

GOING BEYOND THE LITERAL INTERPRETATION: ANALYZING SECTION 7 UNDER THE POCSO ACT, 2012

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ABSTRACT

Every text is subjected to an intense process of interpretation which could answer why that particular text is being written. Likewise, legislations are also a kind of text which is subjected to interpretation. Some legislations are directed toward a particular section of society who are among the most vulnerable. Therefore, while interpreting such legislation a narrower interpretation can be detrimental for such sections. One such section is children whose needs and protection differ from adult counterparts hence, proper care and sentiment have to be invested. On the same note, the main focus of this article is to look at the complexities that arose out of the kind of interpretation of a particular word that is contrary to the intention of the authors of the POCSO Act, 2012. The recent judgment by one of the courts has ignited a controversy, where a stricter and narrower interpretation was relied upon while dealing with the term “skin to skin contact”. Challenging what has been into discourse till now, this paper tries to find out the possible loopholes that one could find through adopting a kind of interpretation that would not only focuses on what was the intention of the legislatures (author) but the accused as well, and, what a reasonable man would understand a particular word.

Keywords: Interpretation, Narrow Interpretation, Children, POCSO Act 2012.

INTRODUCTION

In 2021, the Supreme Court in Attorney General of India and Ors. Vs. Satish and Ors have rightly set aside the decision of a single judge bench in the Bombay High Court that dealt with the Protection of Children from Sexual Offenses (POCSO) Act, 2012. The ruling of the Apex Court has once again focused on the interest of one of the most vulnerable sections of society. The bone of contention arose out of the decision of the single judge bench of Bombay High Court which held that to establish the offense of sexual assault there must be direct physical contact. The Supreme Court while condemning the observation, stated that ‘the act of touching sexual parts of the body with sexual intent will not be trivialized and not excluded under Section

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7 of the POCSO Act. The court made this observation in response to the appeals filed by Attorney General KK Venugopal, the state of Maharashtra, and the National Commission for Women against the judgment delivered by Justice Pushpa Ganediwala. The High Court had held that groping a child's breast does not come under the purview of section 7 of the POCSO Act and would not amount to sexual assault, as there was an absence of 'skin to skin contact' or 'direct physical contact' per se. The Apex Court called this a 'narrow and absurd interpretation' of the act and the same cannot be understood in a manner that stifles the object and the purpose of the statute. In this article, we will broadly analyze the observations made by the Supreme Court, in light of the object of the act and its connection with international jurisprudence.

BACKGROUND

The landmark judgment came in response to a controversial ruling of the Bombay High Court in Satish S/O Bandu Ragde vs. the State of Maharashtra when the Court had modified the order of the Sessions Court which had held a 39-year-old man guilty of sexual assault. The accused had allegedly lured a 12-year-old girl by promising her a piece of guava, then he first groped her breast, and thereafter, he tried to strip off her clothes. The trial court had convicted the accused under various provisions of the Indian Penal Code ("IPC") and the POCSO Act. The question before the High Court was whether pressing a child's breast without pulling out the top would amount to 'sexual assault' under Section 7 of the Act. The single-judge bench concluded that 'stricter proof and serious allegations are required'. Also, there was a lack of any specific details about the act of the accused as to how he approached the girl, whether her top was stripped off or whether the accused first inserted his hands inside her cloth to grope her. Therefore, the court did not convict the accused and neither did punish him under section 8 of the POCSO Act, However, the acts of the accused were found to constitute the offense of outraging the modesty of a woman, and as a result, he was held punishable under Section 354 of IPC.

INTERPRETING SECTION 7 OF THE POCSO ACT

The central issue before the Apex Court regards the way in which the Bombay High Court interpreted Section 7 of the POCSO Act. Therefore, it is imperative to discuss the provision and interpret it in a broad fashion to understand the loopholes in the ruling of the High Court.

SEXUAL ASSAULT IS DEFINED IN GENERAL PARLANCE AND THE LAW

Sexual assault is unwanted touch, sexual contact, or any such behavior which is performed without the consent of the victim such as fondling, unwanted sexual demands, etc. It has been understood as an umbrella term that includes both sexual battery and rape. Here, sexual battery refers to unwanted or non-consensual touching of someone's intimate body parts either 'clothed or unclothed', however, not every unwanted touch against the consent of a person is a sexual crime, otherwise public transportation will not be possible. Therefore, it must be defined from the perspective of a reasonable person, and require that the act is qualified as having been committed with sexual intent.

SECTION 7 OF THE POCSO ACT

Section 7 of the POCSO Act states that "Whoever, with sexual intent, touches the penis, vagina, breast or anus of the child or makes the child touch the vagina, penis, breast or anus of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault". It's a settled maxim *absoluta sententia expository non indiget* i.e. when there is no ambiguity in the meaning of the statute, the same must be construed in a literal fashion. Similarly, in the State of U.P vs. Vijay Anand, the court held that the 'expressed intention' of the statute is more important while interpreting the law. Yet, when the very purpose of the legislation would fail on such a narrow interpretation, a wider understanding should be relied on, as was emphasized in S.S. Railway Company vs. Workers Union. The problem with the impugned judgment was that Justice Ganediwala failed to construe the meaning of 'physical contact' through a wider perspective. Neither did she emphasize the intention of the accused nor the very object of the statute. Therefore, there are three loopholes that could be found in the judgment delivered by the High Court;

1. it overlooked the purpose of the legislation,
2. it construed the meaning of physical contact very narrowly, and
3. it did not emphasize the sexual intention of the accused to establish sexual assault.

THE INTENTION AND OBJECT OF THE LEGISLATURES MUST NOT BE OVERLOOKED

Justice Trivedi opined that one should always strive to ascertain the intention of the legislation while interpreting a statute. The Apex Court has reckoned that to interpret Section 7 of the act accurately, the rule of purposive interpretation should be emphasized, which is upheld in various precedents. The Supreme Court while discussing the matter, quoted that in *Balram Kumawat vs. Union of India & Ors* and *J.P Bansal vs. State of Rajasthan & Anr*, the courts have observed that the intention behind POCSO Act was to obligate its states to protect, secure, and ensure the safety of all children from sexual abuse and all forms of exploitation of such kind, and also to punish the offenders to establish deterrence in the society. Therefore, it is the duty of any court to give effect to the purpose of the legislation. But, the same has been overlooked by the Hon'ble Bombay High Court. The legislature's intention was crystal clear through the wording of the provision and hence the courts should avoid introducing complexities to it. However, courts can freely depart from the dictionary meaning of any such words to comply with the object of the legislation. A black-letter reading of the law should not defeat the goal of the legislation and benefit the mischief it seeks to curb.

PHYSICAL CONTACT MUST NOT BE CONSTRUED ONLY IN ITS LITERAL FASHION

Following the controversial ruling by the Bombay High Court, the Apex Court delivered a concurring judgment overruling it. Calling the High Court's reasoning a 'fallacy', the bench ruled that limiting the meaning of physical contact to skin-to-skin contact would be a narrow and pedantic understanding of the statute and would defeat its very purpose. Further Justice Bhat states that the act was meant to include both direct and indirect touch. The result otherwise would imply that, without physical contact, there cannot be a sexual assault, since in that case touching sexual or non-sexual parts of a child's body with a condom, gloves, clothes or sheets would also not amount to sexual assault, even if done with sexual intent. Touching a body part does entail a tactile sensation so as to perceive it with the intention to appreciate or understand the object or things. Similarly, Justice Bhat stated that "the receptors on the surface of the human body are acutely sensitive to the subtleties of a whole range of tactile experience". For instance, when we eat food, we sometimes use a spoon which does not diminish the sense of touching the mouth or lips. Similarly, when a person touches someone's body part with an object or covered hands, the person would experience the same sensation as if it were touched

without the cloth or object. The court further cited a foreign Court's decision in the State of Iowa vs. Walter James Phipps and Regina vs. H, where the courts had held that if the accused had a purpose of committing an offense of sexual assault by contact or touching then it does not entail only skin to skin contact.

'MEN'S REA' IS ONE OF THE MOST ESSENTIAL INGREDIENTS TO ESTABLISH SEXUAL ASSAULT

Section 7 of POCSO has emphasized 'sexual intent' in qualifying an act of sexual assault, weeding out any ambiguity in the legislation. Recognizing this, the Apex Court said that the phrase sexual intent or any other act must not be read in a very restrictive fashion. If the act is done with sexual intent, then it comes within the meaning of sexual assault and is punishable under Section 8 of the POCSO Act. Paradoxically, the High Court appears to have overlooked sexual intent under POCSO but found the accused to have such intent to convict him under Section 354 of IPC. The fact that the accused had wrongfully confined the girl and had also attempted to disrobe her, shows clear indications of mala fide intent. This point was hence taken up by the Attorney General before the Apex Court, to emphasize the bad precedent that the High Court decision would establish.

THE PRINCIPLE OF PROPORTIONALITY VERSUS THE INTEREST OF A CHILD

Justice Ganediwala has sentenced the accused under section 354 of IPC after modifying the Sessions Court decision of sentencing him under section 8 of the POCSO Act. The High Court's judgment was so tendentious that several organizations including Attorney General and others moved to the top court. The problem is that the judgment was delivered on the proportionality principle. As the court said;

"The basic principle of criminal jurisprudence is that the punishment for an offense shall be proportionate to the seriousness of the crime".

The Court opined that touching the breast of a child is not grave enough to be called sexual assault, therefore, the accused could not be sentenced under section 8 of the POCSO Act. There is no doubt that the proportionality principle is a crucial component of criminal jurisprudence. However, the Bombay High Court ought to have considered the fact that the victim was a minor and is entitled to special protection under POCSO, as the aim of the act is to protect the interest of children from any sexual abuse. Likewise, the Model Guidelines issued by the Ministry of

Women and Child Development, under Section 39 suggest that almost all forms of sexual abuse on a child are a punishable offense. Therefore, refusing to consider such touch as sexual assault would render the POCSO Act a redundant law.

WHAT DOES INTERNATIONAL LAW SAY ABOUT SEXUAL ASSAULT AGAINST CHILDREN?

The UN Convention on the Rights of Child (UNCRC) is an international treaty that obligates its members to step toward the rights of children. Article 19/34 of UNCRC suggests that the states shall take all measures to protect the child from all forms of sexual abuse as well as physical and mental violence. POCSO is based on the principles laid down in this convention. Yet, disturbingly, the interpretation of the High Court is out of sync with the convention. The High Court should have acknowledged that the acts of the accused such as wrongful confinement, groping, and attempting to disrobe the child, is likely to affect her mental, as well as physical health as the consequences, could be severe such as depression, Post-Traumatic Stress, anxiety, and attachment issues. Further, the lack of emphasis on sexual intent in the judgment, as is seen very important in other treaties like The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, has resulted in the wrongful acquittal of the accused. The decision of the Apex Court has once again set a good precedent in the interest of the most vulnerable sections of society that need special protection and stringent punishment for the offenders. It was reckoned that one of the most important ingredients is mens-rea, as the provision of the act has also emphasized sexual intent under Section 7 of the POCSO Act. Also, a narrow interpretation of the statute would not only destroy the object of it but also the life of a child. Therefore the statutes are meant to be understood in a fashion that would serve the purpose for which it is enacted.