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ANALYSIS OF POSH IN THE BACKDROP OF HEMA COMMITTEE REPORT

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The Justice Hema Committee (“**Committee**”) Report was unveiled on 19 August, 2024 by the Kerala Government after several lawsuits that were filed with the Kerala High Court (“**High Court**”) against its public release. The report was finally issued in a redacted form on account of confidentiality, revealing severe workplace sexual harassment within the Malayalam film industry (“**Malayalam Industry**”). It is rooted in the 2017 rape case of an actress, who was abducted and sexually assaulted in a moving vehicle, causing several petitions filed with the High Court including the petition by Women in Cinema Collective (“**WCC**”) seeking better work conditions for women. This led to constitution of the Committee led by Justice K. Hema, to investigate into the sexual harassment and gender inequality in the Malayalam Industry. Operating on basis of anonymity, the Committee report has exposed a system marked by an all-male power structure, lack of security measures and absence of basic facilities like toilets and changing rooms for women. It also reported significant pay disparities, unauthorized bans, unpaid work, online harassment and the prevalence of a casting couch, causing widespread outrage and calls for an urgent action and leadership change, which led to resignation of the entire executive committee of the Association of Malayalam Movie Artists (“**AMAA**”).

Analysing from a legal perspective, these shocking revelations have raised critical questions regarding the safety of women at workplace, more specifically of women working in challenging workspaces with erratic work hours and schedules. It has highlighted an urgent need for taking safety measures and creating robust systems to ensure protection and justice withing professional environments. It has also compelled the reassessment of prevailing sexual harassment laws, under the lens of reforms brought by landmark cases such as the Mathura custodial gang rape case 1972 and the Bhanwari devi gang rape case of 1992. On September 10, 2024, the High Court questioned the Kerala Government on its inaction on the findings of the Committee's report almost five years of its submission and gave directions for further actions to be taken in case of findings by the Kerala government and Special Investigation Team (“**SIT**”).

Laws relating to Sexual Harassment at Workplace in India

Prior to the legislation of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“**POSH Act**”), the provisions addressing sexual harassment were lacking under the criminal laws. Limited remedy was available under Section 354 of the Indian penal Code (“**IPC**”), which dealt with assault of criminal force to outrage the modesty of a woman while section 509 dealt with using of words, gesture or act insult the modesty of a woman.

In various landmark cases, the Supreme Court (“**SC**”) highlighted the need of reform in existing laws to address sexual harassment at workplaces in India. In **Rupan Deol Vs. K.P.S. Gill**, where a senior IAS officer faced sexual harassment from her superior, the SC highlighted the discrepancy in provisions to address the sexual harassment faced by the victim, highlighting the need for a comprehensive legal framework. In the case of **Vishaka vs. State of Rajasthan** also, the SC emphasised on the need for specific laws to establish prevention and redressal mechanisms to combat sexual harassment at workplace, leading to the development of the POSH Act in India.

Bhanwari devi case of 1992 cited above, marked the beginning of reforms in sexual harassment laws in India. A woman working to stop child marriages was gangraped in Rajasthan, revealing the horrific reality of sexual harassment at workplaces in India. This case led to the passing of Vishaka guidelines by the SC in 1997, imposing obligations on the employer for prevention, prohibition and redressal of sexual harassment at workplace. The menace of sexual harassment however continued to persist, therefore after 15 years, the POSH Act was passed to give effect to the Vishakha guidelines. The POSH Act thus became a pivotal piece of legislation which aims to create a safe working environment for women, providing a clear framework for prevention, prohibition and redressal of sexual harassment at workplace.

Sexual harassment provisions under the BNS

The new criminal laws, namely the Bharatiya Nyaya Sanhita, 2023 (earlier referred to as the IPC) and the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 (earlier called the Criminal Procedure Code, 1973), have introduced certain provisions pertinent from the perspective of addressing sexual harassment at workplace:

1. Section 75 of the BNS deals with sexual harassment and the punishment for it (one year, or fine, or both), whereas Section 514 of BNSS provides for a limitation period of three (3) years from the date of the incident.
2. Section 69 of BNS has introduced a provision addressing sexual harassment under the guise of promise of employment, promotion and marriage which traditionally fell under cheating and fraud in earlier laws. It targets cases of sexual intercourse obtained through false promises, i.e. without any intention of fulfilling the same,

The section 69 provisions however do not address sexual harassment at workplace effectively as it focuses solely on deceitful means employed for sexual intercourse. It doesn't address the sexual harassment faced by women in vulnerable positions, like coercion or other forms of harassment faced by women commonly in modern day workplaces.

Role of the POSH Act in Preventing Workplace Harassment

The Indian Constitution guarantees equal opportunity to all citizens in matters of public employment while Article 15 prohibits discrimination based on religion, race, caste, sex, or place of birth. The Committee findings have highlighted a pressing issue of absence of safety of women working professionals, evidencing considerable disregard for equal opportunity and prevailing practice of gender discrimination at workplace. In the wake of these findings, there is an urgent need to reassess and strengthen the POSH Act, which was enacted to safeguard employees from sexual misconduct at workplaces.

The POSH Act casts duties on employer to prevent, prohibit and redress sexual harassment at workplace, where the first condition under section 19 is to provide a safe working environment at the workplace including safety from the persons coming into contact at the workplace. Thus, the primary duty of the employer is to ensure safety of all women workers and safety from persons coming in contact at workplaces. However, the Committee report revealed that the Malayalam Industry including the AMMA, is under the control of a powerful lobby of male producers, directors, and actors. Further, there was absence of formation of Internal Committee (“IC”) in AMMA, banning of WCC members and others who voice issues. It also revealed that women who experience sexual harassment or assault frequently choose not to speak up for fear of being branded as “troublemakers” or being shunned from getting work. Several shocking instances of sexual misdemeanour and sexual harassment were narrated by witnesses, that the committee concluded were a result of ingrained patriarchal notions and a significant lack of commitment by employer to ensure the safety of women workers and protection from individuals coming in contact at workplace.

This duty is exacerbated further where a government instrumentality is the employer, such as in the tragic rape and murder case of a woman medic on August 9, 2024, while she was on a 36-hour work shift at the R.G. Kar Medical Hospital Kolkata (“**Kolkata Medic Case**”). The brutal attack in hospital premises affirmed the lack of safe environment at workplace, as the preliminary investigations revealed complete absence of CCTVs, security personnel, and control or monitoring over the unauthorized or intoxicated individuals on the premises, revealing complete lack of employer accountability.

These incidents have highlighted that ensuring safety of women at workplace becomes even more crucial where the nature of work requires a women employee to step out of home at odd hours such as in information technology sector, BPO/ hospitality/ travel industry, media or medical field. The challenge posed by this condition is however that it is a wide provision which needs an analysis and implementation on a case-to-case basis by each employer to ensure safety of women workers. Additionally, the absence of penalties or punishment for employers who fail to implement basic safety measures under the POSH Act poses a significant challenge to preventing sexual harassment in the workplace.

The POSH Act defines sexual harassment, mandates preventive measures, establishes a framework for addressing complaints, provides timeline of 90 days for making and addressing the complaint each, submission of annual report, while supporting victims of harassment. However, timely and sensitive redressal of sexual harassment in the workplace is crucial. Neglecting such issues escalate into deeper societal insecurities, contributing to severe outcomes like sexual violence, including rape and murder. Workplace often become breeding grounds for unchecked harassment and has had origins of sexual violence, leading to significant personal and societal harm, as witnessed in case of Aruna Shanbaug (1973) rape and assault of a nurse by janitor at a hospital, which left the victim in a vegetative state for 41 years. Prompt and effective action such as facilitating swift complaint and resolution process at workplace are essential to prevent these tragic consequences and ensure a safe work environment for all.

Directions issued by the Courts in recent cases

On September 10, 2024, the Kerala High Court slammed the Kerala government for its inaction regarding the Hema Committee report on the issues faced by women in the Malayalam film Industry while hearing various related petitions. The division bench of the high court thus ordered the government to transfer the entire report to the SIT established under the order dated August 25, 2024 to enable it make further investigations into the complaints. It also ordered the government to submit a report detailing the actions that can be undertaken

based on its findings, tasking the government to take accountability and perform its part in curbing sexual harassment in the Malayalam Industry.

On August 18, 2024, as an act of judicial activism, the SC took Suo moto cognizance of the **Kolkata Medic Case**, on account of the prevailing systemic problems affecting safety of health care professionals, especially women medical professionals. Chief Justice D.Y. Chandrachud underscored the deeply entrenched patriarchal biases in society that contribute to such incidents and recognised denial of equal opportunities for women professionals due to unsafe work environments, thereby issuing guidelines to enhance their safety. These included stricter security measures, mandatory training and certifications, improved transport and infrastructure, and prevention of intoxicated individuals on premises. A National Task Force of medical professionals was constituted to develop an action plan and further recommendations, marking a significant step in the nation's ongoing struggle against sexual harassment.

In May 2023, in case of **Aureliano Fernandes vs. State of Goa and Others** also, the Supreme Court of India noted that, despite the POSH Act being in place for over a decade, its implementation and enforcement remains inadequate. The Apex Court highlighted that key issues include lack of procedural awareness, insufficient confidence in the process and its outcomes, weak adherence to enforcement protocols. The SC issued clear guidelines to improve functioning of ICs to ensure its effective implementation.

Recommendations

The recent events are evidence of the ineffective implementation of the POSH Act in workplaces across India. Based a comparative study of POSH Act with similar enactments in different countries, for effective implementation of the POSH Act, international best practices must be adopted. Apart from measures such as installation of CCTVs, regulating office timings, monitoring cab facilities, vetting security and other professionals, enlisting employees, etc. few additional practices that can be implemented are:

1. Employer specific safety measures required for workers be carried out and implementation of such institution specific measures and other provisions as per POSH Act and various guidelines be undertaken by each employer.
2. The IC should ideally have trained women members with expertise in the POSH Act and its rules. An odd number of members is necessary for majority decision-making. Selection of members should be based on accessibility, approachability, commitment, sensitivity to gender issues, and technical competence. It must operate autonomously, with dedicated space for meetings and record-keeping along with regular discussions and mandatory trainings to maintain effectiveness.
3. Sexual harassment at workplace should be timely addressed else it may take the form of sexual violence against women which in turn may lead to rape, murders and heinous crimes beyond these classifications.
4. To ensure mandatory compliance with POSH Act, a provision for mandatory quarterly and annual POSH implementation audit at every workplace be introduced; conducted by POSH certified professionals it must include interviewing staff members to record concerns and impose strict penalties for non-compliance.
5. External counselling/additional training for employees at workplace to assure them the process is not intimidating, to ensure they understand why it is necessary, and that it is the organisation's priority.

Ever since the report has exposed the dark underbelly of the film industry in Kerala, there has been a growing call from actors and actresses in other regional cinema industries for similar comprehensive reforms. With the rise of social media platforms and the changing social dynamics, the intensity and frequency of sexual harassment has increased manifolds. These social changes also call for an urgent need of in-depth awareness and heightened gender sensitization in the society, specially at all kinds of workplaces. Even though the POSH Act has been in existence since more than decade, its inappropriate implementation has dampened its effectiveness. The recent incidents have revealed gaps in the implementation of the POSH Act, indicating a need to acknowledge its role in creating a safe working environment, revealing that while comprehensive legal frameworks exist, their effective enforcement in letter and spirit is essential to prevent sexual harassment and uphold safety and dignity of all workers.