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In case any reader seeks any further information or assistance, he/she must seek independent legal advice.

# POSH

Prevention Of Sexual Harrasment *Live*

*A quarterly insight to the POSH Law!*

By Vaishali Bhagwat, Adv

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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.

## Guidelines to virtual workplaces!

Working from home is the new normal! Most of the companies have shifted to work from home policies for a prolonged period of time. With this, arises the necessity for companies to develop work from home guidelines. With increased virtual conversations there is a considerable rise in virtual sexual harassment cases. From suggesting what one should wear during meetings to scheduling virtual meetings at odd hours, sending obscene images/pictures, sharing inappropriate emoji's/gif's, displaying inappropriate pictures behind, attending meetings while lying on the bed or elsewhere, asking personal questions, attending meetings with improper or no clothing, so on and so forth.

We generally fail to understand how much casual is too casual and fail to draw lines between personal and professional talks while working on virtual platforms. This is also a result of absence of etiquettes while working online. Hence, it becomes imperative for organisations to issue guidelines helping people understand the behavioural ethics while working online.

These guidelines can be –

1. Schedule meetings preferably during office hours. For meetings at odd hours due to reasons like onsite clients etc., seek consent for the same.
2. Avoid calling at odd hours for matters that can wait for the next day
3. Choose a proper place for virtual meetings, preferably with decent background
4. Keep yourself on mute and switch off your video when not communicating
5. Be seated in an upright position and avoid lying on the bed or elsewhere. Avoid doing any other work during virtual meetings
6. Record or take screenshot only with the permission of the concerned person
7. Be mindful while sending emoji's/gifs in chat
8. Avoid personal questions

## GOOD TO KNOW!

### ANNUAL RETURNS FORMAT

To,  
District Officer / The Deputy  
Commissioner

We submit herewith the annual report  
for the year ending December 31, 2021.

1. Number of Sexual Harassment complaints received during the year ending December 31, \_\_\_\_\_
2. Number of Cases disposed of during the year ending December 31, \_\_\_\_\_.
3. Number of cases pending as on December 31, \_\_\_\_\_ for more than 90 days.
4. Number of workshops or awareness programme against sexual harassment carried out during the year ending December 31, \_\_\_\_\_
5. Nature of action taken by the employer during the year ending December 31, \_\_\_\_\_
6. Whether the company has framed the policy under Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act and displayed the same \_\_\_\_\_
7. Whether the company has constituted the Internal Complaints Committee as required under section 4 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act and displayed the same.

For \_\_\_\_\_  
Chairperson – Internal Committee

Address for Pune District to send  
Annual Returns –

Pune District Officer  
Women and Child Development Office  
Gulmarg Park Hsg Society  
3<sup>rd</sup> Floor, Near Vijay Bakery, Somwar  
Peth, Pune – 411011

Labour Commissioner Office  
GV 29, Vrindavan Society, Guru Nanak  
Nagar, Pune 411037

For DO addresses at any other city,  
please get in touch with us one on one.

9. Be respectful towards people from various backgrounds attending the virtual conversations
10. Understand the difference between a healthy compliment and an unhealthy comment. Be mindful while providing feedback
11. Observe correct body language while attending virtual meetings
12. Adjust the camera appropriately and be conscious of your actions while the camera is on.
13. Keep only relevant folders/files open while sharing screen

Along with these guidelines, companies should amend their existing POSH Policies with inclusion of virtual workplaces and should share it with all the employees to ensure all the employees are aware of it.

## NEWS CORNER – ‘Security of tenure’ Principle to apply to Presiding officers of Internal Committee under POSH: says Delhi HC

Staying the transfer of a Commandant at Central reserve Police Force, The Delhi High Court, observed that the principles which apply to security of tenure of Judges and Presiding officers of various quasi-judicial tribunals, also apply to Members/Presiding officer of Internal Committee constituted under Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act, 2013.

### Guidelines issued by Bombay High Court on POSH Cases

The Bombay High Court has issued guidelines on POSH Cases on 24<sup>th</sup> September, 2021. The guidelines deal with the format of orders in POSH cases, filing protocols, grant of access by the registry, conducting hearings, directions to certified copy department, public access and breach. The guidelines suggest that names of parties involved should not be mentioned in the order. The orders will not be made available for public or media representation. The order explicitly suggests several protocols protecting confidentiality at various stages of the case. It also suggests that breach of any of the aspects would result in contempt of court.

Please read our detailed analysis of this order in an article named as “Critical analysis of Bombay High Court Judgement! How confidential can the confidentiality be?”

## *Critical analysis of Bombay High Court Judgement!*

*How confidential can the confidentiality be?*

The recent judgement given by Bombay High Court on 24th September, 2021; narrating the protocols/guidelines on hearing case, case file management and confidentiality; under POSH Law, received mixed reviews from the people. While some lawyers find some part of this order in alignment with the objective of the law, some find it as a ‘gag order’. With an effort to present both the sides of the coin, we are writing an analysis of this order from different lenses so as to bring the good and the odd out.

## What does the order say?

To put the order briefly, it talks about aspects like anonymizing the way the orders are to be written, sets the filing protocols, guidelines to access details, guidelines to conduct hearings, public access and media disclosure. Let us look at these guidelines one by one:

- a) Anonymize the identities of the parties** – The order gives instructions to not to mention the names of other personal details of the parties involved including the witnesses. It can plainly be the case of A Vs B.
- b) Filing protocols** – It suggests that no personal information document should be retained by the registry
- c) Access** – No other person than the advocates concerned can have access to the orders or copies of the information, the orders cannot be digitized by any 3rd party without the permission of court
- d) Hearings** – All hearings in camera or in chamber, in physical attendance and in presence of advocates, litigants other than the court staff like Stenographer.
- e) Public Access** – Requires a court order to release the order in public domain
- f) Breach** – Failure to adherence to these orders will be contempt of court.
- g) Media Disclosure** – Both the parties, witnesses and advocates are forbidden from disclosing the contents of any order, judgement without specific leave of the court. Witnesses to sign the oath of NDA and confidentiality. Breach of such will be contempt of court.
- h) Recording** – Recording of any part of proceedings is strictly forbidden
- i) Industrial/Labour court to follow these guidelines**

While we have read what does the order lay, it is important to understand the law and its take on various aspects covered thereunder.

### A. Confidentiality

#### **Section 16 of the 2013 Act states that –**

**Prohibition of publication or making known contents of complaint and inquiry proceedings** — Notwithstanding anything contained in the Right to Information Act, 2005 (22 of 2005), the contents of the complaint made under section 9, the identity and addresses of the aggrieved woman, respondent and witnesses, any information relating to conciliation and inquiry proceedings, recommendations of the Internal Committee or the Local Committee, as the case may be, and the action taken by the employer or the District Officer under the provisions of this Act shall not be published, communicated or made known to the public, press and media in any manner: Provided that information may be disseminated regarding the justice secured to any victim of sexual harassment under this Act without disclosing the name, address, identity or any other particulars calculated to lead to the identification of the aggrieved woman and witnesses.

#### **Section 17 further states that –**

**Penalty for publication or making known contents of complaint and inquiry proceedings** — Where any person entrusted with the duty to handle or deal with the complaint, inquiry or any recommendations or action to be taken under the provisions of this Act, contravenes the provisions of section 16, he shall be liable for penalty in accordance with the provisions of the service rules applicable to the said person or where no such service rules exist, in such manner as may be prescribed.

The Handbook of the POSH Act by the ministry also suggests the IC to create a confidential file of each case received. It is stated therein –

The Act prohibits the disclosure of -

- Contents of the complaint;
- Identity and address of complainant, respondent and witnesses; Information pertaining to conciliatory/inquiry proceedings or recommendations of the ICC/LCC;
- Action taken by the employer/DO.

Any person entrusted with the duty to handle or deal with the complaint, inquiry or any recommendations or action taken under the provisions of this Act is accountable to ensure confidentiality.

The exemption mentioned in the Handbook of the POSH Act, which is a reiteration of section 16 of the Act is as below – Dissemination of information regarding the justice secured without disclosure of name, address, identity and particulars of complainant or witnesses is exempted from the clause of confidentiality.

While the guidelines are in favour of maintaining utmost confidentiality which includes anonymizing the names of parties involved appears acceptable on confidentiality grounds. However, denying access to orders by the public or by media appears to be as a stringent clause.

Protecting the anonymity of the parties involved and anonymizing the wrong act are two different aspects and the later has severe impact on social understanding of justice.

#### **B. “Not only must Justice be done, it must also be seen to be done”**

Orders given by higher courts are precedents of law. These are looked up for interpretations and future references. Not making the orders available for public will not only revoke the future perusal of them but also the public trust/faith in the judiciary. We must not forget the saying of Lord Hewart, **“Not only must Justice be done, it must also be seen to be done”**. It also takes away the right to file public interest litigations as people will not be aware of the judgements and cases otherwise.

If the orders are given by ensuring confidentiality of the parties involved, this order in particular fails to explain why such orders should not be made public and be kept away from media reporting.

#### **C. Hearings**

While the order states that Confidentiality and NDA Agreements should be signed by witnesses involved so that the information is secured, it does not talk about getting such documents signed from the court staff who will be present during the hearings such as the stenographers or court attendants.

#### **D. Media Disclosure**

The guidelines state that in order to publish any details of the case under POSH Act, media should seek the permission of Courts. Having said so, any disclosure of case details by the parties involved will be considered as contempt of court.

This coin has two sides, as it at one side ensures complete confidentiality of the details of parties involved thus giving the parties a sigh of relief from the public scrutiny, considering the current state of social media. However, on the other side there are chances that the wrong act is never known to the society if not by the journalist media.

The need of the society to keep abreast with the kinds of sexual harassment and how the same was dealt with by the judiciary cannot be brushed under the carpet in the name of confidentiality. It also comes as a violation of right to freedom of speech and expression from journalism point of view and is only at the discretion of Court.

#### **E. Extra burden on the Courts**

While we all are aware about the pending cases in courts, seeking court's permission to access orders and to media disclosure is stretching the procedure a little far and increasing the burden of work on the judiciary.

#### **F. Prohibitive, not Preventive**

The order appears to be prohibitive rather than preventive. It puts ban on some important aspects like making the orders under POSH available for public which eliminates the possible preventive measures that arise through various orders and interpretations of the law. For example, there have been orders in past which did throw more light on how should the IC function and also talked about definitions of workplace extensively. Such orders help organisations to take preventive steps proactively. In absence of such time to time explanations, will create a void so as to understand the law better.

It becomes imperative to reiterate that the legislation (POSH ACT 2013) under which the order is passed was once sowed with the seeds of public interest litigation by Vishakha Forum. Had the judgement of Bhanwari Devi not known to the public, the very law would not have come into existence. This right to voice against the judgements or orders is suppressed with the current order, even if it has no intention to do so. We hope that there would be relevant changes done in the guidelines moving ahead to strike the right balance!

## ABOUT THE AUTHORS



### **Adv Vaishali Bhagwat**

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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