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THE BOMBAY HIGH COURT’S POCSO JUDGEMENT – A CRITIQUE

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“Abuse is never contained to a present moment; it lingers across a person’s lifetime and has pervasive long-term ramifications.”

Children are the building blocks of every society and they must be protected to protect the confidence and morale of the youth as the trauma of sexual abuse can leave a scar that lingers throughout the life of the victims. We should treat the children as if they are the equal holders of human rights and their protection should always be of paramount consideration. We must try the hardest that children live in a safe and a secure environment that they should cherish their childhood with innocence and they should not be a victim of paedophiles or child sexual abuse.

India is a country who gives utmost importance to the protection of a child from sexual violence. Provisions regarding the protection of child are envisaged under Juvenile Justice Act 2015, POCSO Act 2012, and Commissions for protection of Child Rights Act 2005. These legislations provide penalties, procedure and measures to review the laws according to the needs of the society and thereby meets the requirements under the UN Convention of the Rights of Child, the UN convention against torture and other cruel, inhumane and degrading treatment as well as Articles of the Constitution of India like article 15(3) and article 39(f). Our constitution of India also takes into consideration the values of international convention.

However, according to the recent report released by the NCRB2, a total number of 32,608 cases were reported in 2017 while 39,827 cases were reported in 2018 under the Protection of Children from Sexual Offences Act (POCSO). The report also showed that 21,605 child rapes were deemed to be recorded in 2018 which included 21,401 rapes which were of girls and 204 cases which were of boys. The report also suggested that the greatest number of cases

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1 Lorraine Nilon, Breaking Free From the Chains of Silence: A respectful exploration into the ramifications of Paedophilic abuse
were seen in Maharashtra followed by UP and MP. This is a data of 2020\(^3\). And as per the data the increasing number of cases are really alarming.

The Nagpur Bench of the Bombay High Court has recently passed some of the most controversial judgements pertaining to child sexual abuse and thereby setting a very bad precedent for the interpretation of Sections of POCSO Act. The Court in *Satish V. State of Maharashtra* held that groping of the breasts “over the top” of a 12-year old child did not amount to the offence of Sexual Assault under Section 7 of POCSO Act. The Court in *Libnus V. State of Maharashtra* further held that the act of holding a minor girl’s hand and unzipping the pants in front of her does not amounts to Sexual Assault as well. Both of these judgements were largely criticized and sparked public outrage. Attorney general of India, K.K. Venugopal, has also taken the Satish case in Supreme Court’s attention and he further added that it is an “unprecedented decision” and “is likely to set a dangerous precedent”. The Supreme Court has in return stayed the acquittal of the accused and have also given the thought whether the respective HC judge should be considered as a permanent judge.

Let’s first discuss the Facts and the Judgment of the court to get the clear picture of the court’s reasoning behind such judgement.

**THE FACTS OF THE TWO CASES AND WHAT WAS HELD:**

On 19\(^{th}\) January 2021, the single Judge bench of Justice Pushpa V. Ganediwala, in the case *Satish V. State of Maharashtra* acquitted a 32 years old man from the charge of Sexual Assault under Section 7 and 8 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) on the ground that there was no “skin to skin” contact and thus the requirement of “sexual intent” cannot be established. Section 7 of the Act defines sexual assault as any non-penetrative contact which is backed by sexual intent towards the victim. The Act provides 3 to 5 years of rigorous imprisonment with fine. The Court held the offender liable for outraging the modesty of women under Section 354, IPC 1860 and made him liable for 1-year imprisonment and 500 rupees fine. The Court explained that the requirements of the Section 7 are not met as the victim’s clothes were not removed and the appellant was not able to undress her as she shouted and ran away. The Judge also said that the punishment under

\(^3\)https://timesofindia.indiatimes.com/india/maha-up-mp-recorded-most-pocso-cases-in-2017-19-ncrb/articleshow/79984056.cms

\(^4\)https://indiankanoon.org/doc/158325618/
Section 8 is disproportionate to the gravity of the act and therefore the conviction under Section 354 is more suitable.

On 26th January 2021, the same bench of Justice Pushpa V. Ganediwala, in the case Libnus V. State of Maharashtra\(^5\) acquitted a 50-year old man who was convicted by a special POCSO Court for the act of holding a 5-year old girl’s hand and unzipping the pants in front of her. The victim also told her mother that the man had taken out his penis and asked her to sleep with him. The Appellant in this case was convicted under Section 10(aggravated sexual assault), Section 12(Sexual harassment) of POCSO along with Section 354A (Sexual harassment) and Section 448(House trespass) of IPC. Under Section 10 of POCSO Act, an offender is liable for imprisonment of minimum 5 years and fine. The Bombay High Court set aside the conviction under Section 10 and 12 of POCSO Act and made the appellant liable under Section 354A (3) of IPC which has a lesser punishment with maximum imprisonment of 3 years and no statutory minimum. The court while disposing the appeal noted that appellant had already served 5 months of imprisonment and that is enough according to the seriousness of his act and held that he must be released.

The passing of these two-judgment resulted in such outrage that National Commission for Women and National Commission for Protection of Child Rights, wrote to the Govt. to challenge this judgement in Supreme Court. On 27th January, 2021, the Supreme Court put a stay on the judgement of Satish case as the case was drawn in attention by the Attorney General, K.K. Venugopal.

**AIMS AND OBJECTIVES OF THE POCSO ACT AND ITS PREAMBLE:**

- It aims to protect children (below the age of 18) from Sexual Assault, Sexual Harassment, and the inclusion of children in pornography.
- POCSO is a legislation specifically made to safeguard the interest of children from reporting and recording of evidence to the trial of offences.
- It provides stricter punishments than IPC to deter the offenders.
- It provides for the creation of special POCSO courts and Special Juvenile Police Units for speedy disposal and relief.
- It helps in promotion of Article 15(3) of Indian Constitution as well as to fulfills the obligation cast on Government of India by the Convention on the Rights of the Child.

\(^5\) https://indiankanoon.org/doc/106697401/
Above everything the aim of the act is to ensure that the offenders, violating the rights of children, are not getting away with their crimes like they used to, it ensures the speedy disposal of proceedings and quick access to justice.

Now let us discuss the relevant provisions related to these two judgements which are mentioned under POCSO ACT:

1. **Section 7**- Whoever touches and makes physical contact to the vagina, penis, anus, breast of a child or be it any other act with sexual intent is said to have committed the act of “sexual assault” under this Section.
   Here the word “penis” would mean the sexual organ of a male and the word “anus” will also include the orifice of a male child. Here we talk about the sexual desire and intent which is of the accused and the resultant injury which is caused to the child which can be of either gender.

2. **Section 8**- The person convicted with Section 7 shall be punished with a minimum punishment of imprisonment of 3 years and which can even extend to a period of 5 years and also will be held liable for fine.

3. **Section 9**- It talks about the “aggravated sexual assault” which means when sexual assault is done upon a child who is less than 12 years.

4. **Section 10** – It talks about the punishment of “aggravated sexual assault” which must not be less than 5 years of imprisonment but may extend to 7 years and shall also be liable to fine.

5. **Section 12**- It talks about the punishment for “sexual harassment” which is done with a child where imprisonment shall extend to 3 years and shall also be liable to fine.

6. Another Section which comes into play shall be **Section 29** which suggests that if a person is prosecuted under Section 7 of POCSO ACT, it will be a presumption that he is the one who has committed the offence.

7. **Section 30** shows there is an existence of mens rea which the accused had during the commission of the offence. Then Section 30(2) says that accused must rebut all these presumptions beyond a reasonable doubt and not even preponderance of probabilities.

In these two judgements, the Honourable judge have punished the accused under the provisions of IPC completely ignoring the POCSO Act which has been made for the beneficial and larger interest of the children. It is a protective legislation and it should be used in a manner which is protects the interests of a child. Using 354 IPC shows the lacks of
application of judicial mind by the honourable judge as this particular provision completely ignores the Male gender.

CRITICISM:
There are several reasons why the Bombay HC judgements has been receiving a vehement opposition. The honourable judge has not once but twice tried to misinterpret the laws. Here we would like to suggest some criticisms regarding the two judgements.

SATISH VS. STATE OF MAHARASHTRA and LIBNUS VS STATE OF MAHARASHTRA.

1. Interpretation of Section 7 POCSO ACT: The Bombay HC held that there should be a physical contact without penetration when Section 7 comes into consideration. The first problem which is seen here is how the Honourable judge tried to insert the principle of ejusdem generis while interpreting the law before and after the (comma).

In MK Salpekar vs. Sunil Kumar Shamsunder Chaudhary, the SC has mentioned the meaning of (comma) which is inserted in provision, that it will be not have an ejusdem generis application. Physical contact without penetration will only govern the acts which is done after the comma- ‘any other acts’ mentioned in Section 7. The fact that there needs to be a skin to skin contact while determining a physical contact is certainly baseless. Section 7 is trying to suggest that there has to be a sexual assault which can be non-penetrative and it has to be with a certain sexual intent.

Section 7 of POCSO ACT uses the term SEXUAL ASSAULT. Let us understand the meaning of the word ASSAULT. The meaning of the word assault has not been given in the POCSO Act, so the meaning of the same has to be ascertained from IPC. The IPC defines assault in Section 351, which suggests that there is no need for physical contact when it comes to assault. Now this essence of ASSAULT in IPC comes from the other two words mentioned in IPC which is FORCE and CRIMINAL FORCE. Now these two terms suggest that there has to be a physical contact with another, which also includes if there is a physical contact with what the other person is wearing. It just has to affect the other person’s sense of feeling. Considering how the word assault and physical contact has been used in Section 7 of POCSO ACT, the meaning has to be interpreted by understanding CRIMINAL FORCE AND FORCE in IPC even if the word used is ASSAULT. However, in this case the fact that
Honourable judge has tried to emphasise the use of skin to skin is a mockery of the provisions mentioned in IPC and the POCSO ACT. In LIBNUS VS STATE OF MAHARASHTRA – the testimony of the victim that the appellant tried to show his penis while touching the hands of the victim comes under the ambit of Sec 7,11,12 of the POCSO ACT and also comes under the purview of Section 354(A)(1) of IPC.

2. BURDEN OF PROOF: As per the judgement, there was a need of a stricter proof when punishment has to be given to Satish under POCSO Act. The POCSO Act in its respective Sections under Section 29 and 30 mentions the principle that would be Actus Reus and Mens rea while determining the foundational facts. This means if the prosecution is able to prove with reliable evidences the existence of foundational facts the burden is shifted towards the accused and he has to prove the absence of mens rea. And this absence of mens rea if prosecuted under Section 7 has to be beyond a reasonable doubt. The fact that this court requires a stricter proof while determining the guilt of the accused in order to punish him under the POCSO ACT is another mockery of the criminal jurisprudence. However, in LIBNUS case, this question of burden of proof returned onto the accused has not been touched.

3. PUNISHMENT IN POCSO ACT IS MORE SEVERE THAN IPC- a certain degree of reluctance can be seen when the honourable judge in this judgement tried to impose the punishment under POCSO ACT. The only reason accorded by him while imposing the punishment under IPC was that the circumstances in both the cases were not outrageous or grave which is another preposterous comment made by the Honourable judge. When we see the preamble of POCSO ACT, it has been made keeping in mind the provision mentioned in Article 15(3) of the constitution of India. The preamble’s utmost responsibility suggests the best interests of the children have been to be considered especially the children who are below 12 years of age. When children suffer these kinds of sexual violence it gradually transforms into serious traumas which torments them throughout their life, even in their adulthood. The fact that the honourable judge paid no heed to the age of the victims and did not try to give a liberal interpretation to Section 7 of POCSO ACT while keeping in mind the preamble of the act shows lack of application of judicial mind. Even in the LIBNUS case, the court did not punish the accused under Section 8, 10 of the POCSO ACT. The court did not
even consider the aggravated sexual assault upon the survivor which was supposed to be made punishable under Section 10 of POCSO ACT.

**VIEWS OF OTHER HIGH COURTS:**

1. The Andhra Pradesh, Delhi and Karnataka HC have held that touching the private part of a minor with a sexual intent is a sexual offence and it will come under the ambit of Section 7 of POCSO ACT. As per the Andhra Pradesh HC Section 7 has to be divided into two parts – the first being touching the private parts of the minor with sexual intent and the second being, any other act with sexual intent without penetration. The application of ejusdem generis will not be attracted here.

2. The Delhi HC has mentioned that touching or pressing the breast of a child with sexual intent will attract the provisions of Section 7.

3. In *Jagar Singh V. State of Maharashtra*, the HP H.C has stressed that “skin to skin contact” is not essential under Section 7 of POCSO ACT.

4. In another judgement of *Lok Prasad Limboo v. State of Sikkim* which was also related to similar charges, both the sentences under the IPC and POCSO were carried out parallelly.

In the United Kingdom, Section 79(8) of the Sexual Offences Act, 2003, defines touching to include touching:

(a) With any part of the body,

(b) With anything else,

(c) Through anything, and in particular, includes touching amounting to penetration.

Now if such an interpretation is taken by the Indian legislation that definitely such ludicrous judgments will have no place in India. The casual attitude towards the seriousness of the sexual crimes can be depicted through these judgements.
CONCLUSION:
Ridiculing the integrity of a human body by differentiating the physical touch with a mere piece of cloth is highly preposterous. The tender age of the victim is completely ignored in the judgement, the trauma which is faced by the victims is also been considered hideous as per this judgement. If any precedent this judgment is going to set will be the lack of faith which the society especially women and their children will have upon the judiciary. Already the delay in decision of Nirbhaya Case when the facts were clearly in front of the whole judicial system somewhere irked the whole nation and then this. The fact that children can be considered as a pushover by such paedophiles and sexual abusers and they can be abused due to the overpowering nature of the adults has been given a blind eye by the Honourable judge. The decision has been given upon a baseless technicality and with the sole purpose of awarding lesser punishment as the judge did not consider that the crime was severe. How will this act as a deterrence for other abusers? Such judgements give more leverage to the abusers to abuse their victims because they know they won’t be handled strictly.

Such insensitivity is the clear indication of entrenched patriarchy and gender biasness in the mindsets of some judges. Gender sensitization cannot be inculcated within the mind sets of those who already have patriarchy ingrained in their mindsets, it can slowly be developed by collective effort on the part of society from the moment a person is born. The Attorney General in the aftermath of this case suggested State Judicial Academies to conduct regular lectures on gender sensitization.

According to the interpretation of honourable judge, if the genitals of a male were pressed over the pants, he would have no protection under the POCSO Act. This act will end up in the household as it will be considered to be too trivial to be reported. According to the National Family Health Survey 2015-16, more than 99% of the cases of sexual violence in India go unreported and the cases which do get reported have a very low conviction rate. This scenario will only degrade if this insensitivity prevails in the judicial system.