

For Endorsement :STATEMENT AGAINST THE ORDER OF THE BOMBAY HIGH COURT FRAMING GUIDELINES FOR PROCEEDINGS UNDER THE POSH ACT

In a recent Order dated 24th September 2021 in P. v. A and Ors., the Hon'ble Bombay High Court has effectively expanded the 'circle of silence' on sexual harassment of women, prevalent in society, to itself. In its effort to protect the interest of "both sides" the Court has made its orders and judgements in cases of sexual harassment at workplace literally inaccessible to the public.

The Hon'ble Court has observed that proceedings under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("the POSH Act") raise important issues of confidentiality of the identities of the parties to the proceedings. Noting that no established guidelines are in force to ensure that the identities of the parties to these proceedings are protected, the Court has gone on to give detailed guidelines, making them applicable to all future orders, hearings, and case files under the POSH Act.

1. Confidentiality of the accused and employer:

In this order the Court operates on the assumption that, all parties in cases of sexual harassment are equal. The Court has failed to consider that often it is the lone voice of one aggrieved woman, pitted against large corporates and their powerful male seniors and/or bosses. The Court disregards the history and reality of women being silenced in such situations by large corporates, either by terminating their services or adversely affecting their future employment. Since the time of Vishakha Guidelines and even after the POSH Act comes into existence instances of women being victimised for complaints of sexual harassment at workplace are multitude.

The evolution of law in India has included the protection of anonymity of the survivor/victim of sexual violence, as publicizing their identity exposed survivors to further violence, stigma, shame and victimization. Protection of victim's identity is based on and has been argued internationally, including by the United Nations Human Rights commission as essential aspect of protection required for survivors/victims. It is also meant to provide space to survivors to recover from the trauma of the assault. Survivors of sexual violence require tremendous courage to come forward and report the violence, and their privacy remains intimately linked to their survival. The POSH Act took this under consideration and included section 16 providing confidentiality to the survivor.

The Court is apparently extending this protection to the accused as well! It is strange that the Court does this at a time when powerful men accused of sexual harassment continue to attempt to suppress women's voices on social media and in news media with gag orders. This has also in recent times happened within the judiciary. The order of the Court will invariably strengthen the hands of large corporates and their powerful men to protect dominant perpetrators of sexual harassment from scrutiny and legitimate public comment.



Moreover, in a time when names of writers, poets, students and, activists' names as accused are being published all over the press as "terrorist or anti nationals" even before proper investigation and trial, this overzealous order which may end up protecting a few men in suits is rather unfortunate. This also begs the question, what is so specific about the POSH Act and those accused under it, that the accused require the court to carve out this veil of anonymity which is not accorded to any other accused under any other laws.

The ripples of this order may not be confined only to cases under POSH Act. Taking a cue from this it is imminently possible that courts start issuing gag orders in matters of sexual harassment or other sexual offences which may have no connection with this Act.

2. Gagging the survivor:

Further, today under section 228A of the Indian Penal Code, a survivor of sexual assault has the choice to let her identity be known in public domain, but this order in fact denies survivors even that right and takes away her agency. By placing a blanket prohibition on the disclosure of the identities of the parties involved, the order robs survivors of sexual harassment of her agency. It forces her to hide her identity and the identity of the person who harassed her without taking into account her choice and her freedom of speech. Going a step further, beyond just the veiling of identities, it keeps her or the media from discussing any part of the proceedings – effectively concealing it from any public scrutiny whatsoever.

Over the years we have seen women find the courage to report earlier experiences of violence drawing strength from those who have already spoken out. Preventing a woman from speaking of the violence she underwent, also gags those others who would have gathered courage to voice what they underwent and stand in solidarity and support of survivor in her struggle for justice.

3. Making access to justice prohibitive:

The guidelines mandate all hearings to be held either in chambers or in-camera and require the physical attendance of parties to the proceedings, with no online or hybrid facility for hearings. This will only make the proceeding onerous, especially on women who do not live within the jurisdiction of a particular court. Furthermore, as case records / orders / judgments of the case are not to be uploaded the record of the proceedings / orders passed will be inaccessible to the parties, requiring frequent travel on his / her part.

In rape cases too, Section 372(2) CrPC which allows for in camera proceedings is not absolute and on a number of occasions survivors have been allowed to have support persons in court. The law allows for the presiding judge, if they think fit, or on an application made by either of the parties, to allow any particular person to have access to, or remain in the room. In contrast these guidelines make no accommodation for the right of the survivor to ask for a person to be present to provide her support and comfort as in cases of sexual harassment/assault.

Finally, the prohibition on the disclosure of the identities of the parties – intentionally or accidentally - is made absolute, resulting in the person making such disclosure being pronounced guilty of contempt of court, a consequence which is disproportionate to the aim of ensuring the confidentiality of proceedings.

4. Prohibiting publishing orders, judgements, discussions:

While the purpose of these guidelines is said to be to maintain the confidentiality of the proceedings and to prevent and prohibit the disclosure of the identities of the parties to the proceedings, we believe that in effect, the guidelines impose a blanket ban on the publication of orders and judgments, overcomplicate the procedure of hearings, prescribe excessive punishments and restrain access to justice. The order also impedes public discussion and discourse on good or bad judgments and their critique. One may never know what comes to pass, or even the development of the law on the subject.

The guidelines mandate the anonymization of all POSH Act case records and orders. Going a step further, it also prohibits the publication in any form of the orders / judgements on merit. This means that orders / judgements in matters under the POSH Act will neither be uploaded online, nor pronounced in open court, without a specific order to that effect from the Court. Furthermore, the disclosure of the contents of the orders to the media or their publication in any mode is strictly forbidden and would amount to contempt of court.

This amounts to absolute prohibition and is excessive and in fact, contrary to the interest of the parties. Orders and judgments of courts form part of public record, clarifying positions of law and the basis for a precedent led judicial system. Restricting public access is not only unnecessary but erroneous.

Even in the past when guidelines have been issued by the Hon'ble Courts, such as in the Vishakha case or in Delhi Domestic Workers Case, the same have been in public interest litigations, not in private suits and these guidelines have been drawn upon international human rights law instrument, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Transparency and accountability are the bedrock of a just and fair system. This order only increases the already existing opacity of a judicial system that seems to be stacked against survivors of sexual violence. Justice must not only be done but must also be seen to be done.

We are of the strong opinion that these guidelines are excessive, hinder public access to judgements, create opacity around judiciary and overburden the proceedings under the POSH Act, and are thus, counterproductive to the objective of ensuring minimum delays and a speedy access to justice devised by the POSH Act. The Order will not only silence women but will also have a chilling effect on the media and society at large in speaking up against perpetrators of sexual violence and harassment.

We, therefore, urge the Hon'ble Court that the guidelines be withdrawn.

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* Indicates required question

