



GRAVITAS LEGAL

Skin to Skin touch not essential for offence of sexual assault under POSCO Act – Supreme Court

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The Supreme Court, in its landmark decision in *Attorney General for India and Ors. v. Satish and Ors.*,¹ has once again swung the pendulum in favour of protection of most vulnerable section of the society, when it held that progressive and beneficial statutes such as the Protection of Children from Sexual Offences Act, 2012 (POCSO Act hereinafter) cannot be interpreted in a manner which stifles the purpose and object of such statutes. The Apex Court has recognized and reinforced the fundamental role of the judiciary in protecting the autonomy and dignity of children. The POCSO Act was introduced to meet the inadequacies in the existing law in the area of protection of children from sexual offences, of every degree and nature. Sexual offences, when committed against adults, mar the individual for life and when the same offences are perpetuated against children, the trauma and agony inflicted cannot be obliterated despite best efforts. The stringent nature of the POCSO Act was contemplated to serve a dual purpose, firstly and primarily to ensure that the punishment is proportionate to the gravity of the offence and secondly to act as a deterrent to prevent the commission of such offences. The Supreme Court, in this decision, has endorsed the view that interpretation of the POCSO Act or any provision, thereof, should be in tandem with this purpose and object in order to realize its true potential.

Factual matrix

The controversy paving the way for this landmark decision centers around the interpretation of Section 7 of the POCSO Act by the High Court of Bombay in two cases. To understand the bone of contention involved, it is imperative to discuss, in brief, the facts of the two cases which entailed into the polemical decisions of the Bombay High Court.

In the “*Case of Accused Satish*”, the description of the offence alleged against him by the mother of the victim is that the accused lured the victim, who was 12 years of age, to his house and “*pressed her breast and tried to remove her salwar*”, however, the victim started to shout, and the accused prevented her by pressing her mouth. The Special Court convicted the accused under Section 342, 354 and 363 of the Indian Penal Code, 1860 (IPC hereinafter) and Section 8 of the POCSO Act. On appeal preferred by the accused, the conviction under Section 8

1. 2021 SCC OnLine SC 42, D.O.D : 18.11.2021

POCSO Act was set aside and the accused was convicted for the offences under Section 342 and 354OF IPC.

In the “*Case of Accused Libnus*” the allegation leveled against the accused was that he came to the house of the victim, who was aged about 5 years, when neither of the parents were present and the accused had “caught the hands of the victim and moved her frock upward with one hand and lowered her pant with the other hand. He, thereafter, unzipped his pant and showed his penis to her and then asked her to lay down on wooden cot”. The Special Court, in this case, convicted the acused for the offences punishable under Section 448 and 354-A (1)(i) of IPC and Sections 8 and 10 read with section 9 (m) and 12 of the POCSO Act. On appeal, the High Court of Bombay set aside the conviction for the offences under Sections 8 and 10 of the POCSO Act and upheld the conviction for the offences under Sections 448 and 354-A(1)(i) of IPC read with Section 12 of the POCSO Act.

It is in the backdrop of these facts that appeals have been preferred by Attorney General of India, National Commission for Women, State of Maharashtra and Accused – Satish.

Issues involved

The Apex Court narrowed down the controversy to the interpretation of Section 7, whereby, in light of the decisions of the High Court of Bombay, the following contentious issues were considered and analysed by the Court:

1. Whether the interpretation of the High Court of Bombay in the case of Accused Satish, that unless there is “direct skin to skin physical contact with sexual intent” the act does not tantamount to the offence of sexual assault as defined under Section 7 of the POCSO Act, is correct?
2. Whether the words “any other act with sexual intent” occurring in Section 7 of the POCSO Act encompasses only acts of the nature specified and described within the Section itself?

Submissions made by the Attorney General

It was contented by the Attorney General on Acquittal by the High Court under Section 8 of the POCSO Act on the premise that since there was no skin-to-skin contact made by the accused with the victim was an incorrect interpretation of the offence of sexual assault as defined under Section 7 of the POCSO Act.

Submission on behalf of National Commission for Women

A contention was raised on behalf of the National Commission for Women that the words ‘touch’ and ‘physical contact’ in Section 7 have been used interchangeably and if the term “physical contact” is restricted to “skin to skin contact” it would result in a narrow interpretation of the said provision defeating the object and purpose of the Act.

Submissions made by Amicus Curiae and State of Maharashtra

The Amicus Curiae underscored and highlighted that Section 7, when analysed in the background of the Scheme of the Act, the primary ingredient which is sufficient to bring an act within the purview of the offence of Sexual offence under Section 7 is “sexual intent”, and, therefore, touching with sexual intent without “skin to skin contact” would also amount to sexual assault under Section 7 of the POCSO Act.

The State of Maharashtra adopted the submissions made above that interpretation of the High Court of Section 7 of the POCSO Act would, in effect, defeat the object of the Act.

Submissions made on behalf of both accused

The following submissions were presented on behalf of the accused:

1. The word “assault” as used in IPC has a different connotation from the use of the said term under Section 7 of the POCSO Act and therefore the definition of the said term as defined in the IPC cannot be imported to interpret “sexual assault” as defined under Section 7 of the POCSO Act.
2. Although, skin to skin contact is not essential for the first part of Section 7 of the POCSO Act which pertains to touching the vagina, penis, anus or breast of the child, however, for the latter part which talks about “any other act with sexual intent” necessarily implies “skin to skin” contact.
3. Sections 29 and 30 of the POCSO Act place a heavy burden on the accused in the form of reverse burden of proof and presumption and therefore any interpretation other than strict interpretation of Section 7 would expand the scope of the offence of sexual assault.
4. Where an ambiguity exists in a criminal statute, the rule of lenity calls for resolving the ambiguity in favor of the accused.

Analysis and reasoning

The Hon’ble Supreme Court has, in a considerable fashion, dealt with every single contention raised on behalf of the accused. It has reckoned that while interpreting a provision of statute, an attempt should be made to interpret the provision so as to reconcile it with the object of the legislation. The Court drawing inspiration from the rule of purposive interpretation as laid down and upheld in a plethora of judgments has held that in order to arrive at the most accurate interpretation of Section 7, the provision must be analyzed in light of the purpose and object of the POCSO Act. After discussing judicial precedents on the rule of purposive construction as laid down in *J.P. Bansal v. State of Rajasthan & Anr*² and *Balaram Kumawat v. Union of India & Ors.*³, the Apex Court observed that the intent and object behind enacting the POCSO Act was to enforce the rights of all children to safety, security and protection from sexual abuse and exploitation, and also to define explicitly the offences against children countered through commensurate penalties as an effective deterrence.

The Court proceeded to dissect and analyse Section 7 and after considering the meaning and import of the word’s “touch” and “physical contact” found credence in the argument that both words have been used interchangeably. The Court opined that the act of touching the sexual part of body or any other act involving physical contact, if done with “sexual intent” would amount to “sexual assault” within the meaning of Section 7 of the POCSO Act. Therefore, by assigning a purposive construction to Section 7, the Court held that the words “physical contact” and “touch” cannot be qualified and restricted to “skin to skin” contact. It would be apposite to reproduce the observations made by Court:

“As per the rule of construction contained in the maxim “Ut Res Magis Valeat Quam Pereat”, the construction of a rule should give effect to the rule rather than destroying it. Any narrow and pedantic interpretation of the provision which would defeat the object of the provision, cannot be accepted. It is also

². AIR (2003) SC 1405

³. 2003) 7 SCC 628

needless to say that where the intention of the Legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective result. Restricting the interpretation of the words “touch” or “physical contact” to “skin to skin contact” would not only be a narrow and pedantic interpretation of the provision contained in Section 7 of the POCSO Act, but it would lead to an absurd interpretation of the said provision. “skin to skin contact” for constituting an offence of “sexual assault” could not have been intended or contemplated by the Legislature. The very object of enacting the POCSO Act is to protect the children from sexual abuse, and if such a narrow interpretation is accepted, it would lead to a very detrimental situation, frustrating the very object of the Act, inasmuch as in that case touching the sexual or non-sexual parts of the body of a child with gloves, condoms, sheets or with cloth, though done with sexual intent would not amount to an offence of sexual assault under Section 7 of the POCSO Act. The most important ingredient for constituting the offence of sexual assault under Section 7 of the Act is the “sexual intent” and not the “skin to skin” contact with the child.”

The Court further took note of the decisions of the foreign Courts in *Regina v. H*⁴ and *State of Iowa V. Walter James Phipps*⁵ where, too, it was observed and held that “touching” or “contact” for the purpose of sexual offence does not imply only “skin to skin” contact.

In response to the averment made on behalf of the accused that due to the presumption and reverse burden contemplated under Sections 29 and 30 of the POCSO Act, only strict interpretation of the Section 7 would be justified, the Court held that although it is a well settled law that penal statute ought construed strictly, however, individual provision must be interpreted vis-a-vis the other provisions, so as to make the objects of the Act more meaningful and effective.

Further, with regard to applicability of rule of lenity, the Court observed that the said rule would only come into play only when there exists an ambiguity and in the absence of the same the Courts cannot tread into a hunt of ambiguities or obscurities in words which are plain.

Decision held

On the basis of said analysis of the provision, that in Section 7 of POCSO Act, the Apex Court held that “sexual intent” being the prime consideration for an act to qualify as sexual assault under Section 7, So the High Court, in the case of Accused Satish, erred in setting aside the conviction under the POCSO Act on the ground that there was no “skin to skin contact”. Further, the Apex Court also held that the decision of the High Court, in the case of Accused Libnus, was completely misguided and premised on an incorrect interpretation of Section 7 as acts of the accused in entering the house of the prosecutrix with sexual intent to outrage her modesty, holding her hands and unzipping his pant showing his penis to the prosecutrix would certainly fall within the purview of the “sexual assault” as contemplated in the second part of Section 7 i.e. “..... or does any other act with sexual intent which involves physical contact without penetration”. Therefore, the Apex Court set aside the Orders of the High Court and restored the Orders of the Special Courts in case of both accused.

4. (2005) 1 WLR 2005

5. 442 N.W.2d.611

Conclusion

The Hon'ble Supreme Court, by interpreting the words "touch" and "physical contact" as not being restricted to "skin to skin" contact and further reinforcing the supremacy of "sexual intent" in determining the offence of "sexual assault, has upheld the well-settled principle that no travesty can be allowed to a statute or its provision and has dismissed and rejected technical pleas and irrelevant rules of construction which would have the effect of defeating the statutory design and intent. The interpretation made by the High Court of Bombay was considered as *de hors* the purpose and object of the statute and set aside.

The precedent laid down by the Hon'ble Supreme Court brings a sigh of relief to the beleaguered children and their families, who after suffering long hiatus of legislative inaction would now have been made victims of narrow and pedantic interpretation made by Courts of Law. It is incomprehensible that children who have been victimized and subjected to abuse for gratification of unconscientious desires had to draw the last straw when the very guardians who are entrusted with the responsibility of protecting them and their rights fail in their duty by using the preposterous interpretations and rules of construction as their crutches. It is incumbent that jural postulates actually achieve legislatively mandated objectives and not defeat them, and the decision of the Apex court in *Attorney General of India* (supra) has endorsed this principle in its true spirit.



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