

POSH

Prevention Of Sexual Harrasment

Live

A quarterly insight to the POSH Law!

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POSH LIVE brings to you updates and information relating to matters of sexual harassment irrespective of the gender and age. This is an effort to create awareness about laws relating to sexual harassment and any form of discrimination.

Cross Examination – Making Sense to the Inquiry Process under POSH Law!

Many of us relate to the cross examination that we often see in movies where it's more of a sensation and we wonder how does it actually play in courts or in any inquiry for that matter! In Judicial process, Cross Examination means interrogating a witness who has testified during a trial. The objective of cross examination is to elicit the truth, to challenge or check the credibility of the statement testified by the witness. Cross Examination gives an opportunity to the opposing party to point out weaknesses or gaps in the witness's statement. It is a process essential to ensure that principles of natural justice are adhered.

The adherence to the principles of natural justice is mandatory under an inquiry as per Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and Rules, 2013. In this article, we will look at different ways in which cross examination can be conducted under POSH law and opinions of different Courts on it.

Meaning of Cross Examination – Cross Examination is a process in which a party questions the opposing party and its witness to elicit truth and check the credibility of the statement.

Cross Examination in an inquiry under POSH law is conducted in order to -

1. To elicit truth
2. To know more about the incidence stated in the complaint
3. To find inconsistencies/gaps
4. To identify facts as stated by the parties
5. To test the credibility of the parties involved
6. To find relevance and validate evidences
7. To find biases
8. To uphold legal right and fairness

.... Continued on page 2

IN THIS ISSUE

Articles –

1. Cross Examination – Making Sense to the Inquiry Process under POSH Law
2. POSH Law Amendments – An Update
3. Bharatiya Nyaya Sanhita, 2023 – Quick Glance on sections related to sexual harassment

News Corner –

Denying Cross Examination of Witness Violates Principles of Natural Justice – Orissa high Court

Single instance of sexual harassment that is grave can be considered as continuing offence – Madras High Court

Good to know –

Working Women's Hostel Scheme by Government

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GOOD TO KNOW!

Working Women's Hostel Scheme by Government

The objective of the scheme is to promote availability of safe and conveniently located accommodation for working women, with day care facility for their children, wherever possible, in urban, semi urban, or even rural areas where employment opportunity for women exist.

Working Women are entitled to hostel facilities provided their gross income does not exceed Rs. 50,000/- consolidated (gross) per month in metropolitan cities, or Rs 35,000/- consolidated (gross) per month, in any other place.

This scheme is to promote availability of safe and conveniently located accommodation for working women who need to live away from their families due to professional commitments.

The principles of natural justice are an essential component to the inquiry of sexual harassment complaint. Giving the involved parties an equal opportunity to put their say forward and also cross question the opposing parties and their witnesses becomes inevitable in the process. Although POSH Law does not directly mention Cross Examination in the process, the Courts have time and again emphasized on its need and importance through various Judgements.

In **Prof. Bidyug Chakraborty Vs. Delhi University**, the Delhi High Court stated that, *"The inquiry conducted without giving an opportunity to the delinquent to cross examine the witnesses and without giving him an opportunity to produce witnesses in his defence, would not confirm to the basic principles of natural justice"*.

The Supreme Court in Kuldeep Singh Vs. The Commissioner of Police & Others, enlightens on the process of cross examination by stating, *"The Reasonable opportunity contemplated by Article 311(2) means "Hearing" in accordance with the principles of natural justice under which one of the basic requirements is that all the witnesses in the departmental enquiry shall be examined in the presence of the delinquent who shall be given an opportunity to cross-examine them. Where a statement previously made by a witness, either during the course of preliminary enquiry or investigation, is proposed to be brought on record in the departmental proceedings, the law as laid down by this Court is that a copy of that statement should first be supplied to the delinquent, who should thereafter be given an opportunity to cross-examine that witness."*

Considering that the complaints received and inquired under POSH Law are of sexual harassment and the process of cross examination may become intimidating to the complainant and witnesses, the Courts have come up with the practice of conducting Cross Examination through Questionnaire which otherwise was supposed to be conducted in the physical presence of parties.

The Delhi High Court in Dr. Pushkar Saxena Vs. Govt. of NCT of Delhi and Others; has mentioned , *"Though, ordinarily, cross-examination of witnesses needs to be conducted in the presence of the delinquent, we are of the view that in the case of an inquiry into allegations of sexual harassment, such cross-examination need not necessarily be in the presence of the delinquent, since sometimes the very presence of the delinquent may result in putting pressure upon the witnesses, particularly, if they are children and may discourage them from coming out with the truth. Moreover, cross- examination in the presence of the delinquent, would invariably result in disclosing the identity of the victim and/or witnesses, even where it is not necessary to disclose their identity. The necessity of withholding the identity of the victim and/or witnesses of sexual harassment was acknowledged by Supreme Court in Bidyug Chakraborty (supra), when it directed cross-examination of the witnesses, by way of interrogatories through a Local Commissioner."*

It further directed to conduct the cross examination by stating, *"The petitioner would be entitled to cross examine the witnesses who were earlier examined by the Inquiry Officer, through a female defence Assistant of his choice. He would, however, not be present at the time of their cross-examination. If the petitioner does not avail the services of a female Defence Assistant, he will submit a questionnaire, giving the questions he wants the witnesses to answer, and the answers to the questions will be obtained by the Inquiry Committee."*

The Judgment of the **Kerala High Court reported at (2016) 2 KLJ 434, L.S. Sibv v. Air India Ltd.** discussed the need to conduct cross examination in various ways not limiting to verbal cross examination.

The Court mentioned in the Judgement, *"In sexual harassment complaint, sometimes the complainant may not have courage to depose all that has happened to her at the work place. There may be an atmosphere restraining free expression of victim's grievance before the Committee. The privacy and secrecy of such victims' also required to be protected. It is to be noted that verbal cross examination is not the sole criteria to controvert or contradict any statement given by the aggrieved before any authority."*

During the hearing of **Ashok Kumar Singh Vs. University of Delhi and Others**, **The Delhi Court** recognizes that it is **the responsibility of the Internal Committee to decide the manner in which the cross examination has to be conducted**. The Court says, *"Primarily, in a sexual harassment complaint, the committee has to verify and analyse the capability of the aggrieved to depose before them fearlessly without any intimidation. If the Committee is of the view that the aggrieved is a feeble and cannot withstand any cross examination, the Committee can adopt such other measures to ensure that the witnesses statement is contradicted or corrected by the delinquent in other manner."*

Thus, it can be said that the degree of fair opportunity to cross examine is also dependent upon the context of atmosphere of free expression of grievance. If the witness of complainant can freely express without any fear, IC can decide to have verbal cross examination. If the complainant is not in a position to express freely, the Committee can adopt any other ways like Questionnaire or having a female Defence Assistant to assist in Cross Examination.

This Judgement also provides guidelines in the manner in which the Cross Examination should be conducted of witnesses by the Internal Committee, few of those are given below - viz., –

1. Questionnaire to cross examine be submitted to IC at the time when the witnesses are produced for their cross examination
2. The witnesses would be called one by one by the IC to answer the questionnaire which is put to them. Witnesses would answer questionnaire in the presence of the Committee. Every effort shall be made by the IC to complete the testimony of a single witness the very day on which the recording of the witness cross-examination commences.
3. So far as witnesses who are common to several complaints are concerned, such common witness shall be cross-examined in one go when the witness appears before the ICC, in respect of all the complaints in which he/she is a witness.
4. The respondent and the complainant would not be present at the time when the cross-examination of the witnesses of the complainant is being recorded.
5. The IC shall ensure that the witnesses who are being cross-examined, does not confabulate with the witnesses who are yet to be cross-examined.
6. The IC shall make every effort to supply a copy of the cross-examination of the complainants' witnesses to the respondent on the date of cross-examination at the earliest, in any case before cross-examination of the next witness.

The Internal Committee should also consider that application of principles of natural justice and conducting cross examination will largely depend upon the facts and circumstances of each case and so the applicability will change. In **Hira Nath Mishra and Ors. Vs. The Principal, Rajendra Medical College, Ranchi and Anr., The Supreme Court** held that *"the principles of natural justice are not inflexible and may differ in different circumstances. The Court was of the view that the principles of natural justice did not require that the statements of girl students should be recorded in the presence of male students against whom the enquiry was held in that case. The principles of natural justice will, therefore, depend upon the facts and circumstances of each case. "*

Considering these different viewpoints discussed by Courts, it can be said that "Cross Examination" during an inquiry is inevitable to make sense to the inquiry and that it can be conducted in different ways such as through a Questionnaire where the discretion depends upon the facts and circumstances of each case which will be decided by the Internal Committee.

Cases Referred –

1. Prof. Bidyug Chakraborty Vs. Delhi University, the Delhi High Court W.P.(C) No.8226/2007
2. Kuldeep Singh Vs. The Commissioner of Police & Others; Supreme Court 17th December, 1998
3. Dr. Pushkar Saxena Vs. Govt. of NCT of Delhi and Others, the Delhi High Court, W.P.(C) 7592/2001
4. L.S. Sibbu v. Air India Ltd, High Court of Kerala, WP (C) No. 4001 of 2016 (A)
5. Ashok Kumar Singh Vs. University of Delhi and Others, Delhi High Court LPA 305

POSH Law Amendments – An Update!

The Rajya Sabha In February 2024 has proposed an Amendment Bill, 2024 to amend Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The following amendments have been stated in the Bill –

A) Timeline to file a complaint –

Section 9, Sub Section (1) – Any aggrieved woman may make, in writing, a complaint of sexual harassment at workplace to the Internal Committee if so constituted, or Local Committee, in case it is not so constituted, **within period of three months** from the date of incident or in case of series of incidents, within a period of three months from the last incident

The Amendment Bill proposes to **extend the timeline to submit the complaint of sexual harassment at workplace from 3 months to one year from last date of incidents.**

Further it suggests to omit the extension period as mentioned as three months in Section 9 (sub section 1) part b which states that “where the Internal Committee or Local Committee as the case may be may for the reasons recorded in writing extend the time limit not exceeding three months, if it is satisfied that the circumstances were such which prevented the woman from filing a complaint within the said period.”

B) Conciliation –

Section 10 (1) – The Internal Committee or Local Committee, as the case may be, may before initiating an inquiry under section 11, and at the request of aggrieved woman take steps to settle the matter between her and the respondent through **conciliation**. The section 10 and Sub sections 10(1,2,3,4) are about the Conciliation process under the law, which specify to record the settlement so arrived, provide copies of the settlement to both aggrieved woman and respondent, and that if conciliation is done, there shall be no inquiry conducted by Internal Committee or Local Committee as the case may be.

The Amendment Bill states to omit the Sections of Conciliation from the POSH Act, 2013

Bharatiya Nyaya Sanhita, 2023 – A quick Glance at Sections covering Sexual Harassment

The Bharatiya Nyaya Sanhita, 2023 has replaced the Indian Penal Code, 1860 w.e.f 1st July 2024. We bring to you a quick glance at the provisions relating to sexual harassment in Bharatiya Nyaya Sanhita, 2023

1. Sexual Harassment

Section 75. (1) A man committing any of the following acts: —

- (i) physical contact and advances involving unwelcome and explicit sexual overtures; or
- (ii) a demand or request for sexual favours; or
- (iii) showing pornography against the will of a woman; or
- (iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

Old Section 354A

2. Voyeurism

Section 77. Whoever watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Old Section 354C

.... Continued on page 5

3. Stalking

Section 78. (1) Any man who—

- (i) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or
- (ii) monitors the use by a woman of the internet, e-mail or any other form of electronic communication, commits the offence of stalking

Old Section 354D

4. Word, gesture or act intended to insult modesty of a woman.

Section 79. Whoever, intending to insult the modesty of any woman, utters any words, makes any sound or gesture, or exhibits any object in any form, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years, and also with fine.

Old Section 509

To be continued in the next issue of POSH Live...!

NEWS CORNER

'Denying Cross Examination of Witness Violates Principles of Natural Justice' – Orissa High Court

In Debraj Sahoo & Anr Vs. Union of India, The Orissa High Court has ruled that denying the opportunity to cross examine witnesses before issuing orders that entail civil consequences violates the principles of natural justice. It observed that, "Justice must not only be done but must also be seen to be done. It is trite that requirement of giving reasonable opportunity of being heard before an order is made by an administrative, quasi-judicial or judicial authority, particularly when such an order entails adverse civil consequences."

Single Instance of Sexual Harassment at workplace that is grave; can be considered "continuing offence", not barred by limitation; says Madras High Court

The Madras High Court held that even an isolated offence of sexual harassment at workplace must be considered as a 'continuing offence' if it is grave in nature and is causing constant trauma and fear in the victim's mind. Therefore, such an offence should not be barred by the 6 month period of limitation mandated by Section 9 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

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Advocate Vaishali Bhagwat, is amongst the first technology lawyers in the country with prior qualification and working experience in the field of Computer Science, Cyber Defense and Information Assurance.

Her work also focuses on women and children's rights and has worked extensively on cases relating to violence against women and children including sexual violence. Vaishali is an external member on various ICC committees and has conducted several complex inquiries relating to sexual harassment at workplace. POSH awareness and capacity building workshops conducted by her are rich in content as she discusses various cases and draws on her experience dealing with inquiries and POSH related court litigation including criminal cases.

Vaishali has advised several organizations across varied sectors on POSH compliance, safety in virtual workplaces, cyber safety and is also regularly invited as an expert speaker/ panelist on this subject by various organizations providing POSH services

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