

PoSH Act in the #MeToo era

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Tuesday 04, Feb 2020



Recently, the Delhi High Court passed an order directing a social networking site (SNS) to take down the #MeToo posts against an Indian artist. After the anonymous post, raising allegations of sexual harassment, the artist filed a defamation suit. The Court restrained the SNS from posting any further posts against the artist and directed the SNS to reveal the identity of the person who posted it. The Court added that such allegations of sexual harassment cannot be posted in public without any legal backing and to that extent, it should be taken down.

“Complaints that are time-barred cannot be protected by the PoSH Act”

Since the uprise of #MeToo as a movement, several new situations have arisen, some of which were not envisaged at the time of enforcing the Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act in 2013 (“PoSH Act”).¹ Our criminal laws were also amended the same year to introduce “sexual harassment” as an offense and provide punishment, including fine and imprisonment, for committing the offense of sexual harassment.² However, the existing laws still appear to be not fully equipped in coping with some of the situations, as discussed below.

1. The PoSH Act came into effect in December 2013. Some of the postings of #MeToo related to workplace incidents occurring prior to that period, would not get protected under the PoSH Act.
2. The PoSH Act requires the complaint to be raised to the employer's internal complaints committee ("IC") within three months from the date of the incident. The IC may, upon its discretion grant an additional three months of extension in certain limited situations. However, complaints that are time-barred cannot be protected by the PoSH Act.
3. As per the PoSH Act and rules thereunder, an external member on the IC may be a person familiar with the issues relating to sexual harassment. However, the participation of a lawyer as an external member of the IC was successfully challenged before the Rajasthan HC, leading to confusion on who can be an appropriate external member.³
4. The PoSH Act limits the IC's appointment to three years - there is lack of clarity in case of a situation in which the tenure of the IC members has expired during an ongoing investigation of a matter.
5. Recently, the Delhi High Court held that the inquiry proceedings should be fair, impartial and in conformity with the principles of natural justice.⁴ In the case where the allegation of bias was established against one of the members of the IC, the Court was of the view that a new IC needs to be constituted and the proceedings should start afresh.⁵
6. As cited above in the case of the artist's allegations, there have arisen certain situations in which derogatory content has been posted on SNS in the form of a statement, pictorial representation or otherwise having sexual undertone to it. If the woman feels that she has been aggrieved by such behavior, she may file a complaint with the IC. However, it may pose practical challenges for the IC to handle those cases where the identity of the respondent may not be known.
7. The PoSH Act does not provide for handling anonymous complaints, which could come up on #MeToo or on social media. Employers and their ICs may face legal and practical challenges in handling and investigating anonymous complaints.
8. In case any sexual harassment complaint has been proved, the criteria for determining monetary penalty under the PoSH Act remains vague and unclear. In the absence of clarity, the IC would find it difficult to arrive at a precise monetary amount to be paid by the respondent to the complainant.
9. Individuals who wish to appeal against the decision of the IC may face challenges in doing so given the lack of information relating to the Local Complaints Committee or District Officer in several of the Indian states. If and when, the matter eventually goes to the Court, given the huge pendency of matters, it is likely to take a considerable time for the matter to be adjudicated upon, defeating the purpose.
10. Considering the frequency of incidents being reported and complaints being filed, a Group of Ministers (GoM), headed by the Home Minister, along with three other senior members, was set up in October 2018 by the government. The GoM is meant to be the central authority to examine the legal and institutional framework in dealing with matters of sexual harassment of women at workplace. This initiative needs to be revived by the government.
11. In the wake of series of sexual harassment incidents after the rise of the #MeToo movement in the film and media industry, the Producers Guild of India instituted a committee to lead anti-sexual harassment efforts among filmmakers and actors. In addition to this, the Editor's Guild of India lauded and extended its support to the women journalists who brought up their incidents in public. Other industry associations can take a leaf out of this exercise and assist their member companies. Based on the surveys and studies conducted recently,⁶ employers have started to review their HR policies and practices in dealing with sexual harassment prevention and complaints. Some companies have also increased the frequency and intensity of their trainings conducted for employees and IC members.

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To conclude, it remains a difficult task to combat the challenges of dealing with sexual harassment allegations at the workplace and complying with the PoSH Act with quick and efficient resolution. A collective effort of all stakeholders to work towards achieving the common goal of building a safe workplace with a top-down approach continues to remain the need of the hour.