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## UNVEILING CHALLENGES IN POSH ACT, 2013

~Nitya Agarwal

### INTRODUCTION

India has witnessed an increased number of women leaving their households and working shoulder-to-shoulder with men, and consequently, there has been an upsurge in complaints of sexual harassment. Sexual harassment in the workplace is not a new concept in India. Women, for years, have been victims of sexual harassment in the form of “physical, mental as well as verbal” abuse. Men in the workplace assume themselves to be in dominant positions. This misconception often becomes an illogical reason for them to harass women. However, this harassment of women in the workplace has been addressed by the Indian legislature and Judiciary multiple times but is unsuccessful. To mitigate sexual harassment of women in the workplace a landmark legislation, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter POSH Act) was implemented in 2013.

The POSH Act, 2013 was implemented with the objective of protecting women against sexual harassment at the workplace and preventing and redressing complaints of sexual harassment.<sup>1</sup> The Act has tried to include all the workplace and therefore, been a way through which the Government has tried to deal with the increasing complaints. POSH Act provides legal redress and encourages a culture of respect and equality in professional settings, hence has become an essential step toward empowering women.<sup>2</sup>

Despite the implementation of the POSH Act, 2013 a decade ago, there exist major challenges and shortcomings that women face in their workplace. We will explore these issues in this

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<sup>1</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013(India).

<sup>2</sup> Navigating Challenges In Upholding Workplace Safety: A Comprehensive Analysis Of The Posh Act Implementation, King Stubb & Kasiva (14 December 2023), <https://ksandk.com/labour-employment/posh-act-navigating-workplace-safety-challenges/>.

article. First, it is essential to understand the background of the implementation of the POSH Act of 2013.

## **BACKGROUND**

Before the implementation of the POSH Act in 2013 or any guidelines issued by the Supreme Court, the Indian Penal Code, 1860 dealt with any sexual harassment faced by women both at the workplace and at home. The first case that dealt with sexual harassment at workplace was *Vishaka v the State of Rajasthan*<sup>3</sup>. The case involved a social worker named, Bhanwari Devi who while attempting to stop a child's marriage was brutally gang raped by a group of males from the ruling caste society who took part in the child marriage.<sup>4</sup> This case prompted the Supreme Court to issue "Vishaka Guidelines" which were effective till the time the legislature did not introduce the Act. The Supreme Court in its judgment recognized the apparent legislative shortcomings and recognized workplace sexual harassment as a violation of human rights.<sup>5</sup>

After the guidelines, the Legislature brought the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, also known as the POSH Act. Along with the introduction of the specific act regarding sexual harassment, the Indian Penal Code (IPC), 1860 was simultaneously amended by inserting Section 354A to make sexual harassment a criminal offence.<sup>6</sup> This Act was implemented with the aim of encouraging the empowerment of women by facilitating a secure environment where one could work without compromising one's dignity and self-respect. Moreover, this Act in reality has resulted in a comparatively more productive environment. The Act has been brought in accordance with multiple fundamental rights ensured by the Indian Constitution, including Articles 14<sup>7</sup>, 15<sup>8</sup>, and 21<sup>9</sup>. The Act provided clear definitions to terms such as "sexual harassment", "workplace" etc. The POSH Act further provided for the establishment of an Internal Complaint Committee (ICC) where there are 10 or more people employed.<sup>10</sup> The Act has established a comprehensive

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<sup>3</sup> *Vishaka v the State of Rajasthan*, AIR 1997 SC 3011

<sup>4</sup> *Ibid.*

<sup>5</sup> Suhani Agarwal, Timeline of the POSH Act, 2013, 2 *JUS CORPUS L.J.* 1174 (2022).

<sup>6</sup> Bharat Vasani, Varun Kannan & Vanya Agarwal, POSH Act – Implementational Challenges, Companies Act, Corporate Law, Employment Law (15 December 2023), <https://corporate.cyrilamarchandblogs.com/2022/12/posh-act-implementation-challenges/>.

<sup>7</sup> INDIA CONST. art. 14.

<sup>8</sup> INDIA CONST. art. 15.

<sup>9</sup> INDIA CONST. art. 21.

<sup>10</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, § 4, No. 14, Acts of Parliament, 2013 (India).

framework for what actions would be considered offences and what sanctions the employer could impose in response to the ICC investigation.

It is true that due to this Act, there have been substantial improvements in the professional lives of women but there still exist some challenges and issues that need to be overcome in order to ensure better results. Identifying and resolving these shortcomings and inadequacies of the legislation is critical as women still suffer due to them. This article will further explore these inadequacies in detail.

## **CHALLENGES**

We can divide the challenges in the POSH Act, 2013 into two categories, that are, challenges in framework and challenges in implementation. The primary defect in the framework is that the legislation only focuses on sexual harassment suffered by women. The Act is not gender inclusive. Section 2(a)<sup>11</sup> of the POSH Act defines “aggrieved women” which specifies that only women can be victims and are the only ones who can seek justice under the POSH Act. There is no single provision that allows male or LGBTQIA+ employees to file a complaint regarding sexual harassment under the Act. Sexual harassment is dominantly faced by women but that does not categorically exclude men. Moreover, the act's bias against the LGBTQIA+ community suggests that the Indian legal system does not recognize LGBTQIA+ people as victims under the law, despite the Supreme Court's decision in *Navtej Singh Johar v. Union of India*<sup>12</sup>, which declared that everyone is entitled to equal protection and benefits under Articles 14, and 16 and explicitly recognized the queer community as a significant part of society.<sup>13</sup> After the landmark “NALSA Judgment”<sup>14</sup> and the *Navtej Singh Johar v. Union of India*<sup>15</sup>, the Transgender Persons (Protection of Rights) Act, 2019<sup>16</sup> was implemented which provided for a secure environment for transgender. Section 9<sup>17</sup> of the same Act specifies that there shall not exist any discrimination in employment and its related issues. Nevertheless, as the POSH Act does not outline a process for transgender employees to raise their voices against sexual

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<sup>11</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, §2(a), No. 14, Acts of Parliament, 2013(India).

<sup>12</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>13</sup> Manya Gupta, A Gendered and Non-Inclusive Statute - Protection of Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013, 3 NYAAYSHASTRA L. REV. 1 (2022).

<sup>14</sup> *NALSA vs. Union of India*, (2014) 5 SCC 438

<sup>15</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>16</sup> Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019(India).

<sup>17</sup> Transgender Persons (Protection of Rights) Act, 2019, §9, No. 40, Acts of Parliament, 2019(India).

harassment they experience at work, it conflicts with the Transgender Persons (Protection of Rights) Act, 2019<sup>18</sup>.

A major controversy surrounding the POSH Act, 2013 is the limitation period specified within. One can file a complaint within three months from the date of the incident of sexual harassment. However, the contention of many is that this period specified in Section 9(a)<sup>19</sup> of the POSH Act is unreasonable. Many women do not report sexual harassment due to fear of a bad name in the society or impact of this investigation on their careers. Numerous concerns arise in a woman's mind which also includes the question of her freedom. Women frequently require encouragement to speak up. Since there is a short window of time to file a complaint, many offenders enjoy their routine lives when the wrongdoing is discovered.

Another challenge with the Act is the lack of awareness among the employees as well as employers. The most common excuses offenders have for their statements that result in harassment are "I didn't know she is so sensitive", "It is a joke", "Stop acting like a crybaby" etc. Offenders, especially men have this misconception that women get offended because they are sensitive or they can't take a joke. Offenders do not comprehend the fact that derogatory statements or gender-based statements like "Oh you are a woman so you must have done sexual favours to get this promotion" are not a matter of laughter. Moreover, there is an evident dearth in the level of knowledge and awareness about the basic aspects of the POSH Act, 2013. Many companies, in particular small companies, are firm on the ground that only their Human Resources Department should be aware of the intricacies of the Act. There have been merely any channels that have been successful in communicating in encouraging women to report any incident of sexual harassment.

Apart from flaws in the framework of the POSH Act, 2013, there have also been challenges in the implementation. It has been a task to maintain the confidentiality of the victims and the witnesses. Despite there being provisions in the Act protecting the identity of the victims and witnesses, many have been at the brutal end of the investigation even after being the victim. This is due to the failure of the system to keep the identities of the parties involved confidential. A recent example of this failure is the case involving allegations of sexual harassment against the Vice-Chancellor of a reputed law school in India. In this case, apart from the name of the

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<sup>18</sup> Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019(India).

<sup>19</sup> Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, §9(a), No. 14, Acts of Parliament, 2013(India).

accused, many media houses have also disclosed the identities and personal details of victims as well as the witnesses.

Another challenge is the redressal mechanism as provided by the Act. The POSH Act, 2013 led to the constitution of the “Internal Complaint Committee” (ICC) where ten or more workers are employed or the “Local Complaint Committee” if less than ten workers are employed or for an unorganized sector. These committees have been given the responsibility of investigating the complaint and giving a decision that would be implemented by the employer. However, the ICC or LCC often lacks expertise in dealing with sexual harassment cases which are sensitive and need to be decided upon quickly, thereby resulting in unfair decisions.<sup>20</sup> In addition to this, since ICC has been formulated from existing employees of the company there exists a possibility wherein the members of the Committee may, in advance, know the parties involved and lead to a biased decision. The members of the Committee also lack training and the legal acumen to understand the complexities of the POSH Act, 2013.<sup>21</sup>

False sexual harassment complaints are another problem faced in the implementation of the Act. There have been instances when female employees have filed a complaint with the knowledge and understanding that no sexual harassment occurred only out of a feeling of revenge or disdain against the accused.<sup>22</sup> False cases create doubts regarding genuine cases as well and also result in punishing an innocent person if the ICC finds him guilty. Therefore, dampening the effective implementation of the POSH Act, 2013.

### Recommendation and Conclusion

The POSH Act, 2013 was implemented with the aim of creating a better working environment however, there is a need to make certain amendments to the legislation. Some of the recommendations are –

- Gender-Inclusive Legislation – It is the need of the hour to make the POSH Act more gender inclusive by amending it. The Act should provide a mechanism for any person irrespective of their gender to report sexual harassment.

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<sup>20</sup> Bharat Vasani, Varun Kannan & Vanya Agarwal, POSH Act – Implementational Challenges, Companies Act, Corporate Law, Employment Law (15 December 2023), <https://corporate.cyrilamarchandblogs.com/2022/12/posh-act-implementation-challenges/>.

<sup>21</sup> Legal Specs, Limitations of POSH act and the possible improvements, LinkedIn (7 March 2024), <https://www.linkedin.com/pulse/limitations-posh-act-possible-improvements-legal-specs-yjki/>.

<sup>22</sup> Kumar, R., 2022. An Overview of Women Rights in the workplace in India. Jus Corpus LJ, 3, p.963.

- Awareness Campaigns and Seminars- The Act must make awareness campaigns and seminars mandatory for all employees wherein the basics of the Act are discussed. Also, men should be educated on their role in making the workplace secure and safe.
- Strict Implementation of provisions- Certain provisions including confidentiality have to be strictly implemented without any loopholes. Implementation of the Act should ensure that the parties involved, especially the victims and witnesses, remain safe and have no repercussions in the future.
- Better Redressal Mechanism- The ICC and LCC which have been constituted by the Act need to be in a better state. The Act's newly established ICC and LCC must be in better condition. Before assuming their positions, the members ought to undergo the appropriate training. There should be a system in place that would guarantee there is no conflict of interest while looking into a complaint.
- Consequences of False Complaints- It is imperative that the company sensitise the employees in case of the potential consequences of making false sexual harassment complaints. The “Internal Complaints Committee” should take steps to ensure the complainant doesn't misrepresent facts through emails or communication.

India is a developing country with workers of different gender orientations. So, for India to move from a developing status to a developed one, it is important that as a country we understand the need for a productive work environment. An environment that is safe and sound automatically facilitates productivity. Hence, the POSH Act,2013 with immediate amendments can be a force that ensures that the workplace in India is safe for all and thereby becomes a boon for the Indian Economy.