

“ERRONEOUS PRECEDENT” SETS BY THE HIGH COURT OF BOMBAY

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Abstract

Children are the most vulnerable groups in society. They are the victims of various types of physical and sexual abuse in their day-to-day life. Crime against children ranges from physical and emotional abuse to an act of pornography and sex trafficking. So, to prevent children from such offences of sexual assault, the government of India has enacted important legislation known as “The Protection of children from sexual offence Act-2012.”

The POCSO Act-2012 has been in news recently, after the controversial verdict of the Bombay High court justice, Pushpa Ganediwala. The act recognizes sexual harassment of child involving touch and so on. The High court of Bombay in its judgement has interpreted the provisions of laws in very narrow terms. The judgement has attracted sharp criticism from all sides. The Hon'ble Supreme Court of India has taken cognizance of the issue and stayed the verdict of the subordinate court. This paper aims to analyze the provision of laws under the POCSO Act. It mainly deals with the provisions mentioned under Section-7 of the POCSO Act and Section-354 of the Indian Penal Code- 1860. Further, it analyzes the implications of the verdict of the Bombay High court on society and children.

Key terms- Sexual abuse, Sex trafficking, POSCO Act.

“Erroneous Precedent” sets by the High court of Bombay

“Dorothy didn’t play with other children at school, she didn’t think it was safe for them to be friends with her. The playground supervisors would ask her why she didn’t want to play with the others but she just said she wanted to be left alone and refused to say anything”

The recent decision of the Nagpur bench of the Bombay High court has created a controversy and it raises a series of concerns regarding child safety. The judgment had sparked a furore on

social media, prompting the National Commission for Protection of Children Rights to urge the Maharashtra government to challenge the verdict.

In the recent judgment, in Satish Ragde v. State of Maharashtra, a single-judge bench of the Bombay High court headed by Justice Pushpa Genediwala had acquitted an accused who was sentenced to a minimum of 3-years of imprisonment under section-8 of the protection of Children from Sexual Assault (POCSO) Act. In the verdict, she said that “it is necessary for the accused to have a “Skin-to-skin” contact with the survivor to bring the offence within the purview of Section-8 of the POCSO Act, which stipulates minimum punishment of 3-years.” The judgment has created a shock wave among the child right and women’s right activist across the nation.

Brief facts: -The accused took the child to his house who was 12 when the offence was committed. In the pretext of giving fruit to her, he groped her breast and tried to remove her clothes.

The mother of the victim took her to the Police Station and lodged FIR against the accused. Later, the Session Court found him guilty under section 354 of IPC as well as Section-7 of the POCSO Act.

An analysis of judgment and legal provisions

The Protection of children from sexual offence Act-2012 was enacted by the government of India “to protect the children from offences of sexual assault, sexual harassment and pornography and to provide a child-friendly system for trial of those offences”.¹ The primary aim of this separate legislation is to protect the interest of vulnerable children in the time of distress and ensure the safety and dignity of the child and seek to provide stringent punishment to those engaged in such offences.

The section-7 of the POCSO Act says that- “Whoever with the sexual intent touches the vagina, penis or breast of the child or make the child touch the vagina, penis, anus or breast of such

¹ The Protection of children from offences Act,2012(NO. 32 OF 2012).<<https://wcd.nic.in/sites/default/files/POCSO-ModelGuidelines.pdf>>

person or any other person, or does any act with the sexual intent which involves contact without penetration is said to commit Sexual Assault.”²

The Protection of Children from Sexual Offences Act is a victim-oriented statute. The injury caused to the victim of offence assumes more importance. The words, “.....with sexual intent touches....”³ denotes that an unintentional contact would not be an offence under the said legislation. For example, while travelling on the bus if someone accidentally touches the private parts of children, this touch would be unintentional and would not be an act of crime. But in this case, *Satish Ragde v. State of Maharashtra*, a person deliberately pressed the breast of a child of age 12 years over her clothes. The court convicted him under section-354 of Indian Penal Code-1860, this decision established his intention i.e., the touch was not unintentional. Hence, his act would be an offence under the provision of the POCSO Act.

The provision mentioned under section-7 seems to have a wide ambit and touching the breast of a child with a sexual intent amount to sexual assault. In the said act, nowhere it is mentioned that “Skin-to-skin” contact is required for an act to cover under section-7 of the act, but in the verdict, such a narrow interpretation of section-7 seems to be imprecise and it would set an “erroneous precedent.” So basically, according to this judgment, we have to wait for the person sliding their hands into the minor’s garments to file a case.

Legal experts are of the view that judgment would restrict the scope of the POCSO Act and would set a wrong precedent. Further, it would weaken the legislation which will result in lessening the fear among perpetrators. The number of such crimes may rise in the near future. However, the bench ruled in the case that, the act of pressing of the breast of the child, in absence of any specific detail as to whether the top (cloth) was removed or whether he inserted his hand inside top and pressed her breast would not fall under the definition of “sexual assault” under section-7 of the POCSO Act. It would however fall within section-354 of the Indian Penal Code, which criminalizes for “outraging the modesty of a woman”, but here, a matter of concerns regarding the child safety arises that, such act of groping child breast if would not deal

² The Protection of Children from Sexual Offences Act, 2012 (Act 7 of 2012)

³ The Protection of children from offences Act,2012(NO. 32 OF 2012), S. 7.

under POCSO Act, then it would attract lesser punishment under section- 354 of the Indian Penal Code. The maximum punishment for the offence of outraging the modesty of a woman is two-years and fine, whereas, under POCSO Act, the maximum punishment for such offence of sexual assault is five- years, and shall also be liable for fine. Further, an offence of sexual assault under section-7 of the POCSO Act involves two things, the first is the sexual desire of the accused, while the second is the resultant injury caused to the body of the victim(child), hence, this legislation cannot be equated with the section-354 of the IPC. So, if such cases are not dealt with under the POCSO, then the severity of punishment will decrease and more such incident will take place.

Also, Indian laws fail to define ‘touching’ exclusively, thereby providing a chance for ludicrous interpretations for cases like *Satish v. State of Maharashtra*. According to the Bombay High Court, there are two essential previews under Section 7 of the POCSO Act:

1. There should be sexual intent;
2. Touching of penis, vagina, anus, or breast of a child.

Now with the respect to the second interpretation, the court held that, without any firm evidence of disrobement or skin-to-skin contact, the offence under section 7 of the POCSO Act cannot be made out.

The court also held that disrobing a minor’s breast without any proof is a “minor offence,” under section 354 of IPC and prescribed the accused one-year rigorous imprisonment. This remark of “sexual assault” gives a perverse shift from the existing perception of the courts in India. Such judgment would also leave minor boys irremediable, as Section 354 of IPC is only for female victims.

The act was nothing but an “intentional assault with sexual intent.” Hence, it should be an offence of sexual assault. The allegations should be examined both subjectively and objectively. The matters of the fact depict that the only objective can be of sexual assault, as accused and victims were alone in the room and the possibility of unintentional touch is completely ruled out.

According to data from NCRB, Crime against children increased by 4.5% in 2019 as compared to 2018. Further, it says that 31.2% of cases of crime against children were registered under the POCSO Act. Among states, Uttar Pradesh reported the highest cases of crime against girls under the POCSO Act with 7444 cases. The list is followed by Maharashtra with 6402 cases and Madhya Pradesh with 6053 cases. If legislation itself is weakening further, then the number of such incidents will be higher than this and it would affect the whole society and especially the victims of such crime. These types of abuse often have deleterious consequences on children both during their childhood as well as across later periods of growth. It affects the physical and psychological well-being of children. It hampers education and career growth too. The verdict of this case seems to provide a route to escape from liability. Perpetrators will do such act of child abuse in future and in absence of any specific detail as to whether there was “skin-to-skin”, they would take it as a defence and would escape from punishment.

Furthermore, there is an increase of 18.9 % in the registration of cases under the POCSO Act. This indicates the better enforcement of cases under the said act. It helps the government to examine the real situation so that they may act accordingly, but such a narrow interpretation of the law and keeping such a heinous act like “pressing the breast of a child without removing her top” out of the ambit of the POCSO act would give rise to a false presumption that children are safe in society while reality would be reversed.

By ruling out the term “assault” because of the prerequisites mentioned under 354 of IPC, they are reducing the gravity of the offence. The two statements: “she was humiliated by him” and “she was harassed by him”. The second one is graver. The description of the crime decides the second period and its gravity of punishment. The statement, the court has delivered, looks loose and irresponsible. Categorization of molestation and measuring the degree of it and how much penetration clothing was needed for it to be called an assault to befit the law and is disrespectful to the victim. It looks like it is empowering the criminal.

The judgment had attracted sharp criticism from all sides. The National Commission of Women approached the apex court regarding the said verdict. They claimed that the interpretation adopted by the Hon’ble High court is bad and perverse in law.

A bench headed by Hon'ble Chief Justice of India S.A. Bobde took cognizance of the issue immediately after Attorney General K.K. Venugopal made a special mention in court. He said that decision of the High court would set a “very dangerous precedent” and cripple the intention of POCSO to punish the sexual offender. After this, the apex court has stayed the verdict of the subordinate court by using its rights provided under constitutional provisions.

The analysis of the decision and expert's opinion reveals that the judge has failed to apply the provision of legislation in “letter and spirit” to the situation before them and their reluctance to give effect to the provision of this legislation in wider terms has made it very difficult to prove a different form of sexual abuse. Senior advocate, Sanjay Parekh, harshly criticized the verdict, he said, “the reasoning adopted by the court in interpreting the legislation is absurd”.⁴

Recently, in dealing with an offence of sexual assault, a special POSCO court in Mumbai has held that “touching bums with sexual intent is a crime under POSCO”. Session judge of special POSCO court, M.A. Baraliya, said that “act was done with full knowledge and intention to outrage the child's modesty, and to assault her sexually.” He ruled that “the term private part is to be interpreted in the context of what it means in our Indian society.” He rejected the argument of the victim side who were relying on Google's interpretation of the term private part.

In another case of *Jagar Singh v. State of Himachal Pradesh*, the judgment of Himachal Pradesh High Court has negated the requirement of skin-to-skin touch to attract section-7 of the POCSO Act. It mentioned that section-7 does not provide for any such mention like touching of the naked penis, naked vagina, naked breast or naked anus. The court further specified that touching any part of a minor child (as mentioned under section-7) even while the minor is wearing cloth is enough to attract the provisions. Also, in this case, it was well-established that when there are two interpretations, then the interpretation which is in favour of the minor should be adopted to provide the ends of justice by the court.

⁴ Apoorva Mandhani, “Absurd interpretation — experts say HC's POCSO order in groping case wrong on many levels” The Print, January 25, 2021.<<https://theprint.in/judiciary/absurd-interpretation-experts-say-hcs-pocso-order-in-groping-case-wrong-on-many-levels/591873/>>

Apart from the very obvious ridiculousness and stupid interpretation of the mentioned term, the verdict of the Nagpur bench of the Bombay High court doesn't even take into account the very basic fact about the trauma that causes to the victim tells us how disconnected the judge is from reality.

Conclusion

In a country like India, where 109 children are abused sexually every day, it is very important to have a strict interpretation of legislation. The judgement of the court in Satish Ragde v. State of Maharashtra would have a serious implication on society and child's safety. It would set "a wrong and erroneous precedent." This type of narrow interpretation of legislation would give a chance to accuse to escape from liability which will eventually lead to more and more such acts of assault on children in the near future. This is extremely shameful and incredibly regressive judgment. We will never progress as a country until we figure out how to protect our children and women.

It is therefore sine qua non that legislation should be interpreted strictly. The interpretation of legislation should be made in broader terms after considering all the ill-effect of such judgement on society and its stakeholders. The intent of the judiciary should be to award strict punishment to the offender so that such an act could be deterred.