual harassment by the IC, would be unjust on the part of the court. In this case, except reiterating the very same allegations which were made by the complainant before the IC, no additional material was placed on record to substantiate the said criminal charges.<sup>11</sup>

## ANALYSIS

The POSH Act being a relatively new labour law in India, these judgements analysing various intricate aspects under the POSH Act helps provide better clarity not just for the employer and the IC members, but also for the public at large.

In light of the ~~#Me~~ Too movement, a number of cases including those which occurred before the enactment of the POSH Act are now coming into limelight. With the rising number of reported cases of workplace sexual harassment of women, it becomes imperative for employers and their respective HR & in-house legal teams to take pro-active steps to prevent and effectively redress complaints of workplace sexual harassment.

It is also important for employers to regularly train their IC members on the nuances of the POSH Act and investigation formalities. In order to keep litigation at bay, a comprehensive understanding of the interpretation being adopted by courts in India and the ability to look at things from the lens of the judiciary, is necessary.

While employers have in general been following the process of educating/training their IC members on the POSH Act, as a next step, the IC members should be kept abreast of the latest judicial interpretations, so as to avoid any potential mistakes which could end up creating litigation and reputational risks for the employer.

— Archita Mohapatra, Preetha S & Vikram Shroff

You can direct your queries or comments to the authors

<sup>1</sup> Sapana Korde Nee Ketaki A. Ghodinde v. the State of Maharashtra and Ors. 2019(1) Bom CR (Cri)415

<sup>2</sup> Global Health Private Limited & Mrs. Arvinder Bagga v. Local Complaints Committee, District Indore and Others

<sup>3</sup> Neelam Bhardwaj v. State of Punjab & Ors., 2018 LLR 1286

<sup>4</sup> Shubham Bhuwangiri Goswami v. the Union of India and Ors. MANU/WB/1285/2019

<sup>5</sup> Somaya Gupta v. Jawaharlal Nehru University and Ors. 2018 (159) FLR 390

<sup>6</sup> Dr. T.V. Ramakrishnan v. Kannur University 2018 LLR 990

<sup>7</sup> Union of India and Ors. v. Shibaram Sarkar MANU/WB/1016/2019

<sup>8</sup> Debjani Sengupta v. Institute of Cost Accountants of India 2019 SC OnLine Cal 734

<sup>9</sup> X. v. District Magistrate MANU/DE/0361/2019

<sup>10</sup> D.B Singh v. State of Jammu & Kashmir and Ors. MANU/JK/76/2019

<sup>11</sup> Usha Padmini and Ors. v. State of Karnataka and Ors. MANU/KA/0584/2019

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