



**INTERPRETATION OF 'SEXUAL ASSAULT' UNDER THE POCSO ACT WITH SPECIAL REFERENCE TO SATISH RAGDE v STATE OF MAHARASHTRA: A CRITICAL STUDY**

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**Abstract**

On January 19, 2021 the Country had encountered a controversial judgment in the case of *Satish Ragde v State of Maharashtra*, pronounced by the Nagpur Bench of High Court of Bombay in Criminal Appeal No. 161 of 2020. It had been controversial because of the Literal Rule of Interpretation adopted and applied to Section 7 of the Pocso Act, 2012 which defines 'Sexual Assault'. In precise, the question before the court was "whether the act of 'pressing of breast' and 'attempt to remove salwar' would fall within the definition of 'sexual assault' as defined under Section 7 and punishable under Section 8 of the Pocso Act?".<sup>1</sup> To this question, the court answered in negative, reason being that there is no 'skin-to-skin contact' to constitute sexual assault.<sup>2</sup> Outrage was poured to this interpretation for setting a wrong precedent on the ground that such interpretation would not serve the purpose behind the enactment of Pocso. Notably, in another case by the same bench the literal rule to interpret 'sexual assault' against minors was appreciated.<sup>3</sup> However, the Apex court of the Country had stayed this order vide order dated 27.01.2021 and on 18<sup>th</sup> Nov,

2021 decided the case by reversing the judgment of the Bombay HC.<sup>4</sup> Henceforth, the instant paper is an attempt to discover the right interpretation to 'sexual assault' under the Pocso law, and to address the research question 'Whether the Literal Rule of Interpretation is the Appropriate Rule to Interpret 'Sexual Assault' u/s. 7 of the POCSO Act, 2012?' by ascertaining the legislative intent behind certain problematic expressions.

Keywords: Sexual Assault, POCSO Act, Interpretation, Literal rule.

**Literature Review**

1. John V. Roberts, *Sexual Assault is a Crime of Violence*, 37 CANADIAN J. CRIMINOLOGY 88, (1995).

The paper has primarily researched upon the category of 'violence' to which sexual assault belongs to. The paper, as a commentary has answered the question- "whether sexual assault is a violent offence?" under three levels of examination. They are, i) through the level of 'popular conception' of violence ii) connecting to statistics on sexual assault by the Criminal Justice System iii) lastly, from the judicial constructions on and about sexual assault. Finally, the author held sexual assault as the crime of violence under all three levels. Thus, the paper did not focus on interpreting provisions of law(s) relating to sexual assault.

2. Kanad Sinha, *Be it Manu, be it Macaulay: Indian Law and the 'Problem' of the Female Body*, 5

<sup>1</sup> ¶ 16.

<sup>2</sup> ¶ 26, ¶ 27.

<sup>3</sup> *Libnus v State of Maharashtra*, 2021 SCC OnLine Bom 66.

<sup>4</sup> *Attorney General for India v Satish and Another*, (2021) 4 SCC 712.



JOURNAL OF INDIAN LAW AND SOCIETY 61, (2013).

In this paper, the author had carried out a socio-legal study on the prevailing status of increasing crimes against women such as rape, sexual assault and so on. The author uncovers the deepest roots behind the social stigmatization of considering women as 'property of men' starting from the era of Manu to Macaulay and further. At the end, the author had raised two concerns 1. Society to acknowledge multi-traditional approach 2. Legal system to produce gender neutral laws. Henceforth, the paper completely stands outside the scope of instant research.

3. Jyoti Belur & Brijesh Bahadur Singh, *Child sexual abuse and the law in India: a commentary*, CRIME SCIENCE A SPRINGER OPEN JOURNAL, (2015).

The paper highlights the intended benefits of POCSO law and the unintended consequences that would arise in its implementation considering the existing situation in India. Here, the authors have delved into the issue in respect of holding a child as a person below the age of 18 years. Thus, the paper's scope extends to 'Child Sexual Abuse' as a whole i.e., including child sexual assault and connects how POCSO Act can bring forth various unintended negative consequences albeit its welcoming purposes. Henceforth, research with regards to interpretation of POCSO Act or a provision of the Act falls outside the scope of the paper.

4. SARAH MICHAL GREATHOUSE ET AL., A REVIEW OF THE LITERATURE ON SEXUAL ASSAULT PERPETRATOR CHARACTERISTICS AND BEHAVIORS 7-30 (Rand Corporation 2015).

Chapter 2 of the book, titled as "Characteristics of Male Perpetrators who Sexually Assault Female Victims" delves into the criminological approach of studying sexual assault and is relevant in understanding the perpetrators' story behind their delinquent behaviour although the same does not fall straight into the research on interpretation of sexual assault. Hence, the chapter's scope confined only to the criminological study of the crime of sexual assault.

5. Brian Flanagan, *Revisiting the Contribution of Literal Meaning to Legal Meaning*, 30 OXFORD JOURNAL OF LEGAL STUDIES 251 (2010).

The paper justifies the claim that 'Literal Meaning need not always produce the true/intended Legal Meaning'. To this, the author fundamentally relies on HLA Hart's infamous hypothetical illustration of interpreting 'Vehicles on the Park'. Thus, the paper has examined and critiqued the technique of reaching at legal meaning through 'literal meaning' approach, and has not researched upon interpretation of 'sexual assault' as such nor concluded literal rule as failure.

6. Rajeev Seth & RN Srivastava, *Child Sexual Abuse: Management and Prevention, and Protection of Children from Sexual Offences (POCSO) Act*, 54 INDIAN PEDIATRICS 949, (2017).

This paper has analyzed the Protection of Children from Sexual Offences Act as an instrument guiding physicians and pediatricians in examination of victims of child sexual abuse. The authors have highlighted the management guidelines and legal procedures that are present in the



POCSO enactment and asked the professionals of the healthcare network to acquire knowledge on the same, thereby abiding by those guidelines for the well-being of the child. Thus, the paper has nothing to do with 'interpretation of sexual assault'.

7. Alekhya Reddy T. *Literally Interpreting the Law- A Appraisal of the Literal Rule of Interpretation in India*, MANUPATRA.

The commentary by Ms. Alekhya Reddy comprehensively covers 'Literal Rule of Interpretation' including the rules to be followed while adopting and appreciating the literal rule, literal rule's relation with other rules, and the merits and demerits as criticisms. Thus, the paper is just the theoretical explanation on and about 'literal rule' and does not extend to the specific query of interpreting 'sexual assault'.

## I. REVISITING POCSO, 2012

### 1.1 POCSO: THE SPECIAL LAW TO PROTECT CHILDREN FROM SEXUAL OFFENCES

The 'Protection of Children from Sexual Offences' Act (hereinafter, PocsO) was enacted by the Union legislature by

exercising power under Art. 15, Clause 3 of the Indian Constitution.<sup>5</sup> It has been the State's duty to protect children from sexual exploitation since India became a signatory to the 'United Nations Convention on the Rights of the Children, 1989'.<sup>6</sup> Nevertheless, the Constitution of India makes it the State's duty to facilitate children's growth and development that is devoid of any kind of exploitations.<sup>7</sup> Thus, the '*political will*' got reflected as a legislation and got enacted on 19th June 2012, and is in force since 14th November, 2012.<sup>8</sup>

As the Indian Penal Code, 1860 was not able to punish and prevent sexual offences committed against children of both the genders, the Indian government felt the need for legislating a special law to exclusively punish and prevent sexual offences committed against children of both genders, thereby to protect them considering their well-being and best interest as the central theme.<sup>10</sup>

### 1.2 DISTINCTIVE FEATURES OF POCSO

First and foremost, pocsO is special because of the wide range of sexual offences it classifies and contains. One could see the whole concept of 'Child Sexual Abuse' present in the Act. To be precise, the Act has

<sup>5</sup> Art. 15 (3) authorizes the state to legislate special provisions for children and women which would fall under the ambit of 'positive discrimination / affirmative action'.

<sup>6</sup> Art. 34 of the United Nations Convention on the Rights of the Child has declared 'the right to be protected from sexual exploitations, sexual abuses, and sexual harassments' as children's right and thereby, mandates signatories to make provisions for the same.

<sup>7</sup> INDIA CONST. art. 39, cl. f.

<sup>8</sup> The then President of India, Ms. Pratibha Patil gave her presidential assent to the POCSO bill, 2011 on 19th June 2012. As an Act, it was notified in the

Official Gazette of India on 20th June, 2012 and was said to be coming into effect on 14th Nov, 2012. Govt. of India, Ministry of Law and Justice, S.O. 2705 (E) (Jun. 20, 2012).

<sup>9</sup> In *Sakshi v Union of India*, 2004 5 SCC 518 the court found IPC to be inadequate to deal with child sexual abuse matters.

<sup>10</sup> The Indian Penal Code under S. 375 r/w S. 376 punishes only Penetrative Sexual Assault as the Crime of Rape. Moreover, the law is not gender-neutral as it considers only women and girls as the victim of Rape.

LAW COMMISSION OF INDIA, Report No. 172: REVIEW OF RAPE LAWS 19 (2000).



categorized sexual offences committed against children as *Sexual Assault, Penetrative Sexual Assault, Aggravated Penetrative Sexual Assault, Aggravated Sexual Assault, Sexual Harassment, and Using Child for Pornographic Purposes*.<sup>11</sup> Depending on the type of sexual abuse, the perpetrator will be punished in accordance with the minimum and maximum punishment expressed in respective provisions of the Act. Commission, Abetment and Attempt to Commit are all punishable under the Act.<sup>12</sup> It is to be noted that, pocso considers a child to be a person below 18 years of age.<sup>13</sup> So, the applicability primarily depends on the question -whether the victim is a child or not.

Pocso mandates establishment of Special Courts which would decide cases under the Act and further, the government concerned must appoint Special Public Prosecutors to plead matters under the Act.<sup>14</sup> In addition, the authorities functioning under the Act should abide by the procedure for investigation, trial, examination of witnesses, and so on by respecting the dignity and well-being of the child. Moreover, the Act also establishes an authority to monitor the

implementation of Pocso law under section 44 of the Act. The National Commission for Protection of Child Rights is the said authority. Apart from the above-mentioned features, the Pocso Act has many other provisions that are appreciable and necessary for the protection of children from sexual offences at every stage of childhood.<sup>15</sup>

### 1.3 WHERE DOES POCSO STAND TODAY?

It has been 9 years since Pocso was enacted but child sexual abuse continues to exist in the Country till today. Reasons for the same are multifarious i.e., legislative/administrative/judicial loopholes, social stigmatization and so on. But the contemporary deliberations would say 'courts misinterpretation of law' as the reason for poor implementation and is the resultant of low conviction rate under Pocso. For instance, the National Crime Record Bureau in its 'Crime in India 2019' report has mentioned that a total of 47,335 cases have been recorded under Pocso throughout the country<sup>16</sup> but only 6072 and 10,146 got convicted and acquitted<sup>17</sup>. Having said this, it is imperative to understand the state of

<sup>11</sup> The Protection of Children from Sexual Offences Act, 2012, § 3, § 5, § 7, § 9, § 11, § 13, No. 32, Acts of Parliament, 2012 (India).

<sup>12</sup> The Protection of Children from Sexual Offences Act, 2012, Ch. 4, No. 32, Acts of Parliament, 2012 (India).

<sup>13</sup> The Protection of Children from Sexual Offences Act, 2012, § 2 (1) (d), No. 32, Acts of Parliament, 2012 (India).

<sup>14</sup> The Protection of Children from Sexual Offences Act, 2012, § 28, No. 32, Acts of Parliament, 2012 (India).

<sup>15</sup> For instance, as per section 29 and 30 of the Act, an accused is guilty until proven innocent. In other words, courts will hear cases under pocso with the presumption that the accused is guilty and the burden is on the accused to prove his innocence. Secondly, the Act punishes both consensual and non-consensual

sexual activity with a child. Thirdly, a case triable under pocso will have to be completed within a year and the victim's statement should be recorded within 30 days. Finally, there are provisions like in-camera proceedings, child-friendly environment in court during the proceeding, and so on and so forth.

Jyoti Belur & Brijesh Bahadur Singh, *Child sexual abuse and the law in India: a commentary*, CRIME SCIENCE A SPRINGER OPEN JOURNAL, 3 (2015).

<sup>16</sup> MINISTRY OF HOME AFFAIRS, NATIONAL CRIME RECORDS BUREAU, SLL CRIMES AGAINST CHILDREN (CRIME HEAD-WISE & STATE/UT-WISE) 2019 307 (2019).

<sup>17</sup> MINISTRY OF HOME AFFAIRS, NATIONAL CRIME RECORDS BUREAU, COURT DISPOSAL OF CRIMES AGAINST CHILDREN (CRIME HEAD-WISE) 2019 336 (2019).



pocso law today and the implementation failure caused by the Nagpur Bench of Bombay HC which adopted certain contentious interpretative techniques to interpret the language of Pocso.

## II. SEXUAL ASSAULT: MEANING AND SCOPE

### 2.1 SEXUAL ASSAULT AND RAPE

Sexual assault generally means and includes any kind of 'unwanted sexual conduct' that is usually non-consensual.<sup>18</sup> Yet, its concrete definition would ultimately depend on the law of the land. For instance, In India *sexual assault* is not defined under IPC, but defined and made punishable under Pocso. Under IPC, sexual assault to women above 18 years of age is called as 'Rape' and it could only be *sexual assault involving penetration*.<sup>19</sup> In contrast, POCSO appreciates both *sexual assault with and without penetration* under the realm of 'sexual assault' and as per the Act sexual assault is committed against a person below 18 years of age.<sup>20</sup> From this understanding, it is clear that 'sexual assault' is much wider compared to 'rape' and the latter is indeed a type of the former.

### 2.2 DEFINITION OF SEXUAL ASSAULT

<sup>18</sup> Dictionary definition of 'sexual assault' reads as "illegal sexual contact that usually involves force upon a person without consent or is inflicted upon a person who is incapable of giving consent (as because of age or physical or mental incapacity)..." *Sexual Assault*, MERRIAM WEBSTER, Sexual Assault | Definition of Sexual Assault by Merriam-Webster (Nov. 21, 2021).

<sup>19</sup> The Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 2012 (India).

<sup>20</sup> Pocso does not use the term 'rape'. Jyoti Belur & Brijesh Bahadur Singh, *Child sexual abuse and the law in India: a commentary*, CRIME SCIENCE A SPRINGER OPEN JOURNAL, 2 (2015).

The World Health Organization has provided the definition for 'Sexual Assault' and it reads as below:

*"Use of physical or other force to obtain or attempt sexual penetration...includes rape. Sexual assault including rape of children or adolescents is a specific form of child sexual abuse. The latter has a broader definition involving non-penetrative and non-contact sexual acts"*<sup>21</sup>

In the case of *Parmjit v Union of India and Others*,<sup>22</sup> the hon'ble supreme court defined sexual assault and differentiated sexual assault from a simple assault. The lucid classification of sexual assault is as follows: Sexual Assault: 1. Sexual intercourse with another person who does not consent... 2. Offensive sexual contact with another person, exclusive of rape"<sup>23</sup>. Thus, to put it simple, sexual assault is wide enough to include anything and everything from 'touching a person without his/her consent in a sexual way with sexual intent' to till 'forcible sexual intercourse'.<sup>24</sup>

Hence, to conclude *sexual assault* is i. an unwanted sexual conduct, ii. that may or may not include penetration, iii. may or may not involve intimate demeanor, iv. need not always include violent behaviour<sup>25</sup>; and is

<sup>21</sup> Responding to children and adolescents who have been sexually abused: WHO clinical guidelines, Geneva: World Health Organization; 2017. Licence: CC BY-NC-SA 3.0 IGO, viii.

<sup>22</sup> 2018 SCC OnLine AFT 4256.

<sup>23</sup> ¶ 6.

<sup>24</sup> Swapnil Sudhirkumar Agarwal ET ALL., *Legal and Ethical Complexities in the Examination of Victims of Sexual Assault in India: A Medical Practitioner's Perspective*, 31 JOURNAL OF MEDICAL SOCIETY 72, 72 (2017).

<sup>25</sup> Sexual assault need not always involve 'violence'. However, it can be categorized as a crime of violence when it meets one's individual interpretation to



wide enough to include sexual exploitations such as rape, sexual harassment, non-penetrative sexual conduct, attempt to rape, and so on. Nonetheless, the definition of 'sexual assault' varies from state to state and *depends upon the applicable law*.

### 2.3 SEXUAL ASSAULT UNDER POCSO, 2012

Section 7 of the Pocso Act has provided a *hybrid definition* for sexual assault. As per the definition, a person regardless of his/her age said to have committed sexual assault if he/she with sexual intent (i) touches the child's private sexual organ or (ii) makes the child to touch his/her/other person's sexual organ or (iii) does any other act involving physical contact, provided there is no penetration involved.<sup>26</sup> If it is the case of sexual assault with penetration, then Section 3 of the Act will be attracted. Section 7 is a mandatory provision because (i) it is a substantial part of the penal law (ii) defines a crime which if proven, imprisonment from 3 to 5 years will follow (iii) the language is strict, affirmative and prohibitive and lastly, (iv) the context does not give any scope for different legislative intent.

### III. SATISH RAGDE v STATE OF MAHARASHTRA: THE CONTENTIOUS JUDGMENT

#### 3.1 ANALYSING THE INTERPRETATION OF 'SEXUAL ASSAULT' IN SATISH RAGDE v THE

violence. Julian V. Roberts, *Sexual Assault is a Crime of Violence*, 37 CANADIAN J. CRIMINOLOGY 88, 92 (1995).

<sup>26</sup> The section is expansive and includes any other act committed with sexual intent.

<sup>27</sup> Special Court under POCSO (Nagpur, Bombay), Special Child Protection Case No. 28 of 2017, Order dated 05.02.2020.

STATE OF MAHARASHTRA, (2021) 2 Bom CR (Cri) 142

In the Crime Appeal No. 161 of 2020, the Hon'ble High Court of Bombay, Nagpur Bench had to decide on the Appeal made against the Order of Conviction passed by the Trial Court of Nagpur.<sup>27</sup> The accused-appellant was convicted under section 8 of the Pocso act for committing sexual assault u/s.7 of the Act. The notable facts of the case are- the accused pressed the breast of the victim, (12 years of age) and attempted to remove her salwar.<sup>28</sup> Now, the HC, as a part of its interpretation task had to interpret S. 7, thereby answer the issue i.e., Whether 'the act of Pressing of Breast' and 'Removing Salwar' of a girl falls under the ambit of 'Sexual Assault?'<sup>29</sup> The court had provided its findings-cum-conclusion in page 13&14 of the Judgment. It reads as follows:

*"26. As such, there is no direct physical contact i.e. skin to skin with sexual intent without penetration...27. Court holds that the appellant is acquitted under Section 8 of the POCSO Act"*.<sup>30</sup>

Thus, the court convicted the accused under IPC for Outraging the modesty of Woman<sup>31</sup> and acquitted him under Pocso charges.

Now, it is pertinent to analyze the court's understanding of sexual assault in this case. According to the court, sexual assault has to undergo two qualifications. They are 1. there must exist the act of touching any of the

<sup>28</sup> Satish S/o Bandu Ragde v The State of Maharashtra, (2021) 2 Bom CR (Cri) 142 ¶ 4.

<sup>29</sup> *Id.* ¶ 16.

<sup>30</sup> This is the Verbatim of what the court had held in the case. The ruling is exactly reproduced to avoid any consequences of erroneous analysis.

<sup>31</sup> The Indian Penal Code, 1860, § 354, No. 45, Acts of Parliament, 2012 (India).



private organs of the child such as penis, vagina, breast, anus (or) the accused must have made the child touch his/her/other's private organ (or) any other physical contact without penetration 2. there must involve 'sexual intent'.<sup>32</sup> At this juncture, it is pivotal to place the facts i.e., i. 'pressing of breast' and ii. 'removing salwar' into the dissection.

For the court the two acts are two different acts. However, the *author finds both the acts to be forming a part of the same transaction*.<sup>33</sup> As a consequence of this two-classification approach, the court ended up placing both the acts under the head 'physical contact without penetration' which is unreasonable. According to the author, 'Pressing of breast' squarely fits into the very first condition i.e., "whoever, touches...breast of the child". Herein, had the court seen in this way, there would have been no necessity/scope for interpreting the word 'physical contact'. Henceforth, the word 'touches' even as a plain and ordinary meaning would not require a *skin-skin contact*.<sup>34</sup> The author finds this to be the *error on the face of the record*.

Moreover, in this case the 'sexual intent of the accused' is well established and even the court had not questioned it. Yet, considered the sexual contact made 'on the dress in between' to be merely an act of

outraging the modesty of women. Further, it appears that the court by focusing on 'whether removing salwar would mean sexual assault?' have disregarded the former act of the perpetrator and abandoned the purpose of the legislation altogether.

### 3.2 LITERAL RULE OF INTERPRETATION TO SECTION 7 OF POCSO

It is evident from the above analysis that the court had adopted the *Literal Rule of Interpretation* in the *Satish Ragde Case* while interpreting section 7 of PocsO Act which has defined 'sexual assault'. The 'Literal Rule' as the name itself suggests, is a type of *interpretation technique that does not appreciate interpreting words beyond the letter of law*.<sup>35</sup> The Phrase 'Physical Contact' within the definition of sexual assault was given literal interpretation by the court. To be precise, the court interpreted '*physical contact without penetration*' to be 'skin-to-skin contact on the private sexual organ of the child'<sup>36</sup> in order to constitute the offence of sexual assault under PocsO. Such a construction can be said to be providing 'plain meaning' to the words. The disputed phrase was interpreted by applying the principle of 'ejusdem generis'<sup>37</sup> to the usage 'any other act involving physical contact'.<sup>38</sup>

<sup>32</sup> See Page 3 of the Judgment.

<sup>33</sup> Here, the author tries to connect the concept of 'Res Gestae' in Criminal Jurisprudence with the facts in hand.

<sup>34</sup> As the word 'touch' is precise, unambiguous, and non-technical, it can be given ordinary meaning and needs no technical interpretation- *Absoluta Sententia Expositore Non Indiget*.

<sup>35</sup> Literal rule is the first step in Textual/Statutory Interpretation.

Frederick J. de Sloovere, *Textual Interpretation of Statutes*, 11 N.Y.U. L. Q. REV. 538, 540 (1934).

<sup>36</sup> 'Skin To Skin' Judgment: Supreme Court Issues Notice on NCW Plea Challenging Bombay HC's POCSO Acquittal, LIVE LAW (Feb. 10, 2021), <http://www.livelaw.in.tnnlulibrary.remotexs.in/top-stories/skin-to-skin-judgment-supreme-court-issues-notice-on-ncw-plea-challenging-bombay-hcs-pocso-acquittal-169652> (Nov. 21, 2021).

<sup>37</sup> As per the principle, where a provision ends with a general phrase, it should be construed in line with the words and phrases expressed immediately prior to it.

<sup>38</sup> ¶ 17.



Further in *Libnus v State of Maharashtra*,<sup>39</sup> the same court held the act of ‘holding the hands of the minor’ and ‘unzipping the pant’ as not a sexual assault.<sup>40</sup> The very same interpretation flows here as well. It was observed that the alleged activities of the accused do not fit to the parameter of ‘any other act...’ to constitute sexual assault.<sup>41</sup> In *Asok Das v State of Tripura*,<sup>42</sup> the court was of the view that act of ‘kissing the child and removing trouser of the child’ is not sexual assault and acquitted the accused of charges under Pocs0.

At this juncture, it is observable that the courts have *failed to uphold the legal meaning by appreciating literal meaning to a child-welfare* legislation. Brian Flanagan in his article titled ‘Revisiting the Contribution of Literal Meaning to Legal Meaning’ proved that ‘*Literal Meaning need not always end up in producing Legal Meaning*’ which has become relevant to the instant case.<sup>43</sup> The Literal Rule of Interpretation here, *had considered the aim, object and purpose of Pocs0 as nugatory*.

### 3.3 POSSIBLE REPERCUSSIONS OF LITERAL INTERPRETATION TO THE DEFINITION OF ‘SEXUAL ASSAULT’ U/S.7

Referring to the infamous observation by Justice Krishna Iyer, who said that “*to be literal in meaning is to see the skin and miss the soul*”<sup>44</sup>, the author finds the interpretation of ‘sexual assault’ in *Satish Ragde Case*, *Libnus Case* and *Asok Das Case* to shatter the very policy behind enacting the special law (i.e., to protect children from any kind of sexual abuse/exploitation), and if the same comes into effect, it would certainly act as a precedent<sup>45</sup> for subordinate courts. Finally, *the courts will abandon the spirit of the law in deciding cases*. Moreover, such judgments will expose children to more ‘non-penetrative, non-skin-to-skin contact’ sexual abuses by the perpetrators.

## IV. SEXUAL ASSAULT UNDER THE POCSO ACT: ATTEMPT FOR JUDICIOUS INTERPRETATION

### 4.1 ASCERTAINING LEGISLATIVE INTENT

Legislative intent of a provision can be ascertained with the help of various internal aids<sup>46</sup> and external aids<sup>47</sup> of interpretation. Firstly, to ascertain legislative intent of a particular provision in a legislation, legislative intention of the whole act can be referred to.<sup>48</sup> By looking back at Chapter 1. ‘Revisiting POCSO’ one could

<sup>39</sup> 2021 SCC OnLine Bom 66.

<sup>40</sup> ¶ 16.

<sup>41</sup> *Holding Hands Of Minor Girl & Opening Pants Zip Not 'Sexual Assault' Under POCSO Act But 'Sexual Harassment' Under Section 354A IPC : Bombay High Court*, LIVE LAW (Jan. 28, 2021), <http://www.livelaw.in.tnmlulibrary.remotexs.in/top-stories/holding-hands-minor-girl-opening-pants-zip-sexual-assault-pocs0-act-sexual-harassment-354a-ipc-bombay-high-court-169006> (Nov. 21, 2021).

<sup>42</sup> 2019 SCC OnLine Tri 190.

<sup>43</sup> Brian Flanagan, *Revisiting the Contribution of Literal Meaning to Legal Meaning*, 30 OXFORD JOURNAL OF LEGAL STUDIES 255, (2010).

<sup>44</sup> Chief Inspector of Mines v Ramjee, AIR 1977 SC 965.

<sup>45</sup> Principle of *Stare Decisis* applies to India.

<sup>46</sup> M N RAO & AMITA DHANDA, NS BINDRA’S INTERPRETATION OF STATUTES, 685-800 (LexisNexis 2018).

<sup>47</sup> M N RAO & AMITA DHANDA, NS BINDRA’S INTERPRETATION OF STATUTES, 801-933 (LexisNexis 2018).

<sup>48</sup> Internal Aid- ‘Context’ by Reading all the parts of the Statute together. It has been the practice that every provision in a statute must be construed *ex vigoenibus actus* i.e., within the four corners of the Act. - M N RAO & AMITA DHANDA, NS BINDRA’S



infer the legislative intention behind the enactment of Pocso. To reiterate, every provisions in the Act is striving to provide the children of country the environment to grow that is free from any kind of sexual abuse or sexual exploitation.<sup>49</sup> Moreover, in *Eera* through *Manjula Krippendorf v State (Govt. of NCT of Delhi) and Ors.*,<sup>50</sup> the hon'ble Supreme Court had perused the relevant documents in order to ascertain the legislative intent of Pocso and made observation as "...it is quite manifest and limpid that the legislature has intended to protect the child from any kind of sexual assault and harassment."<sup>51</sup>

Secondly, legislative intent of the provision can be ascertained through the 'purpose' of the enactment as a whole. In line with the previous attempt, by reading the purpose through the preamble of the Act and/or the Statement of Objects and Reasons that was presented in the POCSO Bill, 2011, the legislative intent behind section 7 can be traced. A perusal into the Statement,<sup>52</sup> clearly highlights the object as 'to reduce the sexual abuses against children which was prevalent

in the country as per the NCRB statistics at that point of time.<sup>53</sup>

Thirdly, the surrounding sections can be analyzed. Through sections 42 and 42A, Pocso has strengthened its importance over other existing legislations. In *Mondi Murali Krishna v Dumpa Hanisha Naga Lakshmi and Ors.*,<sup>54</sup> the court perused section 42 of Pocso, and held 'punishment under Pocso will not prevail over punishments under any other criminal law in force, however can be made in addition to'.<sup>55</sup> In addition, there is a *Non-obstante Clause* in Pocso<sup>56</sup> according to which Pocso will get an overriding effect in case of any inconsistency with other laws including IPC.<sup>57</sup> This implies that punishment for sexual assault under the Pocso will never be altered with punishment for outraging the modesty of women under the IPC. At the same time, courts ought to establish *harmonious construction* after giving due consideration to the purpose behind enacting the special law (i.e., Pocso Act).

Henceforth, to conclude the legislative intent behind section 7 of Pocso

INTERPRETATION OF STATUTES, 689 (LexisNexis 2018).

<sup>49</sup> Art. 15 (3), Art. 39 (f) of Indian Constitution r/w the UNCRC. In *Eera* through *Manjula Krippendorf Case* (*infra* note 50), the court observed the legislative intention of Pocso in Para 18 of the judgment. It reads as "*Best interest and well-being are regarded as being of paramount importance* at every stage to ensure the healthy physical, emotional, intellectual and social development of the child".

<sup>50</sup> AIR 2017 SC 3457.

<sup>51</sup> ¶¶ 22 r/w ¶¶ 19, ¶¶ 20 & ¶¶ 21.

<sup>52</sup> "4. ...to enact a self-contained comprehensive legislation *inter alia* to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well-being of the child

at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences." - The Protection of Children from Sexual Offences Bill, 2011, No. 14 of 2011, 14 (India).

<sup>53</sup> However, the persistent situation of the same even in contemporary times should not be disregarded.

<sup>54</sup> (2020) 1 ALD (Cr.) 898 (AP).

<sup>55</sup> ¶¶ 15 & ¶¶ 24.

<sup>56</sup> The Protection of Children from Sexual Offences Act, 2012, § 42A, No. 32, Acts of Parliament, 2012 (India).

<sup>57</sup> This provision was appreciated and applied in *Independent Thought v Union of India and others.*, AIR 2017 SC 4904 ¶¶ 97 & ¶¶ 187.



was to *punish every kind of act involving touching of private parts of the child without penetration, and done with sexual intent.*

#### 4.2 INTERPRETING ‘ANY OTHER ACT INVOLVING PHYSICAL CONTACT’

After the contentious interpretation of ‘sexual assault’ by the Nagpur Bench of Bombay HC, it has become indispensable to identify the right interpretation of the phrase ‘any other act involving physical contact with sexual intent’.<sup>58</sup>

By looking at the external aid of interpretation i.e., the judicial precedent, the phrase can be better interpreted. In *State of Maharashtra v Sahar Ali Shaikh*,<sup>59</sup> the Special court construed the act of ‘touching bums’ to be sexual assault under the phrase ‘any other act’.<sup>60</sup> Also, in *Mondi Murali Krishna Case*,<sup>61</sup> the court interpreted the phrase and the observation in *Para 15* reads as “The expression “doing any other act with sexual intent” used in the second part is wide enough to include in it various other acts which are committed by the culprits against a child with sexual intent.” The author concurs to this observation which is capable of upholding the spirit of the section and the purpose of the Act.

Taking the legislative intent of the section and PocsO altogether in mind, Interpretation in *Satish Ragde Case*, *Libnus Case* and in *Asok Das Case* is erroneous and should have made use of the ‘discretion’ provided in the Act through the expression of

the phrase ‘any other act’ to further the purpose of the law. Therefore, the phrase in question does involve a wide range of acts done with sexual intent (excluding penetration) and requires meticulous appreciation of facts and circumstances of the case at hand in line with the legislative intent behind the whole enactment.

#### 4.3 SENSIBLE INTERPRETATION TO SEXUAL ASSAULT U/S.7 OF POCSO

##### **Noscitur a Sociis in the Place of Ejusdem Generis**

The Rule, *Noscitur a Sociis* is quite wider compared to the principle of *Ejusdem Generis*.<sup>62</sup> In the definition of ‘sexual assault’ u/s.7 of PocsO, the phrase ‘any other act’ is preceded with the conjunction ‘or’ i.e., “or does any other act with...” which means the level of judicial discretion expressed in the usage ‘or...any other’ must be distinguished from ‘and... any other’. In *Sunita Gandharva v State of M.P. and Ors.*,<sup>63</sup> it was observed that the usage of ‘or’ denotes the availability of more discretion to the court in interpreting the provision compared to the usage of the conjunction ‘and’. Also, through the usage of ‘or’ in a section, the legislature might have intended the courts would construe the open-ended phrase in a wider form by abiding to the scheme of the enactment as a whole.<sup>64</sup>

Moreover, the author is of the opinion that the uncertainty with the expression “any other act” can be resolved by construing the

<sup>58</sup> The phrase verbatim reads as “*does any other act with sexual intent which involves physical contact without penetration*”. The Protection of Children from Sexual Offences Act, 2012, § 7, No. 32, Acts of Parliament, 2012 (India).

<sup>59</sup> Special Court of POCSO Act, 2012 (Fort, Greater Bombay), decided on 12/02/2021.

<sup>60</sup> ¶ 15.

<sup>61</sup> *supra* note 54.

<sup>62</sup> *Sunita Gandharva v State of M.P., High Court of Madhya Pradesh*, decided on 08.10.2020, MANU/MP/1184/2020 ¶ 64.

<sup>63</sup> *Id.* note 62.

<sup>64</sup> ¶ 62.



broader connotation ‘*physical contact*’ which follows after the expression “any other act”, in line with the phrase involving specificity i.e., “whoever... *touches* the vagina...”. In precise, physical contact can better be understood with the similar word used i.e., ‘*touches*’ which in turn confirms that ‘*skin-to-skin*’ contact is not necessary to constitute the offence of sexual assault. Therefore, here the rule *Noscitur-a-Socii* is appropriate.

### Social Reality, an Important Consideration

In *Geetha v State of Kerala*,<sup>65</sup> the court had clearly observed the pathetic situation that is prevailing in the Country in respect of sexual offences committed against children of the land. *Para 12* of the judgment highlights the vulnerable situation prevailing in contemporary India. As per the observation, “a child falling under the age group of 10 years gets raped in every 13 hours and a child below 16 years of age gets raped in every 155 minutes”. This is the social reality in India today. Without proper administration of justice, it is hardly possible to address the problem of child sexual abuse.<sup>66</sup>

Also, as PocsO is a social-welfare (child-welfare) legislation, literal interpretation which abandons the purpose,

<sup>65</sup> 2020 SCC OnLine Ker 1707.

<sup>66</sup> The Journal, ‘The Wire’ had reported the situation of low conviction rates under pocsO in its article. Sujan Bandyopadhyay, *A Closer Look at Statistics of on Sexual Violence in India*, THE WIRE (May. 08, 2018), <https://thewire.in/society/a-closer-look-at-statistics-on-sexual-violence-in-india> (Nov. 21, 2021).

<sup>67</sup> *supra* note 54.

<sup>68</sup> *Para 62* of Eera Judgment reads as “...the Judge had to release himself from the chains of strict linguistic interpretation and pave the path that serves the soul of the legislative intention...he should become a real creative constructionist Judge.”

spirit and social reality should not be appreciated. The author makes such a statement by relying on the observation made in Eera through *Manjula Case*,<sup>67</sup> which said while interpreting a provision of a social-welfare legislation like PocsO, the judge should be guided by the “*Color, Content and the Context of the Statute*”.<sup>68</sup>

Children and Women are considered to be the most vulnerable groups in respect of sexual offences. And in such a scenario the *social impact* created by committing crime against them should not be disregarded altogether.<sup>69</sup>

### Best Interest and Wellbeing of the Child, the Peremptory Norm

From ascertaining the legislative intention of PocsO through the Statement of Objects and Reasons in the Bill<sup>70</sup> It's been made clear that the courts in deciding matters under the Act should abide by the rule of upholding the *Best Interest and Well-being of the Child*. This rule serves the purpose of the enactment more than anything else. In *Eera through Manjula Case*<sup>71</sup> the court said ‘best interest of the child’ as the guiding rule in interpreting any provisions of PocsO.<sup>72</sup>

### A Policy-Oriented Interpretation is Needed

<sup>69</sup> *B.G. Goswami Vs. Delhi Administration.*, (1974) 3 SCC 85 had made the vital observation as follows: “*Social impact of the crime... cannot be lost sight of and per se requires exemplary treatment. Any liberal attitude of imposition meagre sentence or too sympathetic view may be counterproductive in the long run and against social interest which needs to be cared for protected and strength by string of deterrence inbuilt in the sentencing the system.*”

<sup>70</sup> The Protection of Children from Sexual Offences Bill, 2011, No. 14 of 2011, 14 (India).

<sup>71</sup> *supra* note 54.

<sup>72</sup> ¶ 18.



Policy-oriented interpretation, in which ambiguities in the language of the text are removed through the policy of the legislation, is not something new to Indian Courts. For instance, in a Supreme Court Judgment, back in the year 1979, the policy-oriented interpretation was appreciated over a narrower construction.<sup>73</sup> The author believes that such an approach is needed especially in interpreting the debated provision of PocsO to better serve the purpose, provided it does uphold the context of the enactment.

### Giving due regard to the Consequences

Finally, a judge should give due regard to the consequences of his/her interpretation especially while interpreting provisions of social-welfare oriented legislation, penal legislation and the like. As PocsO, is one of the most important legislations in India when it comes to upholding the state's constitutional duty of protecting children from all kind of sexual exploitations as well as the duty arising out of UNCRC, judiciary must interpret the provisions of PocsO with caution by duly considering the consequences that would follow if they misinterpret the law.<sup>74</sup>

## V. CONCLUSION

After a scrupulous study on the definition of 'sexual assault' under PocsO with the in-depth analysis on *Satish Rage* and allied cases, the author comes to the conclusion that *Literal Rule of Interpretation is not the Appropriate Rule to Interpret 'Sexual Assault' u/s. 7 of the POCSO Act, 2012.* Nevertheless, looking at the *Satish Ragde*

*Case* alone, the act of pressing breast of the child with sexual intent does fall within the definition of 'sexual assault' even under the literal rule of interpretation. But the other cases in line with 'literal rule of interpretation to Section.7' indeed erred in interpreting sexual assault by adopting to literal rule. Yet, the author's observations in the whole paper should not be misconstrued as if literal rule in itself is not applicable altogether (or should cease to exist). Instead, the whole process centers around one point that *when a literal rule could uphold context through textualism then it can very well be adopted.* On a similar footing, purposive or any other interpretation should not be adopted merely to showcase creativity and should only be adopted when there is a need. Moreover, when it comes to PocsO, at every stage of the interpretation process the judge ought to consider elements such as social reality, consequences, policy of the enactment, and the best-interest and wellbeing of the children.

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<sup>74</sup> Consequences of Literal Interpretation to Section 7 of PocsO can be referred to under Chapter 3 of this paper.

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