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K. Vadivel
v.
K. Shanthi & Ors.

(Criminal Appeal No. 4058 of 2024)

30 September 2024

[B.R. Gavai and K.V. Viswanathan,* JJ.]

Issue for Consideration

Under what circumstances could the power be invoked for further investigation and whether on the facts, further investigation was warranted.

Headnotes†

Code of Criminal Procedure, 1973 – s. 178(3) – Further investigation – Applications filed by the first respondent for directing the State to conduct further investigation or re-investigation by examining the related occurrence and eyewitnesses of the crime mentioned in the application and submit additional/supplementary charge-sheet – Dismissed by the trial court holding that further investigation cannot be ordered at the post cognizance stage – However, the High Court allowed the application – Correctness:

Held: Contextual facts and the attendant circumstances have to be singularly evaluated and analyzed to decide the needfulness of further investigation or re-investigation to unravel the truth and mete out justice to the parties – However, the further investigation cannot be permitted to do a fishing and roving enquiry when the police had already filed a charge-sheet and the very applicant for further investigation, has not whispered about anything new in her evidence as is now sought to be averred in the application – There must be some reasonable basis which should trigger the application for further investigation so that the court is able to arrive at a satisfaction that ends of justice require the ordering/ permitting of further investigation – Though power to order further investigation is a significant power it has to be exercised sparingly and in exceptional cases and to achieve the ends of justice – On facts, the direction for further investigation absolutely unwarranted – Ordering the additional charge sheet to be taken on record at this

* Author

stage pursuant to the further investigation will not be in accordance with law – All the stakeholders in the process have contributed to the delay and in spite of eleven years having elapsed after the incident, the trial has still not concluded – High Court allowed the further investigation without giving valid justification for the same – Denial of speedy and timely justice can be disastrous to rule of law in the long term – Even if the parties involved in a case themselves, with no valid justification attempt to delay the proceedings, the courts need to be vigilant and stop such attempt instantly – Any proceeding or application which prima facie lacks merit should not be instituted in a court – Pleadings/petitions with outrageous and *ex facie* unbelievable averments are made with no inhibition whatsoever – These directly impinge on the rule of law, because they add to the pendency and the consequential delay in the disposal of other cases – Such frivolous and vexatious proceedings to be met with due sanctions in the form of exemplary costs to dissuade parties from resorting to such tactics – Thus, the judgment of the High Court set aside as also application filed by the respondent no. 1 before the trial court for further investigation u/s. 173(8) – In view thereof, the additional charge sheet would not be taken on record. [Paras 32, 33, 35, 37, 38, 43-47]

Case Law Cited

Vinubhai Haribhai Malaviya & Ors. v. State of Gujarat & Anr. [2019] 15 SCR 936 **: [2019] 17 SCC 1;** *Pooja Pal v. Union of India & Ors.* [2016] 11 SCR 560 **: [2016] 3 SCC 135;** *Ram Lal Narang v. State (Delhi Administration)* [1979] 2 SCR 923 **: [1979] 2 SCC 322;** *Hasanbhai Valibhai Qureshi v. State of Gujarat & Ors.* [2004] 3 SCR 762 **: [2004] 5 SCC 347;** *Vinay Tyagi v. Irshad Ali alias Deepak & Ors.* **[2013] 5 SCC 762;** *Devendra Nath Singh v. State of Bihar & Ors.* **[2023] 1 SCC 48;** *Himanshu Kumar and Others v. State of Chhattisgarh and others* [2022] 11 SCR 724 **: [2022] SCC OnLine SC 884 – referred to.**

List of Acts

Code of Criminal Procedure, 1973.

List of Keywords

Further investigation; Re-investigation; Charge-sheet; Inherent powers; Delay; Rule of law; Denial of speedy and timely justice; Frivolous and vexatious proceedings; Sanctions; Exemplary costs; Additional charge sheet.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 4058 of 2024

From the Judgment and Order dated 30.04.2021 of the High Court of Judicature at Madras at Madurai in CRLRC (MD) No. 533 of 2020

Appearances for Parties

Jayanth Muth Raj, Sr. Adv., Purushothaman Reddy, Shivansh Dubey, Vinodh Kanna B., Advs. for the Appellant.

Amit Anand Tiwari, Sr. A.A.G., S. Nagamuthu, Sr. Adv., M.P. Parthiban, R. Sudhakaran, Bilal Mansoor, Shreyas Kaushal, S. Geyolin Selvam, Alagiri K, Sabarish Subramanian, Ms. Devyani Gupta, Vishnu Unnikrishnan, C. Kranthi Kumar, Danish Saifi, B. Sarathraj, Chandra Bhushan Tiwari, Kaustubh Shukla, Sanket Vashistha, Ms. Samridhi Srivastava, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

K.V. Viswanathan, J.

1. Leave granted.

2. The present appeal mounts a challenge to the judgment and order dated 30.04.2021 of the Madurai Bench of the Madras High Court in Criminal R.C. (MD) No.533 of 2020. By the said judgment, the High Court has, by a cryptic order, and long after final arguments had been concluded on 19.10.2019 in the trial court, ordered further investigation in the matter. The aggrieved accused is before this Court with a grievance that the direction was not justified in law particularly when already an attempt by the wife of the deceased to summon certain witnesses under Section 311 of the Criminal Procedure Code, 1973 (Cr.P.C.) had been rebuffed by the Trial Court and the High Court as early as in December 2019.

3. The question that arises for consideration is whether the High Court was, on the facts of the case, justified in ordering further investigation?

4. The basic facts essential for adjudication of the present controversy are as follows:-

5. On 31.03.2013, a First Information Report (FIR) being Crime No. 27 of 2013 was registered on the complaint given by one Padikasu (subsequently examined as PW-1) stating that when he along with the deceased Kumar were doing their morning walk around 5:00 AM and were returning back, three persons alighted from a car with weapons and hacked to death, the deceased Kumar.

6. On 11.07.2013, a final report was filed setting up eight accused for trial, including the appellant.

7. On 20.12.2016, PW-1 - Padikasu was examined. He testified that among the two persons who alighted from the car to attack Kumar, Ganapathy had a sickle in his hand; upon seeing them he began to run; that he phoned the family of deceased Kumar and spoke to the son of the deceased. PW-1 testified that he had not seen the hacking. He further testified that within five to ten minutes, the family members of Kumar came to the place and that he went to the Police Station at 6:45 AM and gave the complaint.

8. PW-1-Padikasu was declared hostile and sought to be cross-examined by the prosecution. In the cross-examination he denied the suggestion that he had told the Police that he saw Ganapathy and Vadivel (appellant) hacking the deceased and Chinnaraja (the other accused) stabbing the deceased with a spear. On a question by the Court, he reiterated that he saw Ganapathy among the persons who alighted having a sickle and since he was perturbed and began to run though he saw others, he was not in a position to identify them. His deposition was recorded on 20thof December 2016.

9. Thereafter, on 18th of March 2017, the first respondent Shanthi - wife of the deceased was examined. She corroborated the phone call received from PW-1 and also stated that PW-1 told her that Ganapathy, Vadivel (appellant) and Karthick were the accused who hacked her husband with sickle and that while Chinnaraj and Selvaraj stabbed her husband with spear-stick, Madhavan, Murugan and Palaniyappan caught hold of her husband. She also testified that when after receiving the phone call she went to the place of the incident with Sathappa Subramanian and Subramanian, her brothers-in-law and that her own brothers also accompanied her. On 18.03.2017 itself, PW-3, Subbaiah and PW-4, Duraimurugan were examined.

10. On 25.07.2019, PW-1 - Padikasu was recalled at the behest of accused A1 and A2 wherein he stated that he did not specifically

state to the Police about A1 Ganapathy being present in the place of occurrence and that he had only stated that three unidentified persons had attacked the deceased. He further added that he mentioned about A1 Ganapathy only on account of the Police threatening him.

11. On 19.10.2019, on the conclusion of the trial, final arguments were heard, and the case was fixed for filing of written arguments.

12. At this stage, on 22.10.2019, Respondent No. 1 (examined as PW-2/ wife of the deceased) filed Crl. M.P.No.245 of 2019 under Section 311 of the Cr.P.C. She contended that PW-1 - Padikasu has given false evidence; that the Investigating Officer has failed to enquire the proper eye-witnesses; that the direct eye-witnesses to the occurrence-K. Ganesh S/o Kumar, P. Karmegam S/o Periyakaruppan, K. Rajendran S/o Kasi, Sembulingam S/o Padikasu and C. Andiappan S/o Chinnaiah have not been examined and that they deserve to be summoned. According to the application filed by respondent No. 1, these witnesses would speak about the cell phone recovered by the Police from the occurrence spot and that the cell phone was of Nokia Brand holding the sim of Vodafone company which belonged to her. She averred that the Police failed to produce the material object and that the cell phone and call details ought to have been produced by the Police. In view of the above, she prayed that the additional witnesses be summoned and examined.

13. The accused opposed the Section 311 petition by pointing out the delay of 6 years and 9 months in filing the petition and also about respondent No.1 (PW-2) not whispering about any of these facts during her examination. They contended that the persons sought to be examined were none other than her son, brother, brothers-in-law and other close relatives.

14. The State also filed its response opposing the application by averring that when the statement of Respondent No. 1 was recorded nothing was mentioned by her and that during the investigation also nothing of the nature as alleged now was forthcoming; that even while being examined as PW-2 the applicant had not mentioned these facts; that no phone was seized and no sim card was seized and that investigation was properly conducted and final report filed.

15. On 29.11.2019, the Trial Judge dismissed the application filed by respondent No. 1. The Court observed that the application was filed

after the examination of the prosecution witnesses had concluded and when the case was posted for questioning the accused under Section 313. That respondent No. 1 was already examined as PW-2 on 18.03.2017 and that on that day itself, together with her, Subbaiah alias Subramanian and Duraimurugan were also examined as PW-3 and PW-4 respectively. The Court observed that though the power under Section 311 is available to the Court to reach a just decision, it cannot be exercised unless the facts and circumstances of the case make it apparent as otherwise it would result in causing serious prejudice to the accused resulting in miscarriage of justice. The Court observed that though the power is available, it has to be exercised judiciously and not arbitrarily.

16. The first respondent, vide Crl. O.P (MD) No. 18701 of 2019, challenged the order dated 29.11.2019 dismissing the petition under Section 311 Cr.P.C. before the High Court. The State vehemently opposed the said petition by reiterating its contention in the courts below. The High Court, by its order of 16.12.2019, dismissed Crl. O.P. (MD) No. 18701 of 2019 holding in its operative portion as follows:

> "9. It is seen that P.W.1 is the person who stated to have accompanied the deceased victim at the time of occurrence. He had been examined by the respondent police. He had not stated anything as if the occurrence was witnessed either by other persons other than him. He was examined in chief before the trial court on 18.03.2017. On that date also, he has not spoken about the occurrence having been witnessed by any other persons other than him. Further, during cross examination, he has also resiled from his earlier statement. P.W.2 has been examined in chief on 18.03.2017. She has also not spoken about the additional witnesses having seen the occurrence or that they have been left out by the prosecution to be added as witnesses in the final report. Further, after final report has been filed on 11.07.2013, if it is true that the eyewitnesses have been left out, she would have filed the petition for further investigation even at that time, which has also not been done. Therefore, this Court is of the opinion that the petition is filed much belatedly only for the purpose of delaying the trial.

> 10. In view of the above, this Court does not find any infirmity in the order passed by the trial Judge. Accordingly, this Criminal Original Petition is dismissed."

17. Taking a cue, as it were, from the observations of the High Court that the first respondent would have filed a petition seeking for further investigation at that time if eyewitnesses have been left out, the first respondent in January, 2020 filed Cr. M.P. No 40/2020 in S.C. No. 61/2014 before the Court of the Additional District and Sessions Judge with a prayer for directing the State to conduct further investigation or reinvestigation by examining the related occurrence and eyewitnesses of the crime mentioned in the application and submit additional (or) supplementary charge-sheet. In the application, it was averred that the Investigating Officer had failed to enquire Kattarimani who had accompanied her husband-deceased Kumar and also had failed to examine proper eyewitnesses; that PW-1 Padikasu had given false statements and evidence and that Padikasu had expressed fear and mentioned about the threatening influences of the accused and other pressures brought by the accused; that investigation has been carried out in a haphazard manner; that there is lack of collection of material evidence; that the cell phone used by PW-1 Padikasu and the cell phone of deceased Kumar has not been properly secured and placed for tracing the call details. That non-examination of R. Natarajan, M. Muthu, S. Ramasamy who are the occurrence witnesses and eye witnesses K. Ganesan S/o Late Kumar, P. Karmagan S/o Periyakaruppan, K. Rajendran S/o Kasi, Sembulingam S/o Padikasu and C. Audiappan S/o Chinnaiah are designed at the behest of the inspector of police.

18. It will be noticed from the application that insofar as the eyewitnesses, who according to the first respondent were not enquired, the names are common as mentioned in her earlier Section 311 application. Under the category of occurrence witnesses, she has added three names which surfaced for the first time in this application. This aspect will be considered later in this judgment.

19. The application was strongly opposed by the accused. The accused, in their counter, averred that the application was not maintainable without the consent of the public prosecutor and that the misconceived application was intended to fill up the lacunae in the prosecution; the allegation that any threat to witnesses were denied and it was

contended that no such complaint was made in the last seven years about any such threats being administered and even on 18.03.2017 when the respondent no. 1 (PW-2) along with her brothers PW-3 and PW-4 were examined, no such complaint was made. The accused further averred that further investigation cannot be ordered at the post cognizance stage either suo moto or at the instance of victims/complainants and it can only be done at the behest of the investigating agency. The accused further averred that after the section 311 Cr.P.C. petition, namely, Crl. O.P. (MD) No. 18701 of 2019 was dismissed even Section 313 Cr.P.C. examination had been concluded and thereafter the accused had concluded oral arguments and filed written arguments. So contending, they had prayed for the dismissal of the petition for further investigation.

20. The State also opposed the application stating that the case has been investigated properly and charge-sheet filed; that the respondent no. 1 has recorded her statement and her earlier application to examine additional witnesses has been dismissed and that the present application is only with an intent to drag the proceeding.

21. The trial court dismissed the petition for further investigation by its order of 23rd July, 2020. The trial court held that the respondent no. 1 (PW-2) in her examination on 18.03.2017 in court did not speak anything as to about what she is mentioning now in the application. That final report was filed as early as on 11.07.2013 and if her contention is correct, she would have filed a petition for further investigation at that very time. The trial court further held that further investigation cannot be ordered at the post cognizance stage either *suo moto* or at the instance of victims/complainants or at the instance of anyone else except the investigating agency and that the petition was only filed to prolong the proceeding.

22. The respondent No. 1 filed a criminal revision before the High Court to which the accused filed a counter reiterating the contentions. By the impugned order, without any discussion whatsoever and holding the following in the operative portion, the High Court allowed the application:

> "10. It is seen that an opportunity to examine additional witness was not given by this Court on the ground that the petitioner has not filed a petition for further investigation. In the above circumstances, dening (sic.) a relief of further

> investigation may cause prejudice to the petitioner. It is stated that P.W.1 turned hostile. This is a murder case. For the above reasons, it is decided that further investigation is necessary. The order passed in Crl.M.P.No.40 of 2020 in S.C.No.61 of 2014 dated 23.07.2020 on the file of the learned Additional District Judge, Pudukottai is set aside. The investigation agency is hereby directed to take up the case for further investigation and to complete the investigation, after examining all the witnesses referred by the petitioner and to file a additional chargesheet within a period of three months.
>
> 11. On receipt of the additional chargesheet, the trial Court is directed to frame charges afresh and to proceed with the trial and to dispose of the case as expeditiously as possible."

23. The present Special Leave Petition has been filed on 14.03.2022. By an order of 16.08.2022, this Court, while issuing notice, stayed the operation of the impugned order. It appears that before the filing of the Special Leave Petition, the additional charge-sheet also came to be prepared on 02.12.2021.

24. We have heard Mr. Jayanth Muth Raj, learned senior advocate, for the appellant as well as Shri Amit Anand Tiwari, learned Additional Advocate General, for the State as well as Shri S. Nagamuthu, learned senior advocate, for the respondent No. 1 (wife of the deceased).

25. The learned senior counsel for the appellant contends that the present application filed by respondent no. 1 is a disguised attempt to reopen the earlier proceedings under Section 311 which attained finality; that after framing of charges, respondent no. 1, who is not a complainant, cannot file an application for further investigation under Section 173(8) of Cr.P.C.; that the trial court had no jurisdiction to entertain the application under Section 173(8) of Cr.P.C. after framing of charges; that no grounds have been made out for further investigation and that the High Court ought not to have interfered with the order of trial court in the exercise of its revisional jurisdiction. Learned senior counsel relied on several judgments of this Court to support the contentions.

26. The learned Additional Advocate General for the State and the learned senior counsel for the respondent no. 1 strongly defended the impugned order. They contended that the interest of justice is paramount and it will even trump the need to avoid any delay being caused in the proceedings; that the investigating agency has carried out further investigation in compliance with the impugned order and prepared the additional charge-sheet on 02.12.2021 bringing out certain new facts and material; that no prejudice is caused to the defence as the material will be furnished to the accused persons and they will have ample opportunity to put forth their defence. To support their stand, learned senior counsel referred to several precedents.

27. We have carefully considered the submissions of the learned counsels for the parties, perused the records as well as written submissions filed by them.

28. The legal position on the aspect of further investigation is fairly well settled. Under the Code of Criminal Procedure, 1973, pursuant to the recommendation of the Law Commission, in its 41st Report, Section 173(8) has been expressly engrafted setting at rest any controversy that may have obtained earlier. Section 173(8) reads as under:

> "173(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

29. The question really is, under what circumstances could this power be invoked and whether on the facts of this case, is a further investigation warranted.

30. There was some debate at the Bar as to whether the Addl. District and Sessions Judge before whom the application was filed by the respondent no. 1 under Section 173(8) after the conclusion of the evidence could have ordered further investigation. The premise of

the argument was even though in the present case the Addl. District and Sessions Judge has not ordered and it was the High Court which had ordered it, while exercising jurisdiction under Section 397 read with 401 of Cr.P.C. The contention was that as per the law laid down by this Court in ***Vinubhai Haribhai Malaviya & Ors. vs. State of Gujarat & Anr.*** ***(2019) 17 SCC 1***, further investigation could at best have been ordered till the commencement of the trial.

31. In the present case, though the Trial Judge rejected the application, the High Court has ordered further investigation. Considering the fact that we are inclined to set aside the order of the High Court, on merits, we deem it unnecessary to discuss the issue of jurisdiction.

32. Ultimately, the contextual facts and the attendant circumstances have to be singularly evaluated and analyzed to decide the needfulness of further investigation or reinvestigation to unravel the truth and mete out justice to the parties (see ***Pooja Pal vs. Union of India & Ors.*** ***(2016) 3 SCC 135***, para 83). As noticed in ***Ram Lal Narang vs. State (Delhi Administration)*** ***(1979) 2 SCC 322,*** (para 20) where fresh materials come to light which would implicate persons not previously accused or absolve persons already accused or where it comes to the notice of the investigating agency that a person already accused of an offence has a good alibi, it may be the duty of the investigating agency to investigate the genuineness of the same and submit a report to the court.

33. However, the further investigation cannot be permitted to do a fishing and roving enquiry when the police had already filed a charge-sheet and the very applicant for further investigation, in this case respondent no. 1, has not whispered about anything new in her evidence as is now sought to be averred in the application. There must be some reasonable basis which should trigger the application for further investigation so that the court is able to arrive at a satisfaction that ends of justice require the ordering/permitting of further investigation. In ***Hasanbhai Valibhai Qureshi vs. State of Gujarat & Ors.*****, (2004) 5 SCC 347**), this Court held as under:-

> **"13.** In *Ram Lal Narang* v. *State (Delhi Admn.)* [(1979) 2 SCC 322] it was observed by this Court that further investigation is not altogether ruled out merely because cognisance has been taken by the court. When defective investigation comes to light during course of trial, it may

be cured by further investigation, if circumstances so permitted. It would ordinarily be desirable and all the more so in this case, that the police should inform the court and seek formal permission to make further investigation when fresh facts come to light instead of being silent over the matter keeping in view only the need for an early trial since an effective trial for real or actual offences found during course of proper investigation is as much relevant, desirable and necessary as an expeditious disposal of the matter by the courts. In view of the aforesaid position in law, if there is necessity for further investigation, the same can certainly be done as prescribed by law. The mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice. We make it clear that we have not expressed any final opinion on the merits of the case."

34. In ***Vinay Tyagi vs. Irshad Ali alias Deepak & Ors., (2013) 5 SCC 762***, this Court dealing with the aspect of the power of Magistrate to direct further investigation had the following to say:

> "41. .....The power of the Magistrate to direct "further investigation" is a significant power which has to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the court in its supervisory capacity is required to ensure the same. Further investigation conducted under the orders of the court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to the filing of a supplementary report. Such supplementary report shall be dealt with as part of the primary report. This is clear from the fact that the provisions of Sections 173(3) to 173(6) would be applicable to such reports in terms of Section 173(8) of the Code."

35. It is essential to note that this Court emphasized that though power to order further investigation is a significant power it has to be exercised sparingly and in exceptional cases and to achieve the ends

of justice *(see* ***Devendra Nath Singh vs. State of Bihar & Ors., (2023) 1 SCC 48,*** *para 45).* Whether further investigation should or should not be ordered is within the discretion of the Magistrate and the said discretion is to be exercised on the facts of each case in accordance with law. This Court also held that in an appropriate case, where the High Court feels that the investigation is not in the proper direction and to do complete justice where the facts of the case so demand, the inherent powers under Section 482 Cr.P.C. could be exercised to direct further investigation or even reinvestigation. This Court reiterated the principle that even under Section 482 Cr.P.C. the wide powers are to be exercised fairly with circumspection and in exceptional cases.

36. In ***Himanshu Kumar and Others vs. State of Chhattisgarh and others, 2022 SCC OnLine SC 884*** dealing with the prayer for transfer of investigation to CBI, this Court had the following to say:

> "47. ....We are conscious of the fact that though a satisfaction of want of proper, fair, impartial and effective investigation eroding its credence and reliability is the precondition for a direction for further investigation or re-investigation, submission of the charge sheet ipso facto or the pendency of the trial can, by no means, be a prohibitive impediment. The contextual facts and the attendant circumstances have to be singularly evaluated and analyzed to decide the needfulness of further investigation or re-investigation to unravel the truth and mete out justice to the parties. The prime concern and the endeavour of the court of law should be to secure justice on the basis of true facts which ought to be unearthed through a committed, resolved and a competent investigating agency."

37. Applying the above law to the facts of the present case, we find that for the following reasons the direction for further investigation is absolutely unwarranted:-

i. The application for further investigation was filed in January 2020 by respondent no. 1. The charge sheet under Section 173 Cr.P.C. too had been filed as early as on 11.07.2013.

ii. On 20th December, 2016, PW-1 Padikasu was examined, he was recalled and cross-examined on 25.07.2019.

iii. Respondent No. 1 (who is the applicant for further investigation) herself was examined on 18.03.2017. There is no whisper in her deposition about what she now seeks to contend in the application for further investigation. There was nothing that had prevented her from deposing in the box about any failure of the investigating officer, to enquire Kattarimani or any person concerned; about R. Natrajan, M. Muthu and S. Ramasamy being occurrence witnesses and about K.Ganesan S/o Late Kumar, P. Karmagan S/o Periyakaruppan, K. Rajendran S/o Kasi, Sembulingam S/o Padikasu and C. Audiappan S/o Chinnaiah being eye witnesses, and about how such failure has caused prejudice.

iv. In fact, seeking the examination of these five witnesses mentioned hereinabove, first respondent filed application under Section 311 Cr.P.C. which came to be dismissed by the trial court on 29.11.2019 and was confirmed by the High Court. The application under Section 311 Cr.P.C. itself was filed on 22.10.2019, that is after a period of about six years after the filing of the charge-sheet.

v. It is only when the High Court dismissed her petition under Section 311 Cr.P.C. stating that she had not made any prayer for further investigation that she filed the present application in January, 2020. At the stage when she filed the application for further investigation, the accused had concluded oral arguments and had also filed written arguments.

vi. The trial court dismissed the application stating that the respondent no. 1 when examined as PW-2 did not speak anything about what she had mentioned in her application and that though the final report was filed as early as on 11.07.2013, respondent no. 1 has filed the application for further investigation only in January, 2020. Though, the trial court held that no further investigation could be ordered at the post cognizance stage, we have, as explained above, not proceeded on that reasoning, since that is clearly erroneous.

vii. The High Court has not recorded any reason whatsoever and has not set out any legal principle which is relevant and applicable to the facts. All that is said is the Section 311 petition of the respondent no. 1 has been denied on the ground that

she has not filed a petition for further investigation; that denial of relief would cause prejudice to respondent no. 1; that PW-1 has turned hostile and that being a murder case, it is decided to order for further investigation. Not one of the legal principles adverted to hereinabove has been considered by the Court.

viii. As pointed out hereinabove, the failure to claim further investigation at that stage was not the only basis for the High Court to reject the revision against the dismissal of the Section 311 application. The High Court had given other detailed reasons also like PW-1 and PW-2 not whispering about the additional witnesses, when they deposed in Court.

38. We are convinced that ordering the additional charge sheet to be taken on record at this stage pursuant to the further investigation will not be in accordance with law. It will be contrary to the settled principles as laid down by this Court. We have also to satisfy ourselves examined the additional charge sheet placed before us. Primarily, apart from explaining the motive which is already set out in the evidence of PW-2, there is a reference to three of these witnesses named in this application as having come to rescue of the deceased after hearing the noise raised by the deceased. It is now alleged that A-5 tried to prevent the said two witnesses from approaching Kumar and threatened them with the sickle. It is also alleged that at that point these witnesses saw A-1 and A-4 committing overt acts on the deceased.

39. As pointed out earlier, when the application under Section 311 Cr.P.C. was filed on 22.10.2019, the State, in its response and in the arguments before the Court vehemently opposed the application. Even before the High Court in the Revision filed against the dismissal of the application under Section 311 Cr.P.C., the Additional Public Prosecutor appearing for the State had expressly contended that the respondent no. 1 was examined more than five times by the investigating officer and even in her deposition in court had not adverted to any of these aspects.

40. Before the trial court and the High Court in the present set of proceedings concerning the application for further investigation, the State had opposed the prayer contending that the investigation of the case has been done properly and charge-sheet had been duly filed arraigning all the allegedly involved individuals.

41. It is only in this Court that the State has vehemently defended the order. A counter affidavit was filed by the State in this Court in September, 2024 without offering any tenable justification for the need for further investigation. We direct that for all these reasons the additional charges ought not to be taken on the record of the trial Court.

42. A brief postscript. While it is true that delay in trial will cede to the pursuit of truth, however, a distinction should be made between cases where there exist genuine grounds to hold up the proceedings and cases where such grounds do not exist. This case is a classic example of the latter category. The FIR was filed on 31.03.2013 and the charge-sheet on 11.07.2013. At the fag end of the trial in October 2019, on the eve of the final arguments, the first round of applications under Section 311 of Cr.P.C. came to be filed, which culminated in its dismissal in December, 2019.

43. Soon thereafter in January, 2020, virtually the same grounds which had been rejected earlier were rehashed in the form of an application under Section 173(8) Cr.P.C. on behalf of the respondent no. 1. The State, which had hitherto opposed all the applications up to the High Court, turned turtle and stoutly supported the respondent no. 1 in this Court without offering any tenable justification as to how the earlier investigation which had arrayed eight accused for trial lacked credibility.

44. The net result has been that all the stakeholders in the process have contributed to the delay and in spite of eleven years having elapsed after the incident, the trial has still not concluded. No doubt, the High Court allowed the further investigation which we have today reversed. The judgment of the High Court also gave no valid justification for ordering a further investigation.

45. The victims of crime, the accused, and the society at large have a legitimate expectation that justice will be available to the parties within a reasonable time. It is beyond cavil that speedy and timely justice is an important facet of rule of law. Denial of speedy and timely justice can be disastrous to rule of law in the long term. Even if the parties involved in a case themselves, with no valid justification attempt to delay the proceedings, the courts need to be vigilant and nip any such attempt in the bud instantly. The administration of justice feeds on the faith of the citizenry and nothing should be done to even remotely shake that faith and confidence.

46. The legal profession has an important role to play in the process. Any proceeding or application which prima facie lacks merit should not be instituted in a court. We are constrained to observe this because of late we notice that pleadings/petitions with outrageous and ex facie unbelievable averments are made with no inhibition whatsoever. This is especially so in some family law proceedings, both civil and criminal. Reading some of the averments therein, we are left to wonder whether at all the deponents were conscious of what has been written purportedly on their behalf, before appending their signatures. These misadventures directly impinge on the rule of law, because they add to the pendency and the consequential delay in the disposal of other cases which are crying for justice. It is time that such frivolous and vexatious proceedings are met with due sanctions in the form of exemplary costs to dissuade parties from resorting to such tactics. If we have desisted from such a course in this case, it is only because the High Court allowed the petition and it is here that we have, reversing the High Court, dismissed the petition for further investigation.

47. In view of what has been stated hereinabove, we set aside the judgment of the High Court dated 30.04.2021 in Criminal RC (MD) No. 533 of 2020. Consequently Cr. M.P. No 40/2020 in S.C. No. 61/2014 filed by the respondent no. 1 before the Court of Additional District and Sessions Judge for further investigation under Section 173(8) Cr.P.C. would stand dismissed. We further direct that, in view of the dismissal of the application, the additional charge sheet dated 02.12.2021 will not be taken on record. The appeal is, accordingly, allowed.

48. We direct that after hearing arguments of parties afresh, the trial should be concluded and judgment pronounced within eight weeks from today.

Result of the Case: Appeal allowed

[†]*Headnotes prepared by:* Nidhi Jain

[2024] 10 S.C.R. 18 : 2024 INSC 733

Khunjamayum Bimoti Devi
v.
The State of Manipur & Ors.

(Civil Appeal No. 10682 of 2024)

19 September 2024

[Hrishikesh Roy,* Sudhanshu Dhulia and S.V.N. Bhatti, JJ.]

Issue for Consideration

Issue arose whether all aspirants whose names find place in the revised select list, pursuant to the course correction process, would secure appointment against the notified 1423 posts of Primary Teachers, irrespective of whether they were litigating for appointment.

Headnotes†

Service law – Appointment/recruitment – Recruitment process for 1423 posts of Primary Teachers – Written examination held and interviews were pending, meanwhile local daily published the result of the selection process when official results were yet to be declared – Enquiry Committee constituted – Government notified 1051 Primary Teachers to be engaged on contract basis – Later clarified that said appointments made was temporary arrangement – Thereafter, official result of the selection notified and 1423 candidates selected for the posts – Appellant and others challenged the selection – High Court condoned the allegation about publication of names of selected candidates in local newspaper – State directed to constitute Review DPC to submit fresh recommendation – Recommendations directed to confine to only unreserved, SC and ST categories and candidates shortlisted in OBC category to be excluded from the fresh select list – Challenge to:

Held: When there is a declaration of law by court, the judgment can be treated as judgment in rem and require equities to be balanced by treating those similarly situated – Thus, as this Court is directing appointments strictly in accordance with merit of the candidates in the recruitment test, as per the revised list, parity relief should be considered for all similarly situated persons – Differential

* Author

treatment for those who did not approach the Court earlier may not be warranted and would amount to denial of opportunity u/ Arts.14 and 16 – Selected candidates are put in limbo waiting for employment for last several years – This Court is quite capable of hearing the selectees, possibly incapacitated to approach the Court by reasons beyond their control – High Court's judgment to be construed as judgment in rem with intention to give benefit to all similarly situated persons irrespective of whether they were before the Court or not – Whereas, this Court's judgment is confined only to those covered by the order and should be considered to be judgment in personam – Beneficiaries of this judgment subject to their respective merit position in the revised select list, should be accommodated only against the notified 1423 posts – Appointment to the OBC category candidates was set aside by the High Court and as such these vacancies would be available to accommodate most of the deserving selectees – Appointment ordered for those whose names would figure in the revised select list, strictly in order of merit against the 1423 vacancies notified – Concerned appointees have been serving for over 13 years and disruption of their service may lead to unimaginable hardships, thus, left to the Government's discretion to take a decision for those who are serving and whose names may not figure in the revised select list, pursuant to the ordered exercise – Judgment by the High Court upheld – State authorities to draw up the revised select list in terms of the High Court's judgment – Appointment orders for those who figure in the revised select list to be issued. [Paras 21-25, 27, 28]

Service law – Appointment / recruitment – Recruitment process for posts of Primary Teachers – Written test conducted in 2006, and the answer scripts destroyed in 2008 – Allegations of selection being vitiated:

Held: When recruitment for public posts is being made by the State, preservation of the answer scripts till reasonable time after the final declaration of result is the prudent course to adopt – This omission was overlooked which definitely was disappointing for those who failed to qualify in the written test – Since things can't be undone, it is expected all concerned to be mindful of their responsibility in future recruitments, to preserve the answer scripts till the selection process is successfully completed, to obviate similar such allegation of wrong doings. [Para 9]

Case Law Cited

Uttar Pradesh and Others v. Arvind Kumar Srivastava and Others [2014] 12 SCR 193 **: [2015] 1 SCC 347;** *Shoeline v. Commissioner of Service Tax & Ors.* [2017] 8 SCR 582 **: [2017] 16 SCC 104 – referred to.**

List of Keywords

Revised select list; Appointment; Posts of Primary Teachers; Acquiescence; Recruitment process; Enquiry Committee; Answer scripts for written test destroyed; Practice of weeding out; Treating those similarly situated, similarly; Denial of opportunity; Prolonged recruitment process; Multiple litigations; Judgment in rem; Judgment in personam; Recruitment for public posts; Preservation of answer scripts; Allegation of wrong doings.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10682 of 2024

From the Judgment and Order dated 29.03.2016 of the High Court of Manipur at Imphal in WPC No. 620 of 2011

With

Civil Appeal Nos. 10683, 10684, 10685 and 10686 of 2024, Writ Petition (Civil) No. 817 of 2016 and Writ Petition (Civil) No. 22 of 2017, Civil Appeal Nos. 10687-10688 and 10689-10690 of 2024, Writ Petition (Civil) Nos. 1355 and 1476 of 2020 and Special Leave Petition (Civil) No. 22118 of 2024

Appearances for Parties

Tushar Mehta, Solicitor General, Gopal Sankaranarayanan, V. Giri, K. Parameshwar, Ms. Aparna Bhat, Sanjay Hegde, Anupam Lal Das, N Jotendro Singh, Dr. Joseph Aristotle, Sr Advs., F. I. Choudhury, David Choudhury, Somiran Sharma, Purushottam Sharma Tripathi, Amit, Ravi Chandra Prakash, Ms. Vani Vyas, Ms. Shivani Vij, Prakhar Singh, Ashutosh Dubey, Abhishek Chauhan, Ms. Rajshri A Dubey, H.B. Dubey, Amit P. Shahi, Shashi Bhushan Nagar, Rahul Sethi, Ms. Sona Khan, Sumant A Khan, Mayank Sapra, Ms. Lalima Das, Pratik R. Bombarde, Mohit Bidhuri, Abdulrahiman Tamboli, Jitendra Kumar, Kirti Anand, Abhishek Kumar, Raj Kumar Mehta, Elangbam Premjit Singh, Niraj Bobby Paonam, Ms. Karishma Maria, Yash S. Vijay, Ms. Pooja B. Mehta, Abhisheck Chauhan, Harshad Sunder,

Sumant Akram Khan, Amit Kumar, Anshuman Singh, Shah Rukh Ali, Ankit Tiwari, Ms. Tatini Basu, Bharat J Joshi, Kumar Shashank, Ahanthem Henry, Ahanthem Rohen Singh, Mohan Singh, Aniket Rajput, Ms. Khoisnam Nirmala Devi, Kumar Mihir, D. Abhinav Rao, David Ahongsangbam, Sayed Murtaza Ahmed, Rahul Kumar, Rajeev L Mahunta, Ms. Rajkumari Banju, Maibam Nabaghanashyam Singh, K Sita Rama Rao, Shakti K Pattanaik, Sanjeev Kumar Verma, Sandeep Kapoor, M.P. Parthiban, R. Sudhakaran, Bilal Mansoor, Shreyas Kaushal, S. Geyolin Selvam, Alagiri K, Mohit Biduri, Divakar Kumar, Satya Kam Sharma, Garv Bajaj, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Order

Hrishikesh Roy, J.

1. Delay condoned. Leave granted.

2. Heard Mr. Gopal Sankaranarayanan and Ms. Aparna Bhat, learned senior counsel appearing for the appellants. The State of Manipur is represented by Mr. Tushar Mehta, learned Solicitor General and Mr. V. Giri and Mr. K. Parameshwar, learned senior counsel. Also heard Mr. Anupam Lal Das, learned senior counsel appearing for the already appointed candidates.

3. These matters pertain to the process of recruitment of, *inter-alia*, 1423 posts of Primary Teachers in the state of Manipur. The recruitment process commenced with the notification dated 12.09.2006 issued by the Employment Officer, Imphal West which required the aspirants to have their names sponsored through the Employment Exchange. The same notice also notified vacancies of 203 Primary Hindi Teachers and 46 Hindi Graduate Teachers, all in the Directorate of Education in Government of Manipur. At the outset, it is made clear that in this order, we are dealing with the case of 1423 Primary Teachers only.

4. For the purpose of this order, the records of Civil Appeal arising out of SLP (Civil) No. 15482 of 2016 together with the convenience compilation filed in the W.P (C) No.817 of 2016 are taken into account to narrate the salient circumstances of the case.

5. On 22.12.2006, the Board of Secondary Education, Manipur (hereinafter referred to as, “the Board”) conducted a written test and

the result of the test was declared on 16.04.2007 by the Secretary of the Board indicating that 5322 candidates were successful in the written examination. The interviews for the short-listed candidates were held from 06.02.2009 and continued till August, 2009. At that stage a local daily in Manipur on 26.06.2010, published the result of the selection process when official results were yet to be declared for the subject recruitment. The said newspaper publication led to an Enquiry Committee being constituted by the Government of Manipur to determine whether any illegality has been committed by the Recruitment Committee (referred to as, "the DPC" by the authorities and courts) in the selection process pursuant to notification dated 12.09.2006.

6. Thereafter, on 07.03.2011, the Director (Education), Government of Manipur notified that 1051 Primary Teachers would be engaged on contract basis on remuneration of Rs.7600 per month. The breakup of the list of 1051 appointees was (Gen.-512, OBC–177, ST–322, SC–21 and PH–19). Since most of the names in the notification dated 7.3.2011 were amongst the names published in the local newspaper on 26.06.2010, the leakage of the select list received the attention of the Manipur Legislative Assembly when it was clarified by the Chief Minister of Manipur before the House that the appointments made through the notification dated 07.03.2011 was a temporary arrangement, since the academic session is to commence from April, 2011.

7. As the official result of the selection process was not declared despite the process having commenced on 12.09.2006, some of the aggrieved candidates moved the High Court and pursuant to the order passed by the High Court on 27.07.2011, the result of the selection was notified on 04.09.2011 by the Director of Education, Government of Manipur indicating that 1423 candidates are selected for the 1423 posts of Primary Teachers, in pursuant to the recruitment process which commenced on 12.09.2006.

8. The appellant - Khunjamayum Bimoti Devi and others moved the High Court challenging the selection process. Besides other petitions, the challenge was also made, *inter-alia*, through the W.P (C) No.815 of 2011 and W.P(C) No.127 of 2012. These writ petitions were taken up for consideration and the learned Judge of the High Court through the common judgment dated 6.10.2015, concluded as follows:-

"[9] In the present case, the selection process can be divided into two parts - one, the part relating to the written examination being conducted by the Board and the second, the rest of the selection process till the end. The first part is the responsibility of the Board and its role was limited to the conduct of written examination only and the moment the result thereof was declared, its role came to an end and it had nothing to do with the rest of the selection process. There is no material on record to show that the Board was instructed by the State Government not to destroy the answer scripts till the completion of the selection process. As has been stated in its affidavit which is not controverted by the petitioners, the Board in its normal course disposes of answer scripts after three months from the date of declaration of result thereof. In the absence of any instruction from the State Government, the Board was not supposed to and could not be expected to keep the answer scripts un-destroyed or preserved for indefinite period when it was not sure as to when the selection process would be completed by the DPC. In the present case, one year after which the Board destroyed the answer scripts, is reasonable time for keeping the answer scripts un-destroyed or preserved. It is understandable if the Board was entrusted to complete the entire selection process but it was not so in the present case. Therefore, keeping in mind the peculiar facts and circumstances, there is no reason as to why this court ought to interfere with the written examination being conducted by the Board, when there was no grievance from any of the unsuccessful candidates against the Board except only the fact that the answer scripts were destroyed before the completion of the selection process which was not in its control and the reasons as to why the answer scripts were to be destroyed, have been narrated above. As regards the interview also, there appears to be no allegation/complain from any of the unsuccessful candidates raising objection against the DPC. The petitioners have not stated in their petition anything about the irregularities, manipulation, arbitrariness committed by the DPC in the viva-voce test. When the

select list came to be published in the newspaper, the public suspected the genuineness of it and therefore, it attracted the attention of the Cabinet which directed to constitute a Committee to look into it. At that point of time also, there is no material on record to show that any one demanded that the viva-voce be repeated in the interest of public. The fact that only some of the petitioners approached the Hon'ble High Court praying that the State respondents be directed to make the official declaration of the result, shows that they were not aggrieved by the viva-voce being conducted by the DPC and they wanted only the result to be declared by the State respondents. Accordingly, on the recommendation of the Review DPC, the result of the selection was declared on 04-09-2011. Thus, it can be seen that there is nothing wrong in the selection process upto the stage of viva voce test and therefore, no order can be passed by this court quashing the entire selection process, as prayed for by the petitioners, only on the ground that the answer scripts had been destroyed before the completion of the selection process.

[10] As regards the second issue, the contention of the learned counsel appearing for the petitioners that in the declaration of result, some candidates were shown to have been selected against the seats allegedly reserved for the OBC category which was totally contrary to the Notice dated 12-09-2006, merits consideration by this court. In the said Notice dated 12-09-2006, nothing is mentioned about any seat being reserved for the OBC category and it could not be done also, at that point of time, for the simple reason that admittedly, the Office Memorandum prescribing reservation of seats for the OBC category came to be issued only on 27-12-2006 after the Notice dated 12-09-2006 having been issued by the Employment Officer and even after the written examination having been held by the Board. Moreover, this OM dated 27-12-2006 does not indicate that it would apply retrospectively. There is no material on record to show that after the said OM dated 27-12-2006 having been issued, a decision was taken by the State respondents to make an amendment

in the breakup of seats, as detailed in the said notice, allotted amongst the categories by adding OBC category therein and a notice thereof was issued informing the candidates about such amendment. From the perusal of the proceedings of the Review DPC, it appears that it had proceeded on an erroneous assumption that seats were reserved for the candidates belonging to OBC and the DPC had not referred to any order issued by the State respondents, subsequent to the issuance of the said OM, that the OM would apply to the then ongoing selection process after due notice being given to the candidates. The Review DPC, in its proceeding, has merely stated that it has followed the 200 point reservation roster which came to be introduced only after the written examination and the viva-voce test were over.

……. …….... …… …….. …… ….

As is evident from the above decision of the Hon'ble Supreme Court, an advertisement shall be issued in matters of public employment. The purpose of requiring the issuance of an advertisement is to give wide publicity to the eligible candidates as regards the terms and conditions including the criteria in respect of the details of selection. Any change in the terms and conditions shall be made known to all the candidates so that they could act accordingly. As mandated under Article 16 of the Constitution of India, equal opportunity shall be given to all in matters of public employment. In this regard, the learned counsel appearing for the petitioners has submitted that although almost all the petitioners belong to OBC category, they did not get an opportunity to get their names sponsored as OBC candidates. There is no statement in the writ petition in support of his submission but when he made the submission during the course of hearing, the same was not denied by any of the counsels appearing for the respondents. It may also be noted at this juncture that the grievance of the petitioner in W.P. (C) No. 127 of 2012 is that in spite of her name being sponsored as OBC candidate, she had been treated as unreserved candidate and accordingly, her name was not included in the impugned list of OBC

candidates, though she secured more marks than many of the candidates shown in the said OBC list. Thus, it is not clear as to how the candidates were sponsored by the Employment Officer. At the time of getting his/her name sponsored, was the concerned person required to indicate whether he/she belongs to OBC category because by then, the OM dated 27-12-2006 had not yet been issued at all? Or is it the case that the candidates were sponsored by the Employment Officer based on the information furnished by the person concered at the time of registration of his name in the employment exchange and if that be so, why was the petitioner in W.P. (C) No. 127 of 2012 denied the benefit of being OBC candidate. On a query put to the learned Government Advocate by this court in this regard, he was unable to give a concrete answer saying that the Government file was silent about it. No additional affidavit in compliance with the order dated 10-09-2015 passed by this court, has been filed by the State respondents in respect of similar queries. In the present case, in the Notice dated 12-09-2006, it is specifically provided as under:

1)	Primary Teacher		
		Gen. Category	910
		ST	442
		SC	29
		Phy. Handicapped	42
			1423

……. ……. ……. …… …….

It is nowhere mentioned in the said notice that certain seats are reserved for the OBC category and on the contrary, when the result of the selection was declared, the names of as many as 242 candidates were shown to have been selected against the seats reserved for the OBC category. To contend that the criteria cannot be changed after the process for selection has commenced, the learned counsel appearing for the petitioners has placed reliance on the decision of the Hon'ble Supreme Court in the case of Madan Mohan Sharma Vs. State of Rajasthan & ors, reported in

AIR 2008 SC 1657 wherein the Hon'ble Supreme Court has held that once the advertisement had been issued on the basis of the circular obtaining at that particular time, the effect would be that the selection process should continue on the basis of the criteria which was laid down and it cannot be on the basis of the criteria which has been made subsequently. The Review DPC had committed error while recommending the candidates belong to OBC category as if there was reservation for them as per the Notice dated 12-09-2006 and the State respondents had blindly accepted the same. In fairness and in order to give equal opportunity, the State respondents ought to have given a notice to all the candidates that the OM dated 27-12-2006 would apply to the then onging selection process and all those candidates, including the petitioners, belonging to OBC category who could not get themselves sponsored as OBC candidates, could have been given an opportunity to do so. In other words, in case certain seats were to be reserved for the OBC, the State respondents must have ensured that all the candidates belonging to OBC category had got themselves sponsored by the Employment Officer. It appears that no such excercise had been done by the State respondents at all in the present case and no opportunity was granted to them. Denial of such opportunity to the petitioners has attracted the provisions of Article 16 of the Constitution of India. Failing to do that, the actions of the State respondents are unreasonable, arbitrary and illegal as being violative of Article 14 and 16 of the Constitution of India. The part of the selection process, as indicated above, i.e., from the stage where the error had crept in, is arbitrary, illegal and is liable to be quashed and in other words, the recommendation of the Review DPC, Notification dated 04-09-2011 and the Government order dated 09-12-2011 are liable to be quashed.

[11] That since this court having held in the preceding para that the selection of as many as 242 candidates as Primary Teachers against the seats reserved for the OBC category, without the same being mentioned in the Notice dated 12-09-2006, is bad and liable to be quashed, no

order is required to be passed in this writ petition being W.P. (C) No. 127 of 2012 and accordingly, the writ petition stands disposed of."

9. The learned Judge in the judgment dated 06.10.2015 noted that for the written test conducted on 22.12.2006, the answer scripts were destroyed on 15.5.2008. The Court however opined that the Board of Secondary Education did not preserve the answer scripts because of paucity of space and also because of the practice followed by the Board for weeding out answer scripts within a fix time frame. When recruitment for public posts is being made by the State, the preservation of the answer scripts till reasonable time after the final declaration of result is the prudent course to adopt. This omission was however overlooked which definitely was disappointing for those who failed to qualify in the written test. Since things can't be undone, we expect all concerned to be mindful of their responsibility in future recruitments, to preserve the answer scripts till the selection process is successfully completed, to obviate similar such allegation of wrong doings.

10. As can be seen, the High Court condoned the allegation made by the writ petitioner(s) in Writ Petition (C) No.815 of 2011 about the selection being vitiated by publication of names of the selected candidates in the local newspaper, well before the official declaration of result. The learned judge concluded that this by itself will not warrant interference with the selection process. With such findings, the Writ Petition (C) No.815 of 2011 was partly allowed and the recommendation of the Review DPC, the notification dated 04.09.2011 and the related Government Order, were set aside with direction to the State-respondents to constitute a Review DPC to submit fresh recommendation strictly in accordance with the Notification dated 12.09.2006. The recommendations were directed to confine to only the unreserved, SC and ST categories. The candidates shortlisted in the OBC category were directed to be excluded altogether from the fresh select list.

11. The Writ Petition (C) No.620 of 2011 filed by the appellant Khunjamayum Bimoti Devi was disposed of on 29.03.2016 with the declaration that her case is covered by the judgment and order dated 6.10.2015 in the W.P (C) No.815 of 2011 and W.P (C) No.127 of 2012. This judgment of the High Court is under challenge in the Civil Appeal arising out of SLP (Civil) No. 15482 of 2016.

12. When the challenge to the High Court judgment dated 06.10.2015 came to be considered by this Court, an affidavit dated 11.03.2016 came to be filed on behalf of the State of Manipur, by Mr. H. Daleep Singh, Commissioner (Education/S). The said affidavit being of some relevance, is extracted herein below:-

> "An Affidavit on behalf of the Respondent No.4
>
> I, H. Deleep Singh, IAS, now serving as Commissioner (Education/S) Government of Manipur, have gone through the contents of the I.A. No. 2 of 2016 and I am acquainted with the facts of the case and having been authorized by the other State Respondents, I am competent to swear this affidavit and accordingly, I swear this affidavit on solemn oath and affirm as hereunder.
>
> 1. That, with reference to para Nos. I and II of the above referred I.A., the answering deponent has no comment to offer as the same are the matter of records.
>
> 2. That, with reference to para Nos. III and IV of the above referred I.A., the answering deponent begs to submit that the Respondent No. 6 to 1428 are the selected candidates for appointment to the post of Primary Teachers and they have been serving as Primary Teachers for the last about 5 years in different Schools under the Department of Education (S), Government of Manipur. On considering the length of service rendered by the Respondent Nos. 6 to 1428, the Government of Manipur is agreeable to accommodate the Writ petitioners against the existing vacancies if the Hon'ble Supreme Court is pleased to protect the appointment of the Respondent Nos. 6 to 1428 and at the same time, the Hon'ble Supreme Court may be pleased to pass an order restraining the unsuccessful candidates who had chosen not to challenge selection process for the last about 5 years to raise any claim in future in order to make the end of litigation on the same issue.
>
> In the light of the above facts and circumstances, it is, therefore, prayed that Your Lordships may graciously be

> pleased enough to dispose of the above referred I.A. and the connected SLP No. 32728 of 2015 in the lines stated in para No.2 of the present affidavit for the ends of justice."

13. This Court considered the averments of the Commissioner in the above affidavit and disposed of the challenge to the High Court's order dated 6.10.2015. The Supreme Court specifically referred to the affidavit (dated 11.3.2016) filed by the State of Manipur and after extracting the contents therein, recorded the following in its order dated 16.03.2016:-

> "In the circumstances, we deem it appropriate to record that no further claim at the instance of any other unsuccessful candidate on the basis of the present order and undertaking given by the Government shall be entertained by the High Court.
>
> Shri Dushyant Dave, learned senior counsel for the petitioner in SLP(C) No. 32728/2015 prayed that the respondent-State be directed to issue the appointment orders within a reasonable period of time as per the undertaking of the State referred to above.
>
> In the circumstances, we deem it appropriate to direct the State to issue the appointment orders in favour of the writ petitioners (before the High Court) within a within a period of eight weeks from today.
>
> Pending applications, if any, also stand disposed of."

14. When this Court disposed of the SLP (Civil) No. 32728 of 2015 and Special Leave Petition (Civil) arising out of CC No. 4129 of 2016, the Court was not informed that other petitions of aggrieved candidates were also pending in Courts. The Bench passed the order on 16.3.2016 oblivious of the fact that multiple petitions challenging the selection process were pending in the High Court. This Court being unaware about the pendency of other petitions filed by other aspirants, had no occasion to address the concern raised in those petitions and thereby observed that further claim at the instance of any other unsuccessful candidates on the basis of the present order and undertaking given by the Government, shall not be entertained by the High Court.

15. In the affidavit dated 11.03.2016 filed by Mr. H. Daleep Singh, Commissioner (Education/S), it was stated that the respondent Nos. 6 to 1428 in the Civil Appeal arising out of SLP (Civil) No. 32728 of 2015, are the selected candidates and they have been serving as primary school teachers. It was also averred in the affidavit that the Government of Manipur is agreeable to accommodate the writ petitioners against the existing vacancies. The Supreme Court in the order dated 16.03.2016 barred appointment of those who had chosen not to challenge the selection process for last about 5 years. Such impression in the Commissioner's affidavit was not only incorrect factually but the same also gave an impression to this Court that no other petitions were pending in the Courts. Therefore, the right of those aspirants in the pending cases was overlooked and not addressed by this Court in its order dated 16.03.2016.

16. As can be gathered from the judgment dated 06.10.2015, the Manipur High Court set aside the recommendation for appointment to 242 posts carved out for the OBC category candidates. The said pronouncement was not disturbed by the Supreme Court. In fact this Court did not really adjudicate the merits of the challenge to the High Court's judgment or had occasion to address the appointment claims of those, whose names may appear in the revised select list, in terms of the High Court's judgment dated 06.10.2015.

17. We have considered the nature of the recruitment process challenged in this proceeding. The inevitable conclusion from the foregoing discussion is that the selection list should be redrawn, in terms of High court's Judgment dated 06.10.2015. Let us now look at the three categories of candidates claiming selection in the redrawn final list. The first category would be those who have qualified the interview and are already included in the list filed before this Court, the second category would be those who have qualified the interview but are not included in said list and the third category would consist of candidates who have not qualified the interview as such but are admitted as OBC candidates.

18. The selection of the OBC category candidates was found to be unmerited by the High Court. As can be appreciated the notification dated 12.09.2006 for appointment of 1423 primary teachers notified the State's reservation policy in the following manner-

Primary Teacher		
	Gen. Category	910
	ST	442
	SC	29
	Phy. Handicapped	42
		1423

However, the review DPC noted that by way of the subsequent notification (dated 27.12.2006), the benefit of reservation has been extended to OBC category in the State of Manipur, following the 200-point formula.

19. Some of the selectees (after the revised exercise) may already be serving amongst the OBC category candidates by virtue of their open category merit. They would naturally be accommodated accordingly as per the revised exercise. Some of the selectees (after the revised exercise), could be amongst the appellants/petitioners in these pending cases, who would also be entitled to benefit of selection. Since the appointment to the 242 posts in the OBC category was interfered by the High Court, those posts would now be available for making appointment after the select list is redrawn, in terms of the High Court's judgment dated 06.10.2015. Since the appellants/ petitioners had filed petitions or were agitating their claims for appointment, around the same time as those who secured relief in the WP (C) No.815 of 2011, these claimants in our opinion, also deserve similar consideration.

20. Next, we have to consider those who are not before the Court but are in the category of job seekers, who responded to the notification dated 12.09.2006, succeeded in the written test and also appeared in the interview segment. When the select list is being revised in terms of High Court's order dated 6.10.2015, new names are bound to figure in the revised select list, as per the respective performance of the candidates, in the recruitment test. The question is whether all aspirants whose names find place in the revised select list, pursuant to the course correction process, will secure appointment against the notified 1423 posts of Primary Teachers, irrespective of whether they were litigating for appointment. Should this Court deny relief to them by considering that there is an element of acquiescence by those, who did not move Court? For answer, we may benefit by

referring to the ratio in *State of Uttar Pradesh and Others vs. Arvind Kumar Srivastava and Others*, reported in (2015) 1 SCC 347 where the following was said:

> "22. *The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under.*
>
> *22.1. The normal rule is that when a particular set of employees is given relief by the court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.*
>
> *22.2. However, this principle is subject to well recognized exceptions in the form of latches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.*
>
> *22.3. However, this exception may not apply in those cases where the judgment pronounced by the court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated persons. Such a situation can occur when the subject-matter of the decision touches upon*

the policy matters, like scheme of regularization and the like. On the other hand, if the judgment of the court was in personam holding that benefit of the said judgment shall accrue to the parties before the court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence."

21. The principles laid down in the case of Arvind Kumar Srivastava (supra) are referred by this court in *Shoeline vs. Commissioner of Service Tax & Ors."* reported as *(2017) 16 SCC 104* to observe that when there is a declaration of law by court, the judgment can be treated as judgment in rem and require equities to be balanced by treating those similarly situated, similarly.

22. Therefore, as this Court is directing appointments strictly in accordance with merit of the candidates in the recruitment test, as per the revised list, we are of the view that parity relief should be considered for all similarly situated persons. A differential treatment for those who did not approach the Court earlier may not be warranted in the facts of the present case, by treating them to be fence sitters and would amount to denial of opportunity under Article 14 and Article 16 of the Constitution of India. One reason for taking such a view is the prolonged recruitment process commencing from 12.09.2006 culminating in the official declaration of result on 04.09.2011, interspersed with multiple litigations by the aggrieved candidates.

23. Also, one cannot ignore that the job seekers who participated in the recruitment test following the Board's notification dated 22.12.2006 and are selected, are put in limbo waiting for employment for last several years. So far those who are not yet appointed, the door of justice must be opened as this Court is quite capable of hearing the silent knocks of the selectees, possibly incapacitated to approach the Court by reasons beyond their control.

24. That apart, the High Court's judgment dated 6.10.2015 as earlier stated, must be construed as judgment in rem with intention to give benefit to all similarly situated persons irrespective of whether they were before the Court or not. On the other hand, this Court's judgment

rendered on 16.03.2016 is confined only to those covered by the order and should be considered to be a judgment in personam. For this reason also, the benefit of the High Court's judgment dated 6.10.2015 should be made available by the State Authorities to everyone as per their respective merit position, in the revised select list, against the notified 1423 posts of Primary Teachers.

25. It is also projected that many more vacancies of primary teachers have since become available. As the recruitment process was initiated on 12.9.2006, vacancies are bound to occur by efflux of time but to order appointment against the later vacancies (beyond the 1423 posts notified on 12.9.2006) will mean, infringing the rights of those who have since become eligible to apply for consideration, for the subsequent vacancies. Therefore, the beneficiaries of this judgment subject to their respective merit position in the revised select list, should in our opinion be accommodated only against the notified 1423 posts. The appointment to the 214 OBC category candidates was set aside by the High Court on 6.10.2015 and the said decision was left undisturbed by the Supreme Court in its judgment dated 16.03.2016 and as such these vacancies will be available to accommodate most of the deserving selectees.

26. Mr. V. Giri, the learned Senior Counsel representing the State of Manipur in the above context informs the Court that the Primary Teachers who were appointed on 09.12.2011 are serving for over 13 years and some of them might have to make way for the selectees. Mr. Anupam Lal Das, the learned senior counsel in his turn submits that the clients he represents were appointed on substantive basis by the Government on 9.12.2011. Despite their long service, a few of them may not find place in the revised select list for adjustment against the 1423 notified vacancies. The submission is that since the cases before the High Court and this Court had continued for over a decade in one form or the other, the appointment of the long serving teachers should be protected.

27. On the above contention of Mr. Giri supported by Mr. Das, we need to observe that appointment is being ordered for those whose names would figure in the revised select list, strictly in order of merit against the 1423 vacancies notified on 12.9.2006. We do appreciate that the concerned appointees have been serving for over 13 years and disruption of their service may lead to unimaginable hardships for this group of people. It is therefore left to the Government's discretion to

take a decision for those who are serving and whose names may not figure in the revised select list, in pursuant to the ordered exercise.

28. In conclusion, the judgment rendered by the High Court on 6.10.2015 in the W.P (C) No.8153 of 2011 and W.P(C) No.127 of 2012 are upheld. In consequence, the appeals/writ petitions filed by the aspirant teachers stand disposed of and those filed by the State of Manipur stand dismissed. The State authorities must draw up the revised select list in terms of the High Court's judgment within 4 weeks from today. The appointment orders for those who figure in the revised select list are ordered to be issued, within 4 weeks of the publication of the select list. By virtue of such appointments, the fresh appointees shall have no claim towards arrears salary. But they shall be granted benefit of notional appointment w.e.f. 9.12.2011 when the substantive appointments were given to those who are serving but this notional benefit is ordered only for the purpose of superannuation benefits. It is ordered accordingly.

29. Pending application(s), if any, including impleadment/intervention application(s) stand closed.

SPECIAL LEAVE PETITION (CIVIL) No. of 2024 (ARISING OUT OF DIARY NO. 20462 OF 2021)

1. Delay condoned.

2. In view of the today's order passed in Civil Appeal arising out of SLP (Civil) No. 15482 of 2016, the Special Leave Petition stands dismissed.

3. Pending application(s), if any, shall stand closed.

Result of the Case: Matters disposed of.

†*Headnotes prepared by:* Nidhi Jain

[2024] 10 S.C.R. 37 : 2024 INSC 720

Rabbu @ Sarvesh
v.
The State of Madhya Pradesh

(Criminal Appeal No(s). 449-450 of 2019)

12 September 2024

[B.R. Gavai,* Prashant Kumar Mishra and K.V. Viswanathan, JJ.]

Issue for Consideration

The appellant was convicted for offences punishable u/ss. 450, 376(2)(i), 376D, 376A and 302 r/w. s.34 of IPC and s.5(g)/6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) awarding death penalty u/ss. 376A and 302 IPC and life imprisonment u/s. 376D of the IPC and rigorous imprisonment for 10 years u/s. 450 of the IPC.

Headnotes†

Penal Code, 1860 – ss.450, 376(2)(i), 376D, 376A and 302 r/w. s. 34 – Protection of Children from Sexual Offences Act, 2012 – s.5(g)/6 – Appellant contended that the instant case rested on the three dying declarations and a DNA report – The Dying declarations were inconsistent and DNA report pointed presence of a third person – It was also contended that it was not 'rarest of the rare' case:

Held: On perusal of the materials on record, it is found that the dying declaration recorded by the Executive Magistrate (Naib Tehsildar), PW-11, which was endorsed by PW-9- doctor is reliable and trustworthy – The dying declaration recorded by PW-11 is in question-answer form – In the said dying declaration, the deceased clearly implicates the present appellant – The Medical Officer, PW-9, before the commencement of the dying declaration has given an endorsement regarding fit mental status of the deceased to make a declaration and at the end of the dying declaration again he has endorsed that the deceased was in a fit state of mind – The written dying declaration is corroborated by the oral dying declaration as has come on record in the evidence of her grand-father (PW-1), her grand-father's brother (PW-2), her aunt (PW-13) and her uncle (PW-14) – In the said dying declaration, all the witnesses have clearly stated that the deceased after coming

* Author

out from the room in flames has narrated the incident about the appellant committing the crime – The statement of the deceased recorded u/s.164 of Cr.P.C. also supports the prosecution case – There is no error in the conviction of the appellant – As far as the question whether the present case falls under the category of 'rarest of rare case' is concerned, in the present case, it is to be noted that the appellant comes from a socio-economic backward stratum of the society – He lost his mother and brother at the tender age – The appellant and his family members do not have any criminal background – The appellant was of a tender age of 22 years when the aforesaid incident occurred – It cannot be said that the appellant is a hardened criminal, who cannot be reformed – The possibility of the appellant, if given the chance of being reformed, cannot be ruled out – In view of the matter, the confirmation of the death penalty would not be justified – In facts and circumstances of the case, the death penalty needs to be commuted to fixed imprisonment without remission for a period of 20 years. [Paras 7, 8, 15, 16, 18]

Case Law Cited

Shivu and Another v. Registrar General, High Court of Karnataka and Another [2007] 2 SCR 555 : **(2007) 4 SCC 713 : (2007) INSC 136;** *Purushottam Dashrath Borate and Another v. State of Maharashtra* [2015] 5 SCR 1112 : **(2015) 6 SCC 652 : (2015) INSC 392;** *Deepak Rai v. State of Bihar* [2013] 14 SCR 297 : **(2013) 10 SCC 421 : (2013) INSC 638;** *Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka* [2008] 11 SCR 93 : **(2008) 13 SCC 767 : (2008) INSC 853;** *Shankar Kisanrao Khade v. State of Maharasthra* [2013] 6 SCR 949 : **(2013) 5 SCC 546 : (2013) INSC 281;** *Gandi Doddabasappa alias Gandhi Basavaraj v. State of Karnataka* [2017] 2 SCR 62 : **(2017) 5 SCC 415;** *Prakash Dhawal Khairnar (Patil) v. State of Maharashtra* [2001] Supp. 5 SCR 612 : **(2002) 2 SCC 35 : 2001 INSC 606;** *Mohinder Singh v. State of Punjab* [2013] 3 SCR 90 : **(2013) 3 SCC 294 : (2013) INSC 61;** *Madan v. State of Uttar Pradesh* [2023] 16 SCR 765 : **(2023) SCC OnLine SC 1473;** *Navas @ Mulanavas v. State of Kerala* [2024] 3 SCR 913 : **(2024) SCC OnLine SC 315 : 2024 INSC 215 – referred to.**

List of Acts

Penal Code, 1860; Protection of Children from Sexual Offences Act, 2012.

Rabbu @ Sarvesh v. The State of Madhya Pradesh

List of Keywords

Section 450 of IPC; Section 376(2)(i) of IPC; Section 376D of IPC; Section 376A of IPC; Section 5(g)/6 of POCSO; Dying declarations; Rarest of rare case; Death Penalty; Socio-economic stratum backward; Remission.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 449-450 of 2019

From the Judgment and Order dated 17.01.2019 of the High Court of M.P. Principal Seat at Jabalpur in CRLR No.12 of 2018 and CRLA No. 6748 of 2018

Appearances for Parties

N. Hariharan, Sr. Adv., Ms. Shreya Rastogi, Bhavesh Seth, M.A. Niyazi, Ms. Zehra Khan, Ms. Anauntta Shankar, Sharian Mukherji, Ms. Sana Singh, Ms. Punya Rekha Angara, Advs. for the Appellant.

Bhupendra Pratap Singh, D.A.G., Ms. Mrinal Gopal Elker, Abhimanyu Singh, Abhinav Shrivastava, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

B.R. Gavai, J.

1. Heard Shri N. Hariharan, learned Senior Counsel for the appellant and Shri Bhupendra Pratap Singh, learned Deputy Advocate General appearing on behalf of the State of Madhya Pradesh.

2. These appeals arise out of the judgment and order dated 17.01.2019 passed by the Division Bench of the High Court of Madhya Pradesh at Jabalpur, dismissing the appeal of the appellant and confirming the judgment and order dated 20.08.2018 passed by the First Additional Sessions Judge, Bina, District Sagar (hereinafter referred to as the "Trial Judge"), thereby convicting the appellant for offences punishable under Sections 450, 376(2)(i), 376D, 376A and 302 read with 34 of the Indian Penal Code, 1860 (for short, 'IPC') and Section 5(g)/6 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO') awarding death penalty under Sections 376A and 302 IPC and life imprisonment under Section 376D of the IPC and rigorous imprisonment for 10 years under Section 450 of the IPC.

3. Shri Hariharan submits that the present case basically rests on the three dying declarations and the DNA report. He submits that the dying declarations are inconsistent. He further submits that as the time progressed there were improvements in the dying declaration. He therefore submits that in the present case the truthfulness of the dying declarations itself is doubtful and therefore the conviction could not be based on the said dying declarations. He further submits that the DNA report also points out towards the presence of a third person. In such an eventuality, the learned Senior Counsel submits that the order of conviction could not be sustained.

4. Shri Hariharan, in the alternative, submits that the present case is not a 'rarest of the rare' case, which would justify awarding death penalty. He further submits that, in the present case, the order convicting the appellant and imposing death penalty were done simultaneously. He submits that the learned Trial Judge also does not consider the balance between the mitigating circumstances and aggravating circumstances while awarding the death penalty. Learned Senior Counsel therefore submits that in the event this Court is not inclined to interfere with the finding of the conviction, in the facts and circumstances of this case and particularly taking into consideration the fact that the appellant lost his mother and brother at a tender age, the socio-economic background of the appellant and the age of the appellant at the time of commission of crime so also his conduct and behaviour in the prison entitle him for commutation of sentence.

5. Shri Bhupendra Pratap Singh, learned Deputy Advocate General (DAG), on the contrary, submits that the learned Trial Judge as well as the High Court, upon appreciation of the evidence, have correctly come to a finding that the present appellant is guilty for the offences committed. He therefore submits that no interference is warranted in the present appeals.

6. Insofar as the prayer made by the learned Senior Counsel for the appellant regarding commutation is concerned, the learned DAG for the respondent-State relies on the following judgments of this Court in the cases of ***Shivu and Another v. Registrar General, High Court of Karnataka and Another***,[1] ***Purushottam Dashrath***

1 [2007] 2 SCR 555 : (2007) 4 SCC 713 : 2007 INSC 136

Borate and Another v. State of Maharashtra,[2] and ***Deepak Rai v. State of Bihar***,[3] in order to contend that merely the age of the appellant cannot be taken into consideration. He further submits that the appellant taking advantage of the circumstances that the deceased was alone in the house has committed the heinous crime and therefore the present case would squarely fit in the category of 'rarest of the rare' cases. He submits that the psychological report would also show that there is no remorse expressed by the appellant. He therefore submits that taking into consideration all these aspects, the death penalty needs to be confirmed.

7. We have perused the material on record and find that the dying declaration recorded by the Executive Magistrate (Naib Tehsildar), PW-11, which was endorsed by Dr. Avinash Saxena, PW-9 is reliable and trustworthy. The dying declaration recorded by PW-11 is in question-answer form. In the said dying declaration, the deceased clearly implicates the present appellant. The Medical Officer, PW-9, before the commencement of the dying declaration has given an endorsement regarding fit mental status of the deceased to make a declaration and at the end of the dying declaration again he has endorsed that the deceased was in a fit state of mind. The written dying declaration is corroborated by the oral dying declaration as has come on record in the evidence of her grand-father Sohan Singh (PW-1), her grand-father's brother Mukund Singh (PW-2), her aunt Preeti (PW-13) and her uncle Sandeep Singh Rajpoot (PW-14).

8. In the said dying declaration, all the witnesses have clearly stated that the deceased after coming out from the room in flames has narrated the incident about the appellant committing the crime. Not only this, but DW-1-Golu Chaubey who was examined on behalf of the defence has also clearly stated that when the deceased came out of the house, she was shouting that the accused person(s) had committed rape on her and set her on fire. The statement of the deceased recorded under Section 164 of the Code of Criminal Procedure, 1973 (for short, Cr.P.C.) by Smt. Suchita Srivastava, Judicial Magistrate First Class, Sagar (PW-23) also supports the

2 [2015] 5 SCR 1112 : (2015) 6 SCC 652 : 2015 INSC 392

3 [2013] 14 SCR 297 : (2013) 10 SCC 421 : 2013 INSC 638

prosecution case. The *Dehat Nalishi* (Ex. P/28) recorded by Sub Inspector, Anjana Parmaar (PW-16) also narrates the same factual position.

9. In that view of the matter, we do not find that there is any error in the concurrent orders of the Trial Judge and the High Court convicting the appellant for the offences punishable under Sections 450, 376(2)(i), 376D, 376A and 302 read with 34 of the IPC and Section 5(g)/6 of the POCSO.

10. The question that now requires to be considered is as to whether the present case would fall in the category of 'rarest of rare case' so as to confirm the death penalty or the sentence could be commuted.

11. We have perused the psychological assessment of the present appellant as conducted by the Department of Psychiatry, NSCB Medical College, Jabalpur, Madhya Pradesh so also the report of the Senior Probation and Welfare Officer, Central Jail, Bhopal, Madhya Pradesh dated 12.06.2023 and the report of the Divisional Officer, Western Division/Assistant Jail Superintendent, Central Jail Jabalpur dated 10.06.2023.

12. In the said reports, it has been found that there is nothing against the behaviour of the appellant herein in the prison. His conduct in the prison has been found to be satisfactory. The reports further reveal that though not allotted any work, the appellant is engaging himself in plantation of trees, cleaning the temple and surrounding area.

13. While considering as to whether the death penalty needs to be confirmed or not, we would be required to take into consideration various factors.

14. It is not in dispute that the appellant lost his mother at the tender age of 8 years and his elder brother at the age of 10 years. The appellant was brought up by his father as a single parent. The appellant has close family ties with his father, his sister, who is married and his grand-mother. Though, Shri Singh is right that the age of the appellant at the time of commission of crime solely cannot be taken into consideration, however the age of the appellant/accused at the time of commission of crime along with other factors can certainly be taken into consideration as to whether the death penalty needs to be commuted or not.

15. In the present case, it is to be noted that the appellant comes from a socio-economic backward stratum of the society. As already discussed hereinabove, he lost his mother and brother at the tender age. The appellant and his family members do not have any criminal background. The appellant was of a tender age of 22 years when the aforesaid incident occurred.

16. It cannot be said that the appellant is a hardened criminal, who cannot be reformed. The possibility of the appellant, if given the chance of being reformed, cannot be ruled out.

17. In that view of the matter, we find that in the present case the confirmation of death penalty would not be justified. However, at the same time we also find that the ordinary sentence of life i.e. 14 years imprisonment with remission would not meet the ends of justice. In our considered view, the present case would fall in the middle path, as laid down by this Court in a catena of judgments, which are as follows:-

i. ***Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka;***[4]

ii. ***Shankar Kisanrao Khade v. State of Maharasthra;***[5]

iii. ***Gandi Doddabasappa alias Gandhi Basavaraj v. State of Karnataka;***[6]

iv. ***Prakash Dhawal Khairnar (Patil) v. State of Maharashtra;***[7]

v. ***Mohinder Singh v. State of Punjab;***[8]

vi. ***Madan v. State of Uttar Pradesh;***[9]

vii. ***Navas @ Mulanavas v. State of Kerala***[10]

18. We, therefore, find that in the facts and circumstances of the present case, the death penalty needs to be commuted to fixed imprisonment without remission for a period of 20 years.

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4 [2008] 11 SCR 93 : (2008) 13 SCC 767 : 2008 INSC 853

5 [2013] 6 SCR 949 : (2013) 5 SCC 546 : 2013 INSC 281

6 [2017] 2 SCR 62 : (2017) 5 SCC 415

7 [2001] Supp. 5 SCR 612 : (2002) 2 SCC 35 : 2001 INSC 606

8 [2013] 3 SCR 90 : (2013) 3 SCC 294 : 2013 INSC 61

9 [2023] 16 SCR 765 : 2023 SCC OnLine SC 1473

10 [2024] 3 SCR 913 : 2024 SCC OnLine SC 315 : 2024 INSC 215

19. The order of conviction is maintained however the death penalty awarded under Sections 376A and 302 IPC is commuted to rigorous imprisonment for 20 years.

20. The appeals are allowed to the extent indicated above.

21. Pending application(s), if any, shall stand disposed of.

Result of the Case: Appeals allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 10 S.C.R. 45 : 2024 INSC 732

S. Vijikumari
v.
Mowneshwarachari C

(Criminal Appeal No. 3989 of 2024)

10 September 2024

[B.V. Nagarathna* and Nongmeikapam Kotiswar Singh, JJ.]

Issue for Consideration

Respondent sought refund of the entire maintenance amount which was paid to the appellant (wife of respondent).

Headnotes†

Protection of Woman from Domestic Violence Act, 2005 – s.25 – Respondent filed an application u/s. 25 of the Act and sought setting aside of order dated 23.02.2015 by which his appellant-wife was granted Rs.12,000/- per month as maintenance and Rs.1,00,000/- towards compensation – Respondent also sought return of the maintenance amount paid on the ground of fraud:

Held: The Magistrate while exercising his discretion under Section 25(2) of the Act has to be satisfied that a change in the circumstances has occurred, requiring to pass an order of alteration, modification or revocation – The Magistrate has to adjudge the change in the circumstances based on the material put forth by the parties in a case and having regard to the circumstances of the said case – In the instant case, the order dated 23.02.2015 has attained finality – Therefore, there cannot be a setting aside of the order dated 23.02.2015 for the period prior to such an application for revocation being made – The second prayer (for refund of the entire amount of maintenance) was not at all maintainable inasmuch as that any alteration, modification or revocation of an order passed under Section 12 of the Act owing to a change in circumstances could only be for a period *ex post facto*, i.e., post the period of an order being made in a petition under Section 12 of the Act and not to a period prior thereto – Thus, such an application for alteration, modification or revocation filed under sub-section (2) of Section 25 of the Act cannot relate to any

* Author

period prior to the order being passed, inter alia, under Section 12 of the Act – Therefore, the prayers sought by the respondent were not maintainable under sub-section (2) of section 25 of the Act. [Paras 13, 17, 18]

Protection of Woman from Domestic Violence Act, 2005 – Applicability of:

Held: The Act is a piece of Civil Code which is applicable to every woman in India irrespective of her religious affiliation and/or social background for a more effective protection of her rights guaranteed under the Constitution and in order to protect women victims of domestic violence occurring in a domestic relationship. [Para 11]

Case Law Cited

Alexander Sambath Abner vs. Miron Lede, **2009 SCC OnLine Mad 2851 – referred to.**

List of Acts

Protection of Woman from Domestic Violence Act, 2005; Code of Criminal Procedure, 1898; Code of Criminal Procedure, 1973; Bharatiya Nagarik Suraksha Sanhita, 2023.

List of Keywords

Women victims; Domestic Violence; Section 25 of Protection of Woman from Domestic Violence Act, 2005; Section 12 of Protection of Woman from Domestic Violence Act, 2005; Alteration; Modification; Revocation; Change in circumstance; Refund of amount of maintenance.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 3989 of 2024

From the Judgment and Order dated 06.04.2023 of the High Court of Karnataka at Bengaluru in CRLRP No.674 of 2022

Appearances for Parties

Ms. Sruti Chaganti, Shekhar Badiger, N. Sai Vinod, Advs. for the Appellant.

Ms. Harsha Tripathi, Balaji Srinivasan, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Nagarathna, J.

Leave granted.

2. Being aggrieved by the order dated 06.04.2023 passed in Criminal Revision Petition No.674/2022 by the High Court of Karnataka at Bengaluru, the appellant who is the wife of the respondent has preferred this appeal.

3. Briefly stated, the facts are that the appellant-wife had filed a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as "the Act"). The said petition, i.e., Criminal Miscellaneous No.6/2014 was allowed by the learned Magistrate by order dated 23.02.2015, granting Rs.12,000/- (Rupees Twelve Thousand only) per month as maintenance and Rs.1,00,000/- (Rupees One Lakh only) towards compensation. At this stage itself, it may be mentioned that the respondent-husband did not let in any evidence in the said proceeding. Being aggrieved by the order of the learned Magistrate, the respondent filed an appeal under Section 29 of the Act which was dismissed by the Appellate Court on the ground of delay. The aforesaid orders attained finality as they were not assailed by the respondent herein.

4. Thereafter, the respondent filed an application under Section 25 of the Act before the learned Magistrate. The said application was dismissed. Being aggrieved, the respondent filed Criminal Appeal No.757/2020 under Section 29 of the Act before the Appellate Court. The said appeal was allowed and the matter was remanded to the learned Magistrate with a direction to consider the application filed by the respondent under Section 25 of the Act, by giving an opportunity to both the parties to adduce their evidence and to dispose of the same in accordance with law.

5. Being aggrieved by the said order, the appellant herein filed Criminal Revision Petition No.674/2022 before the High Court, which, by the impugned order dated 06.04.2023 dismissed the same with a direction to the learned Magistrate to consider the application filed by the respondent under Section 25 of the Act, without being influenced by any observation made by the Appellate Court while disposing of Criminal Appeal No.757/2020.

Being aggrieved by the aforesaid orders, the appellant-wife has filed this appeal.

6. We have heard learned counsel for the respective parties at length.

7. Learned counsel for the appellant, during the course of her submissions, drew our attention to the prayers sought for by the respondent in the application filed under Section 25 of the Act, in light of sub-section (2) of the said Section. She submitted that the application filed under the said provision could be by an aggrieved person seeking alteration, modification or revocation of any order made under the Act and for reasons to be recorded in writing, the learned Magistrate can pass such an order appropriate to the facts of the case. But in the instant case, the respondent is seeking setting aside of the order dated 23.02.2015 passed in Criminal Miscellaneous No.6/2014 and with an additional prayer for seeking return of the entire amount of maintenance paid by the respondent to the appellant on the ground of fraud. Learned counsel for the appellant submitted that such prayers are not maintainable. She contended that the aforesaid application is not for alteration, modification or revocation of an order made under the Act; it is in substance for setting aside of the order dated 23.02.2015 passed in Criminal Miscellaneous No.6/2014; that such an application is not maintainable at all.

8. Learned counsel further submitted that the High Court as well as the Appellate Court were not right in remanding the matter to the learned Magistrate to consider the application filed by the respondent herein under sub-section (2) of Section 25 of the Act. She therefore submitted that the impugned orders may be set aside and the application filed by the respondent may be dismissed and consequently, the earlier order passed on 23.02.2015 in Criminal Miscellaneous No.6/2014 may be given effect to while sustaining the order dated 04.03.2020, by which the application under Section 25 of the Act was dismissed.

9. Per contra, learned counsel for the respondent submitted that the reason as to why the application under Section 25 of the Act was filed was owing to the fact that the appellant herein had misrepresented the fact that she was in need of maintenance whereas she is an employed person and not at all in need of maintenance. The fact that she had said that she was unemployed goes to the root of the matter and hence, despite the order of the learned Magistrate awarding Rs.12,000/- (Rupees Twelve Thousand Only) per month as maintenance having attained finality, an application under Section

25 of the Act was filed seeking revocation of the said order and the Appellate Court as well as the High Court were justified in directing the learned Magistrate to consider the said application.

10. We have considered the arguments advanced at the Bar in light of the facts of this case and Section 25 of the Act. For immediate reference, Section 25 of the Act is extracted as under:

> "**25. Duration and alteration of orders**
>
> (1) A protection order made under section 18 shall be in force till the aggrieved person applies for discharge.
>
> (2) If the Magistrate, on receipt of an application from the aggrieved person or the respondent, is satisfied that there is a change in the circumstances requiring alteration, modification or revocation of any order made under this Act, he may, for reasons to be recorded in writing pass such order, as he may deem appropriate."

On a reading of the same, it is evident that an aggrieved person or a respondent as defined under the Act can seek for alteration, modification or revocation of an order made under the provisions of the Act if there is a change in the circumstances as per sub-section (2) of Section 25 of the Act. This would indicate that after an order has been made, *inter alia*, under Section 12 of the Act, such as in the instant case granting Rs.12,000/- as maintenance per month, if there is any change in the circumstance, the same could be a ground for seeking alteration, modification or revocation of such an order. Such circumstances could be illustratively stated in the context of the present case as the wife on divorce having been given an alimony or the wife earning an amount higher than the respondent-husband and, therefore, not in need of maintenance or such other circumstances. The said change in the circumstance must occur only after an initial order is made under Section 12 of the Act and cannot relate to a period prior to the passing of an order under Section 12 of the Act.

11. The Act is a piece of Civil Code which is applicable to every woman in India irrespective of her religious affiliation and/or social background for a more effective protection of her rights guaranteed under the Constitution and in order to protect women victims of domestic violence occurring in a domestic relationship.

12. Section 25(2) of the Act contemplates an eventuality where an order passed under the Act can be altered, modified or revoked. Section 25(2) of the Act provides that the aggrieved person or the respondent, as defined under the Act, may approach the Magistrate by filing an application for alteration, modification or revocation of "any order" made under the Act. Thus, the scope of Section 25(2) of the Act is broad enough to deal with all nature of orders passed under the Act, which may include orders of maintenance, residence, protection, etc. If any such application is filed before the Magistrate by any of the two parties, i.e., the aggrieved person or the respondent, then the Magistrate may, for reasons to be recorded in writing, pass an order as he may deem appropriate. Thus, an order passed under the Act remains in force till the time that order is either set aside in an appeal under Section 29 of the Act, or altered/modified/revoked in terms of Section 25(2) of the Act by the Magistrate.

13. However, the Magistrate while exercising his discretion under Section 25(2) of the Act has to be satisfied that a change in the circumstances has occurred, requiring to pass an order of alteration, modification or revocation. The phrase "a change in the circumstances" has not been defined under the Act. The said phrase was present under Section 489 of the now repealed Code of Criminal Procedure, 1898, as well as under Section 127(1) of the Code of Criminal Procedure, 1973 (CrPC, 1973), now repealed, as is also found under Section 146(1) of the present Bharatiya Nagarik Suraksha Sanhita, 2023 (BNNS, 2023), but the legislature (Parliament) has intentionally not provided a definition for the same in the repealed Codes or the present Sanhita. Thus, the Magistrate has to adjudge the change in the circumstances based on the material put forth by the parties in a case and having regard to the circumstances of the said case. A change in the circumstances under the Act may be of either a pecuniary nature, such as a change in the income of the respondent or an aggrieved person or it could be a change in other circumstances of the party paying or receiving the allowance, which would justify an increase or decrease of the maintenance amount ordered by the Magistrate to pay or any other necessary change in the relief granted by the Magistrate including a revocation of the earlier order. The phrasing of the provision is wide enough to cover factors like the cost of living, income of the parties, etc. Further, a change in the circumstances need not just be of the respondent but

also of the aggrieved person. For example, a change in the financial circumstances of the husband may be a vital criterion for alteration of maintenance but may also include other circumstantial changes in the husband or wife's life which may have taken place since the time maintenance was first ordered.

14. However, for the invocation of Section 25(2) of the Act, there must be a change in the circumstances after the order being passed under the Act. ***Alexander Sambath Abner vs. Miron Lede, 2009 SCC OnLine Mad 2851*** is also to the same effect. Thus, an order for alteration, modification or revocation operates prospectively and not retrospectively. Though the order for grant of a maintenance is effective retrospectively from the date of the application or as ordered by the Magistrate, the position is different with regard to an application for alteration in an allowance, which may incidentally be either an increase or a reduction – to take effect from a date on which the order of alteration is made or any other date such as from the date on which an application for alteration, modification or revocation was made depending on the facts of each case.

15. The position is analogous to Sections 125 and 127 of the CrPC, 1973, wherein the legislature under Section 125(2) of the CrPC, 1973 had given power to the Magistrate to grant maintenance from the date of the application, but did not give any such power under Section 127 of the CrPC, 1973. Therefore, under the Act, the order of alteration or modification or revocation could operate from the date of the said application being filed or as ordered by the Magistrate under Section 25(2) of the Act. Thus, the applicant cannot seek its retrospective applicability, so as to seek a refund of the amount already paid as per the original order.

16. The respondent herein has however sought the following prayers in the application filed under Section 25 of the Act, which read as under:

> "WHEREFORE, the petitioner respectfully prays that this Hon'ble Court may be pleased to pass the following orders:
>
> a) Set aside the order dated 23-02-2015 passed in Crl. Mis. 6/2014,
>
> b) In pursuant of that direct the respondent to pay back the entire amount received by her by playing fraud on the court and on petitioner.

c) Direct the respondent to pay the cost of this litigation,

d) Grant such other relief or reliefs on this Hon'ble Court deem fit and proper in the circumstances of the case to meet the ends of justice."

What the respondent is seeking is in fact a setting aside of the order dated 23.02.2015 passed in Criminal Miscellaneous No.6/2014 and return of the amount paid by him to the appellant herein in terms of the said order by way of a restitution of the *status quo ante*.

17. Learned counsel for the appellant rightly contended that the said order has in fact merged with the Appellate Court's order in the appeal filed by the respondent which was dismissed on the ground of delay and there being no further challenge to the said order. In fact, the order dated 23.02.2015 has attained finality. Therefore, there cannot be a setting aside of the order dated 23.02.2015 for the period prior to such an application for revocation being made. Unless there is a change in the circumstance requiring alteration, modification or revocation of the earlier order owing to a change occurring subsequent to the order being passed, the application is not maintainable. Thus, the exercise of jurisdiction under sub-section (2) of Section 25 of the Act cannot be for setting aside of an earlier order merely because the respondent seeks setting aside of that order, particularly when the said order has attained finality by its merger with an appellate order as in the instant case unless a case for its revocation is made out. Secondly, the prayers sought for by the respondent herein are for refund of the entire amount of maintenance that was paid prior to the application under sub-section (2) of Section 25 of the Act being filed and the order dated 23.02.2015 passed in Criminal Miscellaneous No.6/2014 being in fact revoked. The revocation of an order, *inter alia*, under Section 12 of the Act sought by a party cannot relate to a period prior to such an order being passed. We find that in the instant case the second prayer was not at all maintainable inasmuch as we have already observed that any alteration, modification or revocation of an order passed under Section 12 of the Act owing to a change in circumstances could only be for a period *ex post facto,* i.e., post the period of an order being made in a petition under Section 12 of the Act and not to a period prior thereto. Thus, such an application for alteration, modification or revocation filed under sub-section (2) of Section 25 of the Act cannot relate to any period prior to the order being passed, *inter alia*, under Section 12 of the Act.

18. In the circumstances, we find that the prayers sought for by the respondent herein were not at all maintainable under sub-section (2) of Section 25 of the Act as they related to the period prior to 23.02.2015 when the original order was passed. In fact, the prayers sought for by the respondent are totally contrary to the spirit of sub-section (2) of Section 25 of the Act. While making such a prayer, the respondent could not have sought in substance for setting aside of the original order dated 23.02.2015 passed in Criminal Miscellaneous No.6/2014 and seeking refund of the maintenance amount which was paid to the appellant pursuant to the said order. The respondent could not have also sought the aforesaid prayers: firstly, because he did not participate in the proceedings before the learned Magistrate; secondly, respondent belatedly filed an appeal before the Appellate Court which was dismissed and thirdly, when that appeal was dismissed on the ground of delay, he did not choose to assail the said order before a higher forum.

19. In the circumstances, the orders of the High Court as well as the first Appellate Court are set aside and the application filed by the respondent is dismissed. However, liberty is reserved to the respondent herein to file a fresh application under Section 25 of the Act, if so advised. If such an application is filed by the respondent, the same shall be considered by the learned Magistrate having regard to the observations made above and on its own merits, which can be relatable to the period subsequent to the date of making the earlier order dated 23.02.2015 in the instant case. Any revocation of the order dated 23.02.2015 could be with effect from the date of the application, if any, to be made by the respondent herein or as ordered by the learned Magistrate.

20. This appeal is allowed and disposed of in the aforesaid terms.

Pending application(s), if any, shall stand disposed of.

Result of the Case: Appeal allowed.

[†]*Headnotes prepared by:* Ankit Gyan

[2024] 10 S.C.R. 54 : 2024 INSC 717

Parveen Kumar
v.
The State of Himachal Pradesh

(Criminal Appeal No(S). 1014-1015 of 2013)

23 September 2024

[Bela M. Trivedi* and Satish Chandra Sharma, JJ.]

Issue for Consideration

Issue arose, if the High Court was justified in convicting and sentencing the husband u/ss. 498A and 306 IPC for subjecting the victim-wife to cruelty and forcing her to commit suicide.

Headnotes†

Penal Code, 1860 – ss.498-A and 306 – Husband or relative of husband of a woman subjecting her to cruelty – Abetment of suicide – Evidence Act, 1872 – s.113A – Presumption as to abetment of suicide by a married woman – Victim-wife committed suicide by consuming tablets of aluminum phosphide-insecticide within two years of marriage – FIR by the victim's brother alleging that the husband had subjected the victim to cruelty and forced her to commit suicide – Trial court convicted and sentenced the husband for the offence u/s.498-A however, acquitted him for the offence u/s.306 – High Court upheld the order of conviction u/s.498A as also convicted and sentenced him u/s.306 – Challenge to:

Held: Giving birth to a male child by the victim and filing of three cases during her life time against the husband-appellant, FIR u/ss.498-A and 506; complaint u/s.107/151 CrPC and case u/s.125 CrPC seeking maintenance for herself and her child, not disputed – Fact of the deceased having committed suicide by consuming tablets of aluminum phosphide-insecticide, also duly proved by the prosecution – Courts below concurrently held the appellant guilty of the offence u/s.498-A by holding that the appellant had subjected the deceased to cruelty – Appellant's case that as per the suicide note, the suicide was committed by the deceased on account of her intolerable pain and illness and not due to the cruelty of the appellant, cannot be accepted –

* Author

Suicidal note not duly exhibited for being admitted in evidence, as also the appellant had not even bothered to inform the parents of the deceased immediately after the incident smacked of his guilt – High Court rightly raised the presumption u/s.113A to hold that the suicide was abetted by the appellant – Prosecution by leading cogent evidence established that the deceased had committed suicide within a period of seven years from the date of her marriage and that the husband had subjected her to cruelty as contemplated in s.498-A – Thus, no illegality or infirmity in the order passed by the High Court convicting the appellant for the offences u/ss.498-A and 306. [Paras 9-11]

Case Law Cited

Hans Raj v. State of Haryana [2004] 2 SCR 676 **: 2004 (12) SCC 257;** *Naresh Kumar v. State of Haryana* [2024] 2 SCR 830 **: 2024 (3) SCC 573 – relied on.**

List of Acts

Penal Code, 1860; Evidence Act, 1872; Code of Criminal Procedure, 1973.

List of Keywords

Subjecting wife to cruelty and forcing her to commit suicide; Abetment of suicide; Presumption as to abetment of suicide by married woman; Consuming tablets of aluminum phosphide,insecticide; Commission of wilful conduct; Maintenance; Presumption u/s.113A of the Evidence Act.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1014-1015 of 2013

From the Judgment and Order dated 16.03.2011 of the High Court of H.P. at Shimla in CRLA Nos. 97 and 325 of 2000

Appearances for Parties

Ashok Tobria, M.S. Yadav, Rajesh Kumar Pandey, S.Y. Usmani, Rishi Kumar, Sahil Kaushik, Sachin Soni, Mayank Yadav, Pushkar Anand, Advs. for the Appellant.

Vikrant Narayan Vasudeva, Sarthak Chiller, Rohit Lochav, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Bela M. Trivedi, J.

1. Both the appeals arise out of the common Judgment and Order dated 16.03.2011 passed by the High Court of Himachal Pradesh at Shimla in the Criminal Appeal No. 97 of 2000 preferred by the appellant-Parveen Kumar and the Criminal Appeal No. 325 of 2000 preferred by the State of Himachal Pradesh.

2. The short facts as curled out from the record are that on 10.10.1992 the appellant had married Raksha Devi (the deceased). The said Raksha Devi gave birth to a male child from the loins of the appellant at her parental home on 18.12.1993. As per the case of the prosecution, the appellant used to beat his wife even when she was pregnant and therefore, she had gone away to her parental home and had got registered an FIR being No. 59 of 1993 for the offence under Section 498-A of IPC on 12.09.1993 at the Police Station Ghumarwin. She also filed a petition under Section 125 of the Cr.P.C. seeking maintenance from the appellant, and also filed another complaint under Section 107/151 Cr.P.C. Somewhere in May 1994, the appellant brought back his wife to her matrimonial home. On 22.09.1994, the said Raksha Devi gave a statement in the Court of Sub-Divisional Judicial Magistrate in the proceedings under Section 125 of Cr.P.C. that she did not want to pursue the matter as she was living happily with the appellant. Similar statement was also allegedly given in the Court in respect of the complaint filed by her. However, on 26.09.1994 the wife of the appellant Raksha Devi consumed tablets of aluminum phosphide at about 1:45 a.m. She was admitted in the hospital for treatment, however could not survive and died at 5.00 a.m. on the same day.

3. The information regarding her death was reduced to writing by the SHO in the daily diary register vide DDR No. 30. The SHO sent the body of the deceased to the hospital for carrying out the post-mortem. On 01.10.1994 the brother of the deceased, Sh. Madan Lal (PW-3) lodged an FIR being No. 97 of 1994 at the Police Station, Bhoranj alleging that the appellant had subjected his sister to cruelty and forced her to commit suicide. The Investigating Officer after carrying out the investigation submitted the chargesheet against the appellant for the offence under Section 498-A and 306 of IPC. The Sessions

Court, Hamirpur, H.P. after appreciating the evidence on record adduced by the prosecution as well as by the defence, convicted the appellant-accused for the offence under Section 498-A IPC and sentenced him to undergo rigorous imprisonment for a period of two years and pay a fine of Rs.1,000/- with the default clause, however, acquitted the appellant for the offence under Section 306 of IPC vide the Judgment and Order dated 24.02.2000.

4. Being aggrieved by the said Judgment and Order passed by the Sessions Court, the appellant preferred Criminal Appeal No. 97 of 2000 against his conviction under Section 498-A IPC whereas the State of Himachal Pradesh preferred the Criminal Appeal No. 325 of 2000 against the acquittal of the appellant from the offence under Section 306 of IPC before the High Court. The High Court vide the impugned Judgment and Order dismissed the appeal preferred by the appellant whereas allowed the appeal preferred by the State and convicted the appellant for the offence under Section 306 of IPC. He was directed to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.3,000/- with default clause of the offence under Section 306 of IPC, while confirming the conviction and sentence imposed by the Sessions Court for the offence under Section 498-A of IPC.

5. The learned counsel appearing for the appellant submitted that out of the three cases filed by the deceased – Raksha Devi against the appellant, the complaint lodged under Section 107/151 of Cr.P.C. was dismissed by the concerned Court on 04.04.1994, and the other two cases filed under Section 125 Cr.P.C. and FIR No. 59/93 under Section 498-A IPC were settled between the parties as per the Order dated 22.09.1994 passed by the concerned Court. According to him the settlement between the parties could not be treated as admission of guilt, on the contrary after the settlement the deceased had come to her matrimonial home to stay with the appellant. He further submitted that there were no allegations of cruelty made between the period June 1993 till she committed suicide on 26.09.1994 and therefore no presumption under Section 113A of the Indian Evidence Act could be raised against the appellant. Placing reliance of the decision of this Court in *Hans Raj Vs. State of Haryana*[1] and in case of *Naresh*

1 [2004] 2 SCR 676 : (2004) 12 SCC 257

Kumar vs. State of Haryana[2] he submitted that the conviction could not be based on conjectures and surmises.

6. *Per contra* the learned counsel appearing for the respondent-State submitted that the appellant had tried to mislead the investigation by stating that the deceased had taken the tablets of aluminum phosphide as an insecticide by mistake. He further submitted that the death had happened within two years of the marriage and during the said two years the deceased had filed three complaints against the appellant alleging harassment and cruelty and therefore the presumption under Section 113A of the Evidence Act was rightly raised by the High Court for convicting the appellant under Section 306 of IPC. According to him though the appellant had examined two defense witnesses, the testimony of both the witnesses did not inspire any confidence.

7. For better appreciation of the submissions made by the learned counsel for the parties it would be beneficial to reproduce the provisions contained in Section 498-A and 306 IPC as also Section 113A of the Indian Evidence Act. The said provisions read as under:

> **"498A. Husband or relative of husband of a woman subjecting her to cruelty.** — Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.—For the purposes of this section, "cruelty" means— (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.
>
> **306. Abetment of suicide.** —If any person commits suicide, whoever abets the commission of such suicide,

2 [2024] 2 SCR 830 : (2024) 3 SCC 573

shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

113A. Presumption as to abetment of suicide by a married woman. —When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation. — For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860)."

8. From the explanation to Section 498-A IPC, it is discernible that the word 'Cruelty' means, (i) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide (ii) any wilful conduct which is of such a nature as is likely to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or (iii) harassment of the woman with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. So far as the instant case is concerned, as per the case of the prosecution the appellant had subjected the deceased to Cruelty i.e. had committed wilful conduct which was of such a nature, that drove her to commit suicide. Undoubtedly, the allegations of Cruelty as contemplated under Section 498A have to be established beyond reasonable doubt. Similarly, the charge under Section 306 also has to be proved by the Prosecution beyond reasonable doubt by leading cogent evidence that the appellant abetted the deceased to commit suicide as contemplated in Section 107 of IPC. Of course, Section 113A of the Evidence Act permits the Court to raise a presumption as to abetment of suicide, if the Suicide was committed within seven years of the marriage and if it is proved that she was subjected to

the "Cruelty" as explained in Section 498A by her husband or the relative of the husband. However, for the purpose of raising the presumption by the Court under Section 113A of the Evidence Act, the basic facts as contemplated in the said provision, need to be proved by the Prosecution.

9. In the light of the above legal position, if the facts of the present case are appreciated, it appears that there are certain facts which have not been disputed, rather have been duly proved by the prosecution. Apart from the fact of the appellant had married the deceased on 10.10.1992, and the deceased had given birth to a male child from the loins of the appellant on 18.12.1993, the filing of three cases by the deceased during her life time against the appellant, i.e. (i) FIR No. 59/1993 dated 12.07.1993 under Section 498-A and 506 IPC; (ii) complaint/Kalendra under Section 107/151 of Cr.P.C. dated 01.07.1993 and (iii) case under Section 125 Cr.P.C in May, 1994 seeking maintenance for herself and her child, is also not disputed. The fact of the deceased having committed suicide by consuming tablets of aluminum phosphide, which is supposed to be an insecticide, is also duly proved by the prosecution. It is also pertinent to note that the trial Court and the High Court have concurrently held the appellant guilty of the offence under Section 498-A IPC by holding that the appellant had subjected the deceased to cruelty.

10. Though it was sought to be submitted on behalf of the appellant that as per the suicide note Exhibit DF, the suicide was committed by the deceased on account of her intolerable pain and illness and not due to the Cruelty of the Appellant, the said contention deserves to be considered for rejection only. Apart from the fact that the said suicidal note does not appear to have been duly exhibited for being admitted in evidence, the fact that the appellant had not even bothered to inform the parents of the deceased immediately after the incident smacked of his guilt. The two defense witnesses claiming to be the neighbours of the appellant were examined to prove that the relationship between the appellant and his wife was cordial and not discordant, however they also do not inspire any confidence, in view of the undisputed and proved facts that the deceased had filed three cases against the appellant during her lifetime in respect of harassment and cruelty subjected to her by the Appellant.

11. In that view of the matter, the High Court has rightly raised the presumption under Section 113A of the Evidence Act to hold that the suicide was abetted by the Appellant. There cannot be any disagreement to the proposition laid down by this Court in case of ***Hans Raj vs. State of Haryana*** (supra) and ***Naresh Kumar vs. State of Haryana*** (supra) relied upon by the learned Counsel for the Appellant, to submit that unlike Section 113B of the Evidence Act, a statutory presumption does not arise in Section 113A by operation of law merely on the proof of the circumstances enumerated in the said provision, and that Section 113A gives a discretion to the Court to raise a presumption. As discussed hereinabove the prosecution by leading cogent evidence had established that the deceased had committed suicide within a period of seven years from the date of her marriage and that the Appellant that is her husband had subjected her to cruelty as contemplated in Section 498-A of IPC. We therefore, do not find any illegality or infirmity in the impugned order passed by the High Court convicting the Appellant for the offences under Section 498-A r/w Section 306 of IPC.

12. The Appeals being devoid of merits are dismissed. Dismissed accordingly.

Result of the Case: Appeal dismissed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 10 S.C.R. 62 : 2024 INSC 737

Kailashben Mahendrabhai Patel & Ors.
v.
State of Maharashtra & Anr.

(Criminal Appeal No. 4003 of 2024)

25 September 2024

[Pamidighantam Sri Narasimha* and Pankaj Mithal, JJ.]

Issue for Consideration

FIR was filed against the appellants under Sections 498A, 323, 504, 506 read with Section 34 IPC. Whether the High Court was justified in dismissing the petition under Section 482, CrPC for quashing of the said FIR and the chargesheet against the appellants and holding that a prima facie case of cruelty was made out against them under Section 498A, Penal Code, 1860.

Headnotes†

Penal Code, 1860 – ss.498A, 323, 504, 506 r/w s.34 – Ingredients of – When not made out – Complaint filed by respondent no.2-wife making vague allegations alleging dowry demand and threat by the appellants (step mother-in-law, step brother-in-law, father-in-law and one other person) to deny her and her husband a share in the property – Petition u/s.482, CrPC filed by the appellants for quashing, dismissed by High Court – Correctness:

Held: Impugned judgment set aside – Criminal proceedings were filed with mala fide intention only to harass the appellants – Though all the allegations related to demand of dowry, the complainant chose not to involve her husband in the criminal proceedings – Complainant and her husband distributed amongst themselves, the institution of civil and criminal proceedings against the appellants with the husband instituting the civil suit and the complainant filing criminal proceedings – The provocation for the Complaint/FIR was essentially the property dispute between father and son and it intended only to further their interest of the civil dispute – Allegations made were general, vague, and omnibus and lacked in particulars and details – The essence of

* Author

the complaint was in the alleged threat to deprive the husband any share in the property with respect to which the husband had already filed the suit for declaration – No offence made out on the basis of vague and unclear allegations – Further, the domestic violence complaint filed by respondent no.2 with identical allegations was also rejected as being false and untenable – None of the ingredients of ss.498A, 323, 504, 506 r/w s.34 made out, criminal proceedings against the appellants are abuse of process of law – FIR and chargesheet quashed. [Paras 13-15, 17, 18]

Code of Criminal Procedure, 1973 – s.482 – Constitution of India – Article 226 – Duty of the court, when complaint/FIR is frivolous/vexatious/instituted with ulterior motive or is civil in nature – Discussed.

Quashing – Of criminal proceedings after filing of charge sheet – Permissibility:

Held: There is no prohibition against quashing of the criminal proceedings even after the filing of charge sheet. [Para 16]

Case Law Cited

Mohammad Wajid and Another v. State of U.P. and Others [2023] 11 SCR 313 **: (2023) SCC OnLine SC 951;** *Jaswant Singh v. State of Punjab* [2021] 6 SCR 1100 **: (2021) SCC OnLine SC 1007;** *Usha Chakraborty v. State of W.B.***(2023) SCC OnLine SC 90;** *Neelu Chopra v. Bharti* [2009] 14 SCR 1074 **: (2009) 10 SCC 184;** *Mamidi Anil Kumar Reddy v. State of A.P.* [2024] 2 SCR 252 **: (2024) SCC OnLine SC 127;** *Kahkashan Kausar v. State of Bihar* [2022] 1 SCR 558 **: (2022) 6 SCC 599;** *Achin Gupta v. State of Haryana* [2024] 6 SCR 129 **: (2024) SCC OnLine SC 759;** *Anand Kumar Mohatta v. State (NCT of Delhi)* [2018] 13 SCR 1028 **: (2019) 11 SCC 706;** *Joseph Salvaraj A. v. State of Gujarat* [2011] 8 SCR 815 **: (2011) 7 SCC 59;** *A.M. Mohan v. State* [2024] 3 SCR 722 **: (2024) SCC OnLine SC 339;** *Mamta Shailesh Chandra v. State of Uttarakhand* **(2024) SCC OnLine SC 136 – relied on.**

List of Acts

Penal Code, 1860; Code of Criminal Procedure, 1973.

List of Keywords

Quashing; Cruelty; Dowry demand; Matrimonial disputes; Dispute civil in nature; General, vague, omnibus allegations lacking in particulars and details; Domestic violence complaint dismissed; Abuse of process of law/criminal process; Travesty of justice; Complaint/FIR frivolous/vexatious, civil in nature.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 4003 of 2024

From the Judgment and Order dated 05.05.2017 of the High Court of Judicature at Bombay at Aurangabad in CRLA No. 4015 of 2014

Appearances for Parties

Dr. Abhishek Manu Singhvi, S. Niranjan Reddy, Sidharth Luthra, Sr. Advs., Ms. Shally Bhasin, Prateek Gupta, Prateek Yadav, Siddharth Seem, Ms. Palak Arora, S. S. Shroff, Jay Kansara, Chiranjivi Sharma, Vasu Gupta, Kushagra Raghuvanshi, Karanvir Gogia, Prudhvi Samrat, Pranaya Goyal, Advs. for the Appellants.

Sanjeev Despande, Sr. Adv., Shrirang B. Varma, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Adarsh Dubey, Mahesh Agarwal, Ankur Saigal, Ms. S. Lakshmi Iyer, Victor Das, Shashwat Singh, E. C. Agrawala, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Pamidighantam Sri Narasimha, J.

1. Leave granted.

2. This criminal appeal is against the dismissal of a petition under Section 482 of the CrPC to quash the FIR and the subsequent chargesheet against the appellants herein. By order dated 01.05.2018, this Court issued notice in the Special Leave Petition and stayed the criminal proceedings. The short and necessary facts for disposal of this criminal appeal are as follows.

3. Respondent no. 2 is the complainant. She was married to one Niraj Mahendrabhai Patel in 2002, and he is not a party in these

proceedings. On 01.03.2013, the complainant filed a complaint, pursuant to which an FIR was registered on 25.03.2013 at P.S. Jalna, Maharashtra under Sections 498A, 323, 504, 506 read with Section 34 IPC against the appellants, who are her step mother-in-law (appellant no. 1), step brother-in-law (appellant no. 2), father-in-law (appellant no. 3), and the Munim (appellant no. 4). The chargesheet in this case was filed on 30.07.2013.

4. A precise but accurate description of the allegations in the FIR are that, *i*) her husband is the son of the appellant no. 3 and his late first wife. Thereafter, the appellant no. 3 married appellant no. 1 and their son is appellant no. 2. She lived with her husband, son and daughter in Mumbai, from where her husband was managing the family business by giving complete accounts to the family, *ii*) at the time of marriage her father gave certain articles and cash as dowry, and *iii*) she also held a joint locker at a bank in Anand, Gujarat with appellant no. 1, keys to which were kept by appellant no. 1 alone. *iv*) At the time of the birth of her daughter, which was eight years before the complaint, appellant nos. 1 and 3 visited her at the hospital and threatened to deprive her of a share in the property and refused to return the gold and silver ornaments that were kept in the locker. *v*) About 2-4 months after the delivery, when she returned to her matrimonial house in Mumbai, appellant nos. 1 and 3 initially refused to take her and later deprived her of food and physically assaulted her. *vi*) Even when her son was born, which was four years before the complaint, appellants no. 1 to 3 visited her at Jalna and threatened to deprive her and her husband any share in the property. *vii*) She has also alleged that appellant no. 2 hindered her daughter's education by cancelling her school admission. *viii*) Against appellant no. 4, who is the Munim, she has alleged that he threatened her that the family property only belongs to appellant no. 2 and that the complainant, and her husband will have no share in it. *ix*) Under these circumstances, being frightened, she left the house of the appellants along with her husband and children and started living in Jalna, her parental home. *x*) Even at Jalna, the accused persons threatened her and asked her to bring Rs. 50,00,000/- for the future of her son and daughter. There is danger to her life and also to the life of her husband and children and therefore the complaint on 01.03.2013. The FIR was registered on 25.03.2013, and chargesheet came to be filed on 30.07.2013.

5. The appellants filed a petition under Section 482 of the CrPC, 1973 for quashing the FIR dated 25.03.2013 and the chargesheet dated 30.07.2013. By the order impugned herein, the High Court held that a prima facie case of cruelty is made out under Section 498A. The High Court also observed that the complainant specifically referred to instances of cruelty and attributed overt acts to each appellant. Rejecting the contention of the appellants that neither the Police Station, nor the Courts will have jurisdiction, the Court held that Jalna would have jurisdiction as per Sections 178 and 179 of the CrPC as some part of the offence was committed there.

6. The appellants have preferred the present appeal against the High Court's order. While issuing notice on 01.05.2018, this Court also stayed further proceedings.

7. We have heard Dr Abhishek Manu Singhvi and Mr Sidharth Luthra, learned senior counsels for the appellants and Mr. Shrirang B Varma, learned counsel for the State of Maharashtra and Mr. Sanjeev Despande, learned senior counsel for respondent no. 2.

    7.1 The learned senior counsels for the appellants have contended that the allegations in the FIR are general and omnibus in nature and lack material particulars bereft of any details, rendering the complaint vague and obscure. There is an existing civil dispute between the father and the son and as such this FIR is an abuse of the process of criminal law. Further, Section 161 statements of witnesses are identical and are based on information from respondent no. 2. They are vague and do not have material particulars about the date and time of the incident. Our attention is also drawn to the judgment and order dated 16.01.2019, passed by the Judicial Magistrate First Class, Jalna dismissing identical allegations, but under Section 12 of the Domestic Violence Act. On the other hand, the learned counsel for the respondent supported the decision and reasoning adopted by the High Court.

8. *Analysis:* After identifying certain allegations in the Complaint/FIR, the High Court came to a quick conclusion that there are specific allegations against each of the accused. After referring to certain precedents on the scope and ambit of the power under Section 482 CrPC, the High Court came to a conclusion that exercise of power under Section 482 for quashing an FIR/Complaint is not warranted in

the facts and circumstances of the case. Beyond holding that there are specific allegations, there is no other analysis. The duty of the High Court, when its jurisdiction under Section 482 CrPC or Article 226 of the Constitution is invoked on the ground that the Complaint/ FIR is manifestly frivolous, vexatious or instituted with ulterior motive for wreaking vengeance, to examine the allegations with care and caution is highlighted in a recent decision of this Court in *Mohammad Wajid and Another* v. *State of U.P. and Others*[1]*:*

> *"34. At this stage, we would like to observe something important. Whenever an accused comes before the Court invoking either the inherent powers under Section 482 of the Code of Criminal Procedure (CrPC) or extraordinary jurisdiction under Article 226 of the Constitution to get the FIR or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into the FIR with care and a little more closely. We say so because once the complainant decides to proceed against the accused with an ulterior motive for wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is very well drafted with all the necessary pleadings. The complainant would ensure that the averments made in the FIR/complaint are such that they disclose the necessary ingredients to constitute the alleged offence. Therefore, it will not be just enough for the Court to look into the averments made in the FIR/ complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not. In frivolous or vexatious proceedings, the Court owes a duty to look into many other attending circumstances emerging from the record of the case over and above the averments and, if need be, with due care and circumspection try to read in between the lines. The Court while exercising its jurisdiction under Section 482 of the CrPC or Article 226 of the Constitution need not*

1 [2023] 11 SCR 313 : 2023 SCC OnLine SC 951.

restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/registration of the case as well as the materials collected in the course of investigation. Take for instance the case on hand. Multiple FIRs have been registered over a period of time. It is in the background of such circumstances the registration of multiple FIRS assumes importance, thereby attracting the issue of wreaking vengeance out of private or personal grudge as alleged."

8.1 Keeping in mind the broad principle as enunciated in the above referred precedent, we will now examine the Complaint/FIR challenged by the appellants in the Section 482 proceeding.

9. The FIR in this case is rather unique, in as much as the complainant has chosen not to involve her husband in the criminal proceedings, particularly when all the allegations relate to demand of dowry. It appears that the complainant and her husband have distributed amongst themselves, the institution of civil and criminal proceedings against the appellants. While the husband institutes the civil suit, his wife, the complainant has chosen to initiate criminal proceedings. Interestingly, there is no reference of one proceeding in the other. On 27.02.2013, the husband filed the Special Civil Suit No. 35 of 2013 in Anand against the three appellants, i.e. his father, stepmother and stepbrother seeking for a declaration that the property is ancestral in nature and that the father has no right to alienate or dispose of the property. In that suit the husband also sought a declaration that he is entitled to use the trademark of the family business. Though the written statement filed by the appellants in the suit is brought on record, we are not inclined to examine the details of the civil dispute, but suffice to note the existence of a highly contentious civil dispute between the complainant's husband at one hand and her father-in-law and others on the other hand.

9.1 While the husband chose to institute the civil suit on 27.02.2013, the complainant filed the present criminal complaint on 01.03.2013 alleging demand of dowry and threat by appellants that she and her husband will be denied a share in the property. The provocation for the Complaint/FIR is essentially the property dispute between father and son.

9.2 Further, the rights and claims in the suit are the very basis and provocation for filing the criminal cases. The Complaint/ FIR is replete with just one theme i.e. that the appellants are threatening them that they will deny share in the property. The Complaint/FIR is intended only to further their interest of the civil dispute. In *G. Sagar Suri* v. *State of U.P* [2] this Court cautioned that:

> *"8. Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence.*
>
> *Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."*

9.3 The duty of the court, when FIR has predominating and overwhelming civil flavour is also reflected in the opinion of this Court in *Jaswant Singh* v. *State of Punjab*,[3] this court observed that:

> *"19. From the above discussion on the settled legal principles, it is clear from the facts of the present case that there was a clear abuse of the process of the Court and further that the Court had a duty to secure the ends of justice. We say so for the following reasons;*
>
> *a) The allegations made in the FIR had an overwhelmingly and predominatingly a civil*

2 (2000) 2 SCC 636.

3 [2021] 6 SCR 1100 : 2021 SCC OnLine SC 1007.

> *flavour inasmuch as the complainant alleged that he had paid money to Gurmeet Singh, the main accused to get employment for his son abroad. If Gurmeet Singh failed the complainant could have filed a suit for recovery of the amount paid for not fulfilling the promise.*
>
> *…*
>
> *20. In our considered view, the High Court erred in firstly not considering the entire material on record and further in not appreciating the fact that the dispute, if any, was civil in nature and that the complainant had already settled his score with the main accused Gurmeet Singh against whom the proceedings have been closed as far back as 26.09.2014. In this scenario, there remains no justification to continue with the proceedings against the appellant."*

10. We will now examine the 'specific allegations' in the FIR/complaint. *Firstly*, the complainant referred to certain items which are said to have been given by her father at the time of marriage. These items are (i) one Scorpio car; (ii) T.V.; (iii) fridge; (iv) DVD Tape; (v) silver utensils; (vi) 100 to 150 tolas gold; (vii) and Rs. 5 lacs. This allegation relates to the year 2002 and the present complaint is of the year 2013. It is important to mention at this very stage that identical allegations in a DV case filed by the complainant were taken up at trial and the Judicial Magistrate, First Class had disbelieved the complainant's version. We will be dealing with the judgment of the Judicial Magistrate, First Class in little more detail in the succeeding paras of the judgment. The *second* allegation relates to a bare statement that there exists a joint locker and that the keys of the said locker are with her stepmother-in-law, that is the appellant no. 1. Even on this, the Judicial Magistrate, First Class has observed that there are no details whatsoever, about the bank or the locker.

10.1 The tendency to make general, vague, and omnibus allegation is noticed by this Court in many decisions. In *Usha Chakraborty* v. *State of W.B.*,[4] this court observed that:

4 2023 SCC OnLine SC 90.

> *"16... the respondent alleged commission of offences under Sections 323, 384, 406, 423, 467, 468, 420 and 120B, IPC against the appellants. A bare perusal of the said allegation and the ingredients to attract them, as adverted to hereinbefore would reveal that the allegations are vague and they did not carry the essential ingredients to constitute the alleged offences.... The ingredients to attract the alleged offence referred to hereinbefore and the nature of the allegations contained in the application filed by the respondent would undoubtedly make it clear that the respondent had failed to make specific allegation against the appellants herein in respect of the aforesaid offences. The factual position thus would reveal that the genesis as also the purpose of criminal proceedings are nothing but the aforesaid incident and further that the dispute involved is essentially of civil nature. The appellants and the respondents have given a cloak of criminal offence in the issue ..."*

10.2 Similarly, dealing with allegations lacking in particulars and details, in *Neelu Chopra* v. *Bharti*,[5] this court observed that:

> *"7. ...what strikes us is that there are no particulars given as to the date on which the ornaments were handed over, as to the exact number of ornaments or their description and as to the date when the ornaments were asked back and were refused. Even the weight of the ornaments is not mentioned in the complaint and it is a general and vague complaint that the ornaments were sometime given in the custody of the appellants and they were not returned. What strikes us more is that even in Para 10 of the complaint where the complainant says that she asked for her clothes and ornaments which were given to the accused and they refused to give these back, the date is significantly absent."*

5 [2009] 14 SCR 1074 : (2009) 10 SCC 184.

11. The *third* allegation is against appellant no. 1, the mother-in-law, who is said to have threatened the complainant when she gave birth to a girl child. The threat is that the complainant will not get her gold and silver ornaments, and her husband will not get any share in the property. The allegations are again vague, lacking in basic details. The essence of the complaint is in the alleged threat to deprive the husband any share in the property with respect to which the husband has already filed the suit for declaration.

12. The complaint also refers to a small incident where the complainant's brother accompanied her to the matrimonial house, when the appellants no. 1 and 3 are alleged to have refused to take her back but on persuasion by her brother, she was allowed to stay. There is also a vague allegation that, when the complainant gave birth to a second child, appellants 1 and 2 came and *"quarrelled"* with the complainant, her brother, parents and threatened them. This Court had occasion to examine the phenomenon of general and omnibus allegations in the cases of matrimonial disputes. In *Mamidi Anil Kumar Reddy* v. *State of A.P.*[6] this Court observed that:

> *"14. ...A bare perusal of the complaint, statement of witnesses' and the charge-sheet shows that the allegations against the Appellants are wholly general and omnibus in nature; even if they are taken in their entirety, they do not prima facie make out a case against the Appellants. The material on record neither discloses any particulars of the offences alleged nor discloses the specific role/allegations assigned to any of the Appellants in the commission of the offences.*
>
> *15. The phenomenon of false implication by way of general omnibus allegations in the course of matrimonial disputes is not unknown to this Court. In Kahkashan Kausar alias Sonam v. State of Bihar, this Court dealt with a similar case wherein the allegations made by the complainant-wife against her in-laws u/s. 498A and others were vague and general, lacking any specific role and particulars. The court proceeded to quash the FIR against the accused persons*

6 2024 SCC OnLine SC 127.

and noted that such a situation, if left unchecked, would result in the abuse of the process of law."

13. There is also an allegation against the appellant no. 2 about which the complainant passingly mentioned that "*my daughter's education disturbed since my brother-in-law Rahul cancelled her school admission by signing fraudulently".* The complaint is again silent about when such an act was done, where was it done, which was the school in which the admission was cancelled, what documents were signed for such cancellation, and what is fraud played by him. It is impossible to conceive of any offence on the basis of such vague and unclear allegations. Lastly, there is an allegation against the appellant no. 4, the Munim against whom it is said *"Vijay Ranchhodbhai Patel is telling stories to my in-laws against me, my husband and my children and making them to mentally torture us".* The Munim is said to have threatened them and ask them to go away as there is nothing left for them as the entire property belongs to Rahul, appellant no. 2.

13.1 In *Kahkashan Kausar* v. *State of Bihar*[7] this Court noticed the injustice that may be caused when parties are forced to go through tribulations of a trial based on general and omnibus allegations. The relevant portion of the observation is as under:

> *"11. …in recent times, matrimonial litigation in the country has also increased significantly and there is a greater disaffection and friction surrounding the institution of marriage, now, more than ever. This has resulted in an increased tendency to employ provisions such as Section 498-A IPC as instruments to settle personal scores against the husband and his relatives.*
>
> *18. ... upon a perusal of the contents of the FIR dated 1-4-2019, it is revealed that general allegations are levelled against the appellants. The complainant alleged that "all accused harassed her mentally and threatened her of terminating her pregnancy". Furthermore, no specific and distinct allegations have*

7 [2022] 1 SCR 558 : (2022) 6 SCC 599.

been made against either of the appellants herein i.e. none of the appellants have been attributed any specific role in furtherance of the general allegations made against them. This simply leads to a situation wherein one fails to ascertain the role played by each accused in furtherance of the offence. The allegations are, therefore, general and omnibus and can at best be said to have been made out on account of small skirmishes... However, as far as the appellants are concerned, the allegations made against them being general and omnibus, do not warrant prosecution.

21. …it would be unjust if the appellants are forced to go through the tribulations of a trial i.e. general and omnibus allegations cannot manifest in a situation where the relatives of the complainant's husband are forced to undergo trial. It has been highlighted by this Court in varied instances, that a criminal trial leading to an eventual acquittal also inflicts severe scars upon the accused, and such an exercise must, therefore, be discouraged."

14. One important event that gives us a clear impression that the criminal proceedings were instituted with a mala fide intention, only to harass the appellants, is the filing of the Domestic Violence case. After the institution of the Civil Case on 27.02.2013 and thereafter the present Criminal Complaint/FIR, respondent no. 2 filed a complaint under Section 12 of the Domestic Violence Act on 06.04.2013, based on similar allegations. The DV complaint refers to the same items, a Scorpio car, T.V., fridge, DVD Tape, silver articles, 100 to 150 tolas gold and cash of Rs. 5 lacs as dowry. Again, there is an allegation that the accused have threatened that she will not get a share in the property as she gave birth to a girl child. There are similar allegations against appellant no. 2 as well as the Munim, the appellant no. 4. The domestic violence complaint went to trial and culminated in a detailed judgment of the Judicial Magistrate, First Class, Jalna dated 16.01.2019. We are informed that the judgment and order has become final as there was no appeal against the said order. While dismissing the domestic violence complaint, the learned judge observed as under:

> "*19. During cross examination, the applicant admitted that the property dispute is going on in between her and respondents. Again, she voluntarily stated that the property dispute is pending in between her husband and parents in law. Moreover, the applicant appears deposed specifically that where ever Joint Bank Accounts are in the name of respondents, her and her husband, in such cases, respondents shall be prohibited from operation said accounts and she shall be allowed to operate. It further appears that the applicant family shall be provided same level of accommodation as holding by respondents.*
>
> *20. The above ocular evidence and admission are clearly suggesting that the applicant has brought the present application at the behest of her husband and with ulterior motive to grab property which the husband of the applicant may be entitled by other provisions of law. The wordings used in the application reveal selfish nature of the applicant. Hence, in the given circumstances, I am of opinion that it would be unsafe to rely on the sole testimony of the applicant without corroboration.*
>
> *21. It seems that the applicant has not brought any other cogent and reliable evidence in support of her said oral evidence. Moreover, it appears that the case filed U/s 498(A) of IPC bearing RCC No. 376/2014 is not yet concluded. There is no record showing that respondents have been held guilty till today in that matter. It means that said allegations are not yet proved and not available for corroboration purpose. Therefore, I am coming to the conclusion that there is no cogent and reliable evidence as to domestic violence and accordingly I record my finding to Point No. 1 as "No"*."

15. We are not referring to all the findings of the Court dismissing the domestic violence complaint. It is sufficient to note that identical allegations were examined in detail, subjected to strict scrutiny, and rejected as being false and untenable. This case is yet another instance of abuse of criminal process and it would not be fair and just to subject the appellants to the entire criminal law process. In *Achin Gupta* v. *State of Haryana*,[8] this court observed that:

8 [2024] 6 SCR 129 : 2024 SCC OnLine SC 759.

"20. It is now well settled that the power under Section 482 of the Cr. P.C. has to be exercised sparingly, carefully and with caution, only where such exercise is justified by the tests laid down in the Section itself. It is also well settled that Section 482 of the Cr. P.C. does not confer any new power on the High Court but only saves the inherent power, which the Court possessed before the enactment of the Criminal Procedure Code. There are three circumstances under which the inherent jurisdiction may be exercised, namely (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of Court, and iii) to otherwise secure the ends of justice.

21. …It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, the court would be justified to quash any proceeding if it finds that the initiation or continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

36. For the foregoing reasons, we have reached to the conclusion that if the criminal proceedings are allowed to continue against the Appellant, the same will be nothing short of abuse of process of law & travesty of justice. This is a fit case wherein, the High Court should have exercised its inherent power under Section 482 of the Cr. P.C. for the purpose of quashing the criminal proceedings."

16. It is submitted on behalf of the respondent that after investigation, charge sheet has already been filed and that this Court should not interfere with the judgment of the High Court. The chargesheet is on record and we have examined it carefully, it simply reproduces all the wordings of the complaint. There is nothing new even after investigation, the allegations made in the FIR/complaint are exactly

the allegations in the charge sheet. Even otherwise, the position of law is well entrenched. There is no prohibition against quashing of the criminal proceedings even after the charge sheet has been filed. In *Anand Kumar Mohatta v. State (NCT of Delhi)*.[9]

> *"14. First, we would like to deal with the submission of the learned Senior Counsel for Respondent 2 that once the charge-sheet is filed, petition for quashing of FIR is untenable. We do not see any merit in this submission, keeping in mind the position of this Court in Joseph Salvaraj A. v. State of Gujarat...*
>
> *15. Even otherwise it must be remembered that the provision invoked by the accused before the High Court is Section 482 CrPC and that this Court is hearing an appeal from an order under Section 482 CrPC....*
>
> *16. There is nothing in the words of this section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High Court can exercise jurisdiction under Section 482 CrPC even when the discharge application is pending with the trial court. Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced and the allegations have materialised into a charge-sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge-sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court."*

Similar view is taken by this Court in *Joseph Salvaraj A. v. State of Gujarat*;[10] *A.M. Mohan v. State*;[11] *Mamta Shailesh Chandra* v. *State of Uttarakhand.*[12]

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9 [2018] 13 SCR 1028 : (2019) 11 SCC 706.

10 [2011] 8 SCR 815 : (2011) 7 SCC 59.

11 [2024] 3 SCR 722 : 2024 SCC OnLine SC 339.

12 2024 SCC OnLine SC 136.

17. Having considered the matter in detail, we are of the opinion that none of the ingredients of Sections 498A, 323, 504, 506 read with Section 34 IPC are made out. We have no hesitation in arriving at the conclusion that if the criminal proceedings are allowed to continue against the appellants, the same will be nothing short of abuse of process of law and travesty of justice. Though the appellants have also argued on the ground that Jalna Police Station and the Chief Judicial Magistrate, Jalna did not have jurisdiction, we are not inclined to examine that position in view of our finding that the Complaint/ FIR and the chargesheet cannot be sustained.

18. For the reasons above mentioned, we allow the present appeal, set aside the impugned judgment and order of the High Court in Criminal Application No. 4015 of 2014 dated 05.05.2017, and quash FIR dated 25.03.2013 bearing Crime No. 81/2013 filed under Sections 498A, 323, 504, 506 read with Section 34 IPC at P.S. Jalna and the chargesheet dated 30.07.2013 bearing Chargesheet No. 123/2013 in the above FIR.

Result of the Case: Appeal allowed.

[†]*Headnotes prepared by:* Divya Pandey

[2024] 10 S.C.R. 79 : 2024 INSC 744

Lakha Singh
v.
Balwinder Singh & Anr.

(Civil Appeal No. 10893 of 2024)

27 September, 2024

[Pamidighantam Sri Narasimha and Sandeep Mehta,* JJ.]

Issue for Consideration

Whether the entire case of the respondent-plaintiff regarding execution of the disputed agreement; alleged payment of Rs.16,00,000/- in cash to the appellant-defendant and alleged appearance of the respondent-plaintiff in the office of sub-registrar in the purported exercise of getting the sale deed executed in terms of the disputed agreement was fraud and concoction.

Headnotes†

Contract – Specific Performance – Respondent filed a suit for specific performance of an agreement to sell in respect of an agricultural plot of land – In alternative, respondent-plaintiff, *inter-alia*, sought relief of recovery of Rs.19,00,000/- including the amount of Rs.16,00,000/- paid as earnest money on the date of execution of the disputed agreement – Trial Court allowed the suit partly, directing recovery of Rs.16,00,000/- and denied the prayer of specific performance – The first appeal as well as the second appeal preferred by the appellant-defendant were rejected – Correctness:

Held: In the instant case, the stamp papers were not purchased by the appellant-defendant nor respondent-plaintiff – The document was typed out in Gurmukhi language and the photostat copy thereof is available on record – The disputed agreement runs into 3 pages – The signature of the respondent-plaintiff, and the thumb impression of the appellant-defendant are marked only on the last page thereof – The first and second pages of the agreement, do not bear the signature of the respondent-plaintiff or the thumb impression of the appellant-defendant – There exist significant blank spaces at the foot of the first two pages below the transcription typed out on these two pages – These observations give rise to a strong inference fortifying the contention of the

* Author

appellant-defendant's counsel that the thumb impression of the appellant-defendant may have been taken on a blank stamp paper and the disputed agreement was typed thereon subsequently – Respondent-plaintiff did not take permission from his department before entering into an agreement to sell of such a high value – According to the disputed agreement, appellant-defendant agreed to sell his land @ Rs.5,00,000/- per Killa, which was half of the market rate of the land – Going by the rate fixed, the total sale consideration of the land would have been Rs.18,87,000/- – However, the disputed agreement recites that appellant-defendant had received an earnest money of Rs.16,00,000/-, which is lion's share of the total sale consideration – Therefore, it does not stand to reason that why respondent-plaintiff would defer execution of sale deed to a date almost 16 months later, when only 15% of the total value was remaining – Thus, the disputed agreement i.e., the agreement to sell is highly suspicious – As far as appearance of respondent-plaintiff in the sub-registrar office is concerned, admittedly, the respondent-plaintiff did not give any advance intimation to the appellant-defendant imploring him to receive the balance consideration and execute the sale deed on the scheduled date i.e. 19.09.2008 or anytime thereafter – Instead, he directly proceeded to file the subject suit in the month of December, 2008 wherein, alternative prayers, one for the execution of the sale deed and the other for the refund of the earnest money were made – The factors enumerated above, are sufficient for this Court to conclude that the entire case of the respondent-plaintiff regarding the execution of the disputed agreement; the alleged payment of Rs. 16,00,000/- in cash to the appellant-defendant on 07.05.2007 and the alleged appearance of the respondent-plaintiff in the office of the Sub-Registrar in the purported exercise of getting the sale deed executed in terms of the disputed agreement is nothing but a sheer piece of fraud and concoction. [Paras 27, 28, 29, 31, 36]

Case Law Cited

Sukhbiri Devi v. Union of India [2022] 13 SCR 523 : **2022 SCC OnLine SC 1322;** *Mekala Sivaiah v. State of A.P.* [2022] 6 SCR 989 : **(2022) 8 SCC 253 – relied on.**

List of Keywords

Contract; Specific performance; Earnest money; Disputed agreement; Refund of earnest money; Fraud; Concoction; Sale

deed; Execution of sale deed; Article 136 of the Constitution; Misreading of material documentary evidence; Concurrent findings of fact.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10893 of 2024

From the Judgment and Order dated 25.04.2018 of the High Court of Punjab & Haryana at Chandigarh in RSA No. 4577 of 2017

Appearances for Parties

Ankit Goel, Nikhil Sharma, Sahil Patel, Advs. for the Appellant.

M/s. Lex Regis Law Offices, Sunil Kumar Jain, Ms. Reeta Chaudhary, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Mehta, J.

1. Heard.

2. Leave granted.

3. This appeal by special leave is directed against the judgment dated 25th April, 2018 rendered by the High Court of Punjab and Haryana at Chandigarh, whereby the second appeal[1] preferred by the appellant-defendant was dismissed, and the judgment dated 20th March, 2017 passed by the learned Additional District Judge, Tarn Taran[2] in Civil Appeal[3] was affirmed. The First Appellate Court dismissed the Civil Appeal preferred by the appellant-defendant and upheld the judgment and decree dated 18th February, 2013 passed by the learned Additional Civil Judge (Senior Division), Patti, Tarn Taran[4] in Civil Suit[5] filed by the respondent-plaintiff. The trial Court allowed the suit partly, directing the recovery of Rs. 16,00,000/- and the interest accrued thereupon from the appellant-defendant by way

1 RSA No. 4577 of 2017(O&M).

2 'First Appellate Court'.

3 Civil Appeal No. 05 of 2016.

4 'trial Court'.

5 Civil Suit No. 535 of 2008.

of alternative relief of recovery while denying the prayer of specific performance sought for by the respondent-plaintiff.

4. The facts in a nutshell relevant and essential for disposal of the appeal are noted hereinbelow.

5. The respondent-plaintiff filed the subject suit in the trial Court seeking a decree for specific performance of an agreement to sell dated 7th May, 2007[6] in respect of an agricultural plot of land admeasuring 30 *Kanals* 8 *Marlas*[7] located at Village Amrike, Tehsil Patti, District Tarn Taran, Punjab. Besides the relief of specific performance, the respondent-plaintiff also sought permanent injunction for restraining the appellant-defendant from alienating the suit land and dispossessing the respondent-plaintiff from the same. In the alternative, respondent-plaintiff sought relief of recovery of Rs.19,00,000/- including the amount of Rs.16,00,000/- paid as earnest money on the date of execution of the disputed agreement along with the damages to the tune of Rs.3,00,000/-.

6. The respondent-plaintiff averred in the plaint that the appellant-defendant, being the owner of the suit land, had agreed to sell the same to the respondent-plaintiff *vide* the disputed agreement wherein, the rate of the land was fixed at Rs.5,00,000/- per *Killa* with a condition to get the sale deed executed and registered on 19th September, 2008. As per the recitals in the disputed agreement, the appellant-defendant received a sum of Rs.16,00,000/- by way of earnest money on the date of the execution of the agreement with a further stipulation that the balance consideration would be paid on 19th September, 2008, when both the parties would appear at the Registrar office. It was further stipulated that if on the said date, the appellant-defendant failed to execute the registered sale deed then, he would become liable to return the earnest money to the tune of Rs.16,00,000/- along with penalty of equal amount, totalling to Rs.32,00,000/- to the respondent-plaintiff. Even after receiving the money and the penalty, the respondent-plaintiff would be entitled to file a suit for getting the sale deed executed in his favour. This disputed agreement was attested by two witnesses namely, Major Singh (PW-4) and Balwinder Singh (PW-2).

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6 'disputed agreement'.

7 'suit land'.

7. It was also averred in the plaint that a part of the property was under mortgage with respondent No. 2 i.e. The State Bank of Patiala. The respondent-plaintiff claimed that he reached the Office of Joint Registrar, Khem Karan on the date stipulated in the disputed agreement i.e. 19th September, 2008 and remained present there from 09:00 am to 05:00 pm waiting for the appellant-defendant to arrive. However, the appellant-defendant did not turn up to get the sale deed registered in favour of the respondent-plaintiff, thereby violating the terms and conditions of the agreement. As such, the respondent-plaintiff got an affidavit of attendance attested from the Executive Magistrate, Khem Karan, who was also discharging the duties of the Joint Sub-Registrar, Khem Karan. In this manner, the respondent-plaintiff claimed to have marked his presence before the Joint Sub-Registrar showing his readiness and willingness to get the sale deed executed and registered in his favour, in terms of the disputed agreement.

8. Respondent-plaintiff further averred in the plaint that the appellant-defendant had breached the terms of the disputed agreement and was not ready and willing to execute and get the sale deed registered despite numerous requests, being made. The respondent-plaintiff also averred that the possession of the land, was handed over to him at the time when the disputed agreement was executed and that the respondent-plaintiff continued to remain in possession of the suit land as a prospective vendee. Apprehending that the appellant-defendant could alienate the suit land in favour of some other person, thereby dispossessing him, the respondent-plaintiff filed the subject suit[8] seeking reliefs in the following terms: -

> "It is therefore respectfully prayed that a decree for Specific Performance of Agreement to sell dated 7.5.2007 with regard to land measuring 30 Kanals 8 Marlas detail of which is as follows:
>
> a. Land measuring 12 Kanals 14 Marlas i.e. 4/72 share of land measuring 229 Kanals 5 Marlas bearing Khata/ Khatoni No. 153 /372 to 379, Rectangle and Killa Nos. 31//14//1, 20, 21, 32//15, 17,327/24, 25, 337/5, 31/722, 347/9, 2,31//12, 13, 19, 317/2671, 327/16,

8 Civil Suit No. 535 of 2008

337/74, 6, 7, 14,15,16, 25, 347/1, 10,20,44//5, 32//4, 5,6,7.8/1, 14/2, 32/714/1, 337/17

b. Land measuring 7 Kanals 17 Marlas i.e. 1/3rd share of land measuring 23 Kanals 10 Marlas bearing Khata/Khatoni No. 153/374, Rectangle and Killa Nos. 327/22, 34/79,2.

c. Land measuring 9 Kanals 17 Marlas i.e. 4/72 share of land measuring 170 Kanals 10 Marlas bearing Khata/Khatoni No. 101/243, 244/, 244.1 246, 102/246 Rectangle and Killa Nos. 31/ /11, 8/2, 19/22/221//14, 15, 16, 17, 24, 25, 22//2, 3/1, 10/2, 22//9, 11,12, 19, 20, 21, 22, 31//1,2,10 min (6-16), 32//1,2.21/211/9,10 nub, (1-4), 21//22,23,32//3/1, situated in village Amrike Tehsil Patti district Tarn Taran as per Jamabandi 2002-2003 on payment of Rs.3,00,000/- or any sum which this Hon'ble Court finds due and for execution and registration of sale deed and for delivery of symbolic actual possession of above land to the plaintiff with consequential relief of permanent injunction thus, restraining the defendant no. 1 from alienating the suit land with anybody in any way, except the plaintiff and also restraining the defendant no. 1 forever from dispossessing the plaintiff forcibly from land measuring 30 Kanals 8 Marlas bearing Khasra No. 31//14/1 min (1-0), 20, (7-16), 21 (8-32)/715 (7-12), 327//17 (7-0) situated at Village Amrike, Tehsil Patti, District Tarn Taran as per Jamabandi for the year 2002 - 03 and also restraining the defendant no. 1 from interfering in the peaceful possession of the plaintiff over the same.

In the alternative, suit for recovery of Rs.19,00,000/- detailed as follow:

a) Amount of earnest money paid on 7.5.2007 at the time of execution of agreement i.e., Rs.16,00,000/-.

b) Amount of damage and compensation for breach of contract dated 7.5.2007 of Rs. 3,00,000/-, totalling to Rs. 19,00,000/- be passed in favour of plaintiff and against the defendant No.1 with costs.

Any other relief to which the plaintiff is found entitled to that may also kindly be granted in favour of plaintiff."

9. The appellant-defendant, upon being summoned, appeared before the trial Court and filed a written statement denying the averments made in the plaint. It was specifically averred in the written statement filed by the appellant-defendant that the disputed agreement was without consideration, result of misrepresentation, impersonation and must have been prepared fraudulently by the respondent-plaintiff who was an employee of the Punjab police, posted as the Head Constable at Amritsar by colluding with the scribe and the attesting witnesses.

10. It was further alleged that the respondent-plaintiff's brother was a commission agent and ran a commission business at Mandi, Amarkot. The appellant-defendant used to sell his agricultural produce through the commission agency of the respondent-plaintiff's brother. The appellant-defendant was an illiterate simpleton and the respondent-plaintiff, and his brother used to get the thumb impressions of the customers/agriculturists including the appellant-defendant on blank stamp papers. It was specifically asserted in the written statement that the disputed agreement had been prepared by fraudulent means on one of such blank stamp papers, on which the thumb impression of the appellant-defendant had been taken by deceitful means. The appellant-defendant also denied the receipt of sale consideration from the respondent-plaintiff and asserted that he was not bound by the disputed agreement. A plea was also made by the appellant-defendant that the market rate of agricultural land in Village Cheema Khurd was not less than Rs.12,00,000/- per *Killa* and that there was no reason for the appellant-defendant to have sold his valuable land to the respondent-plaintiff at a throw away rate of Rs.5,00,000/- per *Killa*, more particularly as the suit land was his only source of livelihood.

11. A pertinent plea was also taken by the appellant-defendant that the suit for specific performance of the disputed agreement and for permanent injunction, was bad for non-joinder of necessary parties because all the co-sharers of the suit land were not arrayed as parties in the subject suit. Based on aforesaid pleadings of the parties, the trial Court framed the following issues for determination: -

"1. Whether the defendant no. 1 executed an agreement to sell dated 7.5.2007 regarding land measuring 30 Kanals 8 Marlas in favour of the plaintiff? OPP.

2. Whether the plaintiff is entitled for specific performance of agreement to sell? OPP.

3. Whether the plaintiff is entitled in the alternative to recover Rs.19,00,000/- from the defendant no. 1? OPP.

4. Whether the plaintiff and defendant no. 1 were owner/ co-sharer in possession to the extent of his share in the disputed property? OPP.

5. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for? OPP.

6. Whether the suit is maintainable in the present form? OPP.

7. Whether the plaintiff has locus standi to file the present suit? OPP.

8. Whether the cause of action arisen to the plaintiff for filing of present suit? OPP.

9. Whether the suit is bad for non-joinder of necessary parties? OPP.

10. Whether the plaintiff has not come to the court with clean hands? OPD.

11. Whether the plaintiff is estopped by his own act and conduct from filing the present suit? OPD.

12. Relief."

12. The issue No.2*(supra)* regarding entitlement of the respondent-plaintiff for specific performance of the disputed agreement and the affiliated issue No. 5*(supra)* for the relief of permanent injunction were decided against the respondent-plaintiff. However, issue No.3*(supra)* regarding the alternative relief seeking recovery of the amount to the tune of Rs. 19,00,000/- was partly decided in favour of the respondent-plaintiff and partly against him. The trial Court recorded the following findings: -

a. It was an admitted fact that the appellant-defendant was the owner of the suit land and respondent-plaintiff while appearing

as PW-1 produced on record the agreement to sell,[9] duly signed by the appellant-defendant.

b. The respondent-plaintiff testified that the appellant-defendant had agreed to sell the suit land in his favour and received a sum of Rs. 16,00,000/- as earnest money with a condition to execute the sale deed on 19th September, 2008.

c. On the date fixed as per the disputed agreement, the appellant-defendant failed to appear at the office of the Sub-Registrar whereas the respondent-plaintiff got his presence marked by way of an affidavit attested by the Executive Magistrate-cum-Sub-Registrar, Khem Karan.

d. The version of the respondent-plaintiff was also corroborated by the attesting witnesses namely, Major Singh (PW-4) and Balwinder Singh (PW-2).

e. That the respondent-plaintiff had proved the execution of the disputed agreement and his willingness to get the sale deed executed by cogent evidence.

f. That the possession of the suit land was never handed over to the respondent-plaintiff although this fact was mentioned in the disputed agreement.

g. That the person who pays a huge amount and fixes a long date for the execution of the sale deed, would not be expected to wait for possession to be taken in future. However, in the case at hand, the date fixed for the execution of the sale deed was after a period of about a year and four months from the date of the execution of the disputed agreement.

13. Based on the aforesaid findings, the trial Court concluded that the transaction between the parties appeared to be a loan transaction rather than an agreement for sale and purchase of the property and held that the respondent-plaintiff was not entitled to the relief of specific performance of the agreement in respect of the suit land. However, the respondent-plaintiff was held to be entitled to recover the earnest money paid to the appellant-defendant at the time of the execution of the agreement along with interest.

9 'disputed agreement'

14. The trial Court decreed the suit *vide* judgment dated 18th February, 2013 and directed the appellant-defendant to refund the earnest money to the tune of Rs. 16,00,000/- with *pendente lite* interest @ 9% per annum and future interest @ 6% per annum to the respondent-plaintiff.

15. As noted above, the first appeal as well as the second appeal preferred by the appellant-defendant against the judgment and decree rendered by the trial Court stood rejected by the First Appellate Court and the High Court, respectively *vide* judgments dated 20th March, 2017 and 25th April, 2018. These judgments are subjected to challenge in this appeal by special leave.

16. Shri Ankit Goel, learned counsel for the appellant-defendant, vehemently and fervently contended that the findings of facts recorded by the Courts below, though concurrent, are perverse on the face of the record and thus, it is a fit case warranting interference by this Court in exercise of the jurisdiction conferred by Article 136 of the Constitution of India.

17. To buttress the above contention, learned counsel for the appellant-defendant, drew the Court's attention to the following excerpts from the cross-examination of the respondent-plaintiff (PW1): -

> "Amarjit Singh S/o Massa Singh is my real brother. He is running a commission agent shop at Amarkot, and the name of the commission agent shop is Cheema Trading Company, at Amarkot. I know Lakha Singh from my childhood. He belongs to my village. I do not know whether Lakha Singh deft sold his agriculture produce through the commission agent shop of my brother Amarjit Singh. I am posted as Head constable in Punjab Police and now posted at Ludhiana at Division no. 11nd. The agreement was scribed at Patti by a typist, but I do not know his name.
>
> Possession was not delivered on the basis of agreement to sell. It was mentioned in the agreement that the possession will be delivered on the agreement but the defendant refused to deliver the possession of the land agreed to sold the land to me.
>
> I file the income tax return because I am employee of Punjab Govt. I have not shown the amount of

> Rs.16,00,000/- in my income tax return. It is correct if any Govt. employee want to purchase any land it is necessary to get the permission from their department. I have not taken any permission from my department before purchasing the agreement to sell with the defendant not I show any amount of Rs. Sixteen lakh to my department. It is correct that agriculture income also not shown in my income tax return. I have never shown my agricultural income in my income tax return.
>
> This amount was not withdrawn by me from any bank & this amount was lying be me in my house.
>
> It is correct that at present the marked rate in vill. Cheema Khurd Rs. 9/10 lakhs per Killa.
>
> It is also wrong. to suggest that defendant never purchase the stamp paper through Angrej Singh for execution of the agreement to sell dated 07-5-2007. It is also wrong to suggest that agreement is prepared and dated with the collusiveness of the attesting witnesses. It is also wrong to suggest defendant never receipt any amount of Rs.16 lakhs from me as earnest money. It is also wrong to suggest deft use to sell his agriculture produce at that shop of my brother Amarjit Singh. It is also wrong to suggest my brother might have got the thumb impression by fraud."

18. He highlighted and stressed upon the following facts elicited from the deposition *(supra)* of the respondent-plaintiff: -

a. The respondent-plaintiff was employed as a Head Constable in the Punjab Police at the time of the incident.

b. The respondent-plaintiff's brother was running a commission agent shop at Mandi Amarkot.

c. Contrary to the recital in the disputed agreement that the possession of suit land was given to the respondent-plaintiff, it was admitted by the respondent-plaintiff in his evidence that the possession of suit land was not handed over to him on the basis of the disputed agreement.

d. The respondent-plaintiff admitted that he used to file Income Tax returns being an employee of the Punjab Government, but

he did not show the amount of Rs.16,00,000/- in the Income Tax return.

e. He also admitted that he had not obtained any permission from the department to purchase the suit land.

f. The respondent-plaintiff admitted that the amount in question was not withdrawn from any bank and the currency notes used for the transaction were lying in his house.

g. He also admitted that the market rate of the land in Village Cheema Khurd was around Rs.9-10 lakhs per *Killa*.

h. He denied the suggestion given on behalf of the appellant-defendant that his brother Amarjeet Singh had procured the thumb impression of the appellant-defendant on blank stamp papers by fraud.

19. Learned counsel urged that the admissions as appearing in the testimony of the respondent-plaintiff, completely discredit the version regarding the execution of the disputed agreement. Therefore, he submitted that the findings recorded in the judgments of the Courts below are patently perverse and are based on misreading/ignorance of the admitted facts available on record and thus, the appeal merits acceptance and the impugned judgments deserve to be reversed.

20. *Per contra*, learned counsel representing the respondent-plaintiff, supported the findings recorded in the impugned judgments. He urged that the trial Court, the First Appellate Court and the High Court appreciated and re-appreciated the evidence minutely and have arrived at an unimpeachable conclusion that the transaction in question was a loan transaction *inter se* between the respondent-plaintiff and the appellant-defendant and thus, the appellant-defendant was rightly held liable to reimburse the amount of loan secured from the respondent-plaintiff at the time of the execution of the disputed agreement. He urged that the law is well settled that this Court whilst exercising the jurisdiction under Article 136 of the Constitution of India, would not enter into pure questions of fact so as to reverse the well-reasoned judgments of the Courts below. On these counts, learned counsel for the respondent-plaintiff implored the Court to dismiss the appeal.

21. We have given our thoughtful consideration to the submissions advanced at bar and have gone through the material placed on record.

22. It is trite law that jurisdiction under Article 136 of the Constitution of India should not be exercised unless the findings on facts recorded by the Courts below suffer from perversity or are based on omission to consider vital evidence available on record.

23. The scope of an appeal by special leave under Article 136 of the Constitution of India against concurrent findings is well-established. In the case of ***Sukhbiri Devi v. Union of India***,[10] this Court noted:

> **"3.** At the outset, it is to be noted that the challenge in this appeal is against concurrent findings by three Courts, as mentioned hereinbefore. The scope of an appeal by special leave under Article 136 of the Constitution of India against the concurrent findings is well settled. In *State of Rajasthan v. Shiv Dayal*[11] reiterating the settled position, this Court held that a concurrent finding of fact is binding, unless it is infected with perversity. It was held therein: —
>
> > "**When any concurrent finding of fact is assailed in second appeal, the appellant is entitled to point out that it is bad in law because it was recorded *de hors* the pleadings or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against any provision of law and lastly, the decision is one which no Judge acting judicially could reasonably have reached.** (see observation made by learned Judge Vivian Bose, J. as His Lordship then was a Judge of the Nagpur High Court in *Rajeshwar Vishwanath Mamidwar* v. *Dashrath Narayan Chilwelkar*, AIR 1943 Nag 117 Para 43)."
>
> **4.** Thus, evidently, the settled position is that **interference with the concurrent findings in an appeal under Article 136 of the Constitution is to be made sparingly, that too when the judgment impugned is absolutely perverse**.

10 [2022] 13 SCR 523 : 2022 SCC OnLine SC 1322

11 [2019] 10 SCR 243 : (2019) 8 SCC 637

On appreciation of evidence another view is possible also cannot be a reason for substitution of a plausible view taken and confirmed. We will now, bearing in mind the settled position, proceed to consider as to whether the said appellate power invites invocation in the case on hand."

(emphasis supplied)

24. This Court in ***Mekala Sivaiah v. State of A.P.***,[12] while dealing with its power under Article 136 to interfere with concurrent findings held the following: -

"15. It is well settled by judicial pronouncement that Article 136 is worded in wide terms and powers conferred under the said Article are not hedged by any technical hurdles. This overriding and exceptional power is, however, to be exercised sparingly and only in furtherance of cause of justice. Thus, when the judgment under appeal has resulted in grave miscarriage of justice by some misapprehension or misreading of evidence or by ignoring material evidence then this Court is not only empowered but is well expected to interfere to promote the cause of justice.

16. It is not the practice of this Court to re-appreciate the evidence for the purpose of examining whether the findings of fact concurrently arrived at by the trial court and the High Court are correct or not. It is only in rare and exceptional cases where there is some manifest illegality or grave and serious miscarriage of justice on account of misreading or ignoring material evidence, that this Court would interfere with such finding of fact.

…

18. In *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat* [*Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat*, (1983) 3 SCC 217 : 1983 SCC (Cri) 728], a two-Judge Bench of this Court held that this Court does not interfere with the concurrent findings of fact unless it is established:

12 [2022] 6 SCR 989 : (2022) 8 SCC 253

18.1. That the finding is based on no evidence.

18.2. That the finding is perverse, it being such as no reasonable person could arrive at even if the evidence was taken at its face value.

18.3. The finding is based and built on inadmissible evidence which evidence, excluded from vision, would negate the prosecution case or substantially discredit or impair it.

18.4. Some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked, disregarded or wrongly discarded."

(emphasis supplied)

25. Keeping in mind the aforesaid principles, we shall now advert to the submissions advanced on behalf of the parties with reference to the findings recorded by the Courts below and the material available on record.

26. The respondent-plaintiff filed the subject suit with a pertinent assertion that the disputed agreement was executed by the appellant-defendant for sale of his agricultural land admeasuring 30 *Kanals* and 8 *Marlas* at the rate of Rs.5,00,000/- per *Killa*. As per the recital in the agreement, the respondent-plaintiff paid a sum of Rs.16,00,000/- in cash to the appellant-defendant at the time of the execution of the disputed agreement.

27. At this stage, a very crucial fact which is noticeable from the disputed agreement needs to be highlighted. It is not in dispute that the stamp papers were not purchased by the appellant-defendant and rather Amarjeet Singh was the person who purchased the same. The document was typed out in *Gurmukhi* language and the photostat copy thereof is available on record. A visual overview of the disputed agreement would show that it runs into three pages. The signature of the respondent-plaintiff, and the thumb impression of the appellant-defendant are marked only on the last page thereof. The first and second pages of the agreement, do not bear the signature of the respondent-plaintiff or the thumb impression of the appellant-defendant. There exist significant blank spaces at the foot of the first two pages below the transcription typed out on these two

pages. These observations give rise to a strong inference fortifying the contention of the appellant-defendant's counsel that the thumb impression of the appellant-defendant may have been taken on a blank stamp paper and the disputed agreement was typed thereon subsequently.

28. It cannot be denied that the respondent-plaintiff being a Police Constable was mandatorily required to seek permission from his department before entering into an agreement to purchase property of such a high value. However, admittedly, he did not seek any such permission from the department. As per the disputed agreement, the appellant-defendant agreed to sell the suit land to the respondent-plaintiff @ Rs. 5,00,000/- per *Killa*, which was just about half of the market rate of the land at the relevant point of time, as admitted by the respondent-plaintiff. Going by the rate as fixed in the disputed agreement, the total sale consideration would have amounted to approximately, Rs.18,87,000/-. The disputed agreement recites that the appellant-defendant had received earnest money to the tune of Rs.16,00,000/- for the purpose of doing agriculture and to buy cheaper and better land nearby. Thus, a lion's share of the sale consideration was already paid to the appellant-defendant at the time of the execution of the disputed agreement and the remaining amount was hardly 15% of the total value of the suit land as agreed upon between the parties. Therefore, it does not stand to reason that the respondent-plaintiff being a Police Constable would part with a huge sum of Rs.16,00,000/- towards a transaction to purchase land and thereafter, agree to defer the execution of the sale deed to a date almost 16 months later with the balance amount being a fraction of the total sale consideration.

29. Apparently thus, there was no rhyme or reason as to why, the respondent-plaintiff would agree to defer the execution of the sale deed to a date more than a year and four months after the execution of the disputed agreement. Thus, the disputed agreement i.e., the agreement to sell read in entirety is highly suspicious and does not inspire confidence at all.

30. As per the disputed agreement, the consequence of non-appearance of the appellant-defendant at the Registrar's office on 19th September, 2008 and his failure to get the sale deed registered, was that the appellant-defendant would be liable to return the earnest money of

Rs.16,00,000/- along with a penalty of equal amount, totalling to Rs.32,00,000/- and even thereafter, the respondent-plaintiff would be entitled to file a case in the civil Court for the execution of the sale deed. Simultaneously, it was agreed that if the balance amount was not paid by the respondent-plaintiff, the earnest money would be liable to be forfeited by the appellant-defendant.

31. As per the averments made in the plaint, the respondent-plaintiff did not even once, during the aforesaid period of 16 months, approach the appellant-defendant for getting the sale deed executed in terms of the disputed agreement. He claimed that he straight away proceeded to the Sub-Registrar's office on 19th September, 2008 and remained present there from 09:00 am to 05:00 pm waiting for the appellant-defendant to turn up and get the sale deed registered. However, the appellant-defendant failed to appear at the office of the Sub-Registrar on the scheduled date. Admittedly, the respondent-plaintiff did not give any advance intimation to the appellant-defendant imploring him to receive the balance consideration and execute the sale deed on the scheduled date i.e. 19th September, 2008 or anytime thereafter. Instead, he directly proceeded to file the subject suit in the month of December, 2008 wherein, alternative prayers, one for the execution of the sale deed and the other for the refund of the earnest money were made.

32. *Ex-facie*, the averments set out in the plaint and the evidence of the respondent-plaintiff do not bear an *iota* of truth and appear to be nothing but a sheer concoction. The circumstances noted above, the evidence of the respondent-plaintiff; the disputed agreement and the plaint clearly indicates that the disputed agreement seems to have been prepared on a blank stamp paper on which, the thumb impressions of the illiterate appellant-defendant had been taken prior to its transcription. The large blank spaces on the first and second pages of the disputed agreement and the absence of thumb impression/signatures of the parties and the attesting witnesses on these two pages, fortifies the conclusion that the disputed agreement was transcribed on one of the blank stamp papers on which the thumb impression of the appellant-defendant had been taken beforehand.

33. It may be mentioned here that the appellant-defendant appeared before the trial court, to give evidence as DW-1 and emphatically denied the factum of the execution of the disputed agreement.

He also denied having received a sum of Rs.16,00,000/- from the respondent-plaintiff. The trial Court disbelieved the version of the respondent-plaintiff on the aspect that the disputed agreement, for the execution whereof the subject suit was filed, was an agreement to sell and instead treated the amount mentioned in the disputed agreement to be a loan. However, on-going through the cross-examination conducted from the appellant-defendant, we do not find any suggestion whatsoever that the amount of Rs. 16,00,000/- was given to the appellant-defendant by way of loan.

34. On perusal of the plaint and the affidavit by way of examination-in-chief of the respondent-plaintiff, a very significant fact can be culled out. The respondent-plaintiff did not even make a whisper in his deposition affidavit that when he proceeded to the office of the Sub-Registrar on 19th September, 2008, he was carrying the balance sale consideration with him. Furthermore, it is not the case of the respondent-plaintiff that he ever offered the balance sale consideration in terms of the disputed agreement to the appellant-defendant at any point of time either before 19th September, 2008 or on 19th September, 2008, when the respondent-plaintiff appeared before the Sub-Registrar.

35. The respondent-plaintiff admitted that he did not seek permission from his department before entering into the agreement for purchase of property having high value. It is not the case of the respondent-plaintiff that he and the appellant-defendant were on such close terms that he would readily agree to give cash loan to the appellant-defendant without any security.

36. The factors enumerated above, are sufficient for this Court to conclude that the entire case of the respondent-plaintiff regarding the execution of the disputed agreement; the alleged payment of Rs. 16,00,000/- in cash to the appellant-defendant on 7th May, 2007 and the alleged appearance of the respondent-plaintiff in the office of the Sub-Registrar in the purported exercise of getting the sale deed executed in terms of the disputed agreement is nothing but a sheer piece of fraud and concoction.

37. These vital factual aspects were totally glossed over by the Courts below while deciding the suit, the first appeal and the second appeal. In these facts and circumstances, we find it to be a fit case to exercise

our powers under Article 136 of the Constitution of India so as to interfere with the impugned judgements.

38. Hence, there cannot be any escape from the conclusion that the judgment and decree dated 18th February, 2013 rendered by the trial Court, judgment dated 20th March, 2017 passed by the First Appellate Court and the judgment dated 25th April, 2018 rendered by the High Court suffer from perversity on the face of the record and hence, the same cannot be sustained.

39. Resultantly, the appeal succeeds and is hereby allowed.

40. The impugned judgments are hereby quashed and set aside. Decree be prepared accordingly. No order as to costs.

41. Pending application(s), if any, shall stand disposed of.

Result of the Case: Appeal allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 10 S.C.R. 98 : 2024 INSC 736

Sukhmander Singh and Ors Etc.
v.
The State of Punjab and Ors Etc.

(Civil Appeal No(s). 1511-1513 of 2021)

11 September 2024

[Hrishikesh Roy,* Sudhanshu Dhulia and S.V.N. Bhatti, JJ.]

Issue for Consideration

Issue arose as to whether the criteria on the basis of which selection was made could be made the legal basis for selection and appointment of Laboratory Attendants.

Headnotes†

Service law – Selection/appointment – Post of laboratory attendents – Selection process for 31 vacancies – 1,952 candidates shortlisted for interview after the written test – Publication of final select list – Challenge to, by the unsuccessful candidates – Single Judge annulled the selection process observing that the process was irregular and lacked transparency – However, the Division Bench held that the selection process was not mala fide or biased, a fresh list should be compiled by the Board, deducting 5 marks previously awarded to candidates belonging to rural areas – Sustainability:

Held: In a recruitment process where there are only 31 posts up for grabs, subjecting an excessively large number of candidates, 63 times the number of vacancies to the interview stage, would inevitably lead to a situation where even those candidates, who may have performed very poorly in the written test, are granted an unfair shot at appointment and many more qualified candidates are potentially overlooked – Thus, limiting the number of candidates for the *viva voce* segment becomes essential for several reasons – It enhances the efficiency of the selection process by providing for a more thorough and fair evaluation of each candidate – By restricting the number of candidates, the process becomes more transparent and less susceptible to allegations of favouritism or bias – Thus, it ensures that only the most qualified candidates, based on an objective criterion, proceed to the stage of

* Author

an interview, helping maintain the integrity of the process, upholding principles of meritocracy and reducing chances of oversight – Impugned judgment can be sustained only to the limited extent of eliminating marks awarded for the rural area criteria – Thus, the direction given by the Single Judge to commence the selection from the stage of written test, upheld – Candidates only up to five times the number of vacancies to be permitted to appear in the next segment of the recruitment test-interview – Candidates should be evaluated on a total of 100 marks, of which 50 marks would be awarded on the basis of a written examination – From the balance, 20 marks should be awarded on the basis of the candidate's performance in an interview, 15 marks on the basis of knowledge of scientific practical equipment, 10 marks on the basis of academic qualifications and 5 marks on the basis of experience – Waiting list of 10 beyond the 31 notified vacancies to be prepared, if any vacancy remains unfilled from amongst the 31 in order of merit in the list, those vacancies can be filled up in order of merit from the waitlisted candidates – Thus, fresh selection exercise to be carried out in terms of the said directions. [Paras 17-20, 23-25]

Case Law Cited

Abhishek Rishi v. State of Punjab & Ors. **(2013) SCC OnLine P&H 6980 – referred to.**

List of Keywords

Selection; Selection and appointment of Laboratory Attendants; Interview stage; Efficiency of selection process; Fair evaluation; Integrity of the process; Principles of meritocracy; Chances of oversight; Elimination of marks awarded for rural area criteria; Written test.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1511-1513 of 2021

From the Judgment and Order dated 20.07.2016 of the High Court of Punjab & Haryana at Chandigarh in LPA No. 1381 and 856 of 2014 and LPA No. 804 of 2015

With

Civil Appeal No. 1514 of 2021

Appearances for Parties

Sanjoy Ghosh, Sr. Adv., Vijay Kasana, Mrs. Chetna Singh, Chirag Verma, Ankit Kumar, Ashish Tanwar, Mrs. Smita Bankoti, Devendra Singh, Ashish Sheoran, Karan Thakur, Ms. Diva Singh, Shubhranshu Padhi, Advs. for the Appellants.

Avishkar Singhvi, Siddhant Sharma, Akash Alex, Praful Bhardwaj, P.S. Khurana, Vibhuti Sushant Gupta, Ram Naresh Yadav, Nitin Bhardwaj, Himanshu Sharma, Ram Niwas Sharma, Sandeep Singh, Mrs. Aditi Sharma, Arun Kumar, Lokesh Solanki, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

Hrishikesh Roy, J.

1. Heard Mr. Sanjoy Ghosh, learned Senior Counsel along with Mr. Vijay Kasana, learned counsel appearing for the Appellants. Also heard Mrs. Smita Bankoti, learned counsel for the appellants in the connected appeal. The Punjab School Education Board (PSEB) is represented by Mr. P.S. Khurana, learned counsel. The State of Punjab is represented by Mr. Avishkar Singhvi, learned counsel.

Factual Matrix: How We Reached Here

2. This matter pertains to the 31 vacancies that arose on the post of Laboratory Attendants, pursuant to an advertisement issued on 27.04.2011 by the PSEB. The eligibility criteria to apply for the said vacancies were that the candidate must have qualified 10th standard with Science & Punjabi as subjects. A total number of 4,752 applicants applied for these posts. As part of the initial screening, a preliminary written test was conducted on 28.09.2011, on the basis of which a total of 1,952 candidates were shortlisted as per the determined benchmark cut-off score.

3. These shortlisted candidates were subsequently called for the next segment of the selection process i.e., the interview stage. Due to the sheer number of candidates, interviews were conducted over multiple dates, culminating in the completion of the selection exercise. Thereafter, a final list of selected candidates was published on 04.04.2012.

4. Several unsuccessful candidates, aggrieved by their exclusion from the final list dated 04.04.2012, then moved the High Court of Punjab & Haryana at Chandigarh by filing different Writ Petitions, challenging the final list of selected candidates dated 04.04.2012 and seeking directions to conduct the same afresh. These aforementioned Writ Petitions were disposed of by a common judgment dated 31.10.2012. The learned Single Judge, *inter alia*, concluded that the process of selection did not inspire confidence and accordingly, set aside the entire selection process and directed for these posts to be re-advertised by the PSEB. However, this judgment was assailed by the aggrieved parties, following which the Division Bench on 29.05.2013, remitted the matter back, observing that the selected candidates were to be heard and the matter be decided afresh by the Single Judge.

Annulment of Selection Process by the Single Judge

5. As per the directions of the Division Bench, the matter was heard afresh by the learned Single Judge. Upon reconsideration, it was observed that the appointment process was marred by irregularities and lacked transparency, with no rules or instructions specifying the criteria adopted for shortlisting candidates for the interview stage. In fact, no material had been placed on record and no deliberations made by the Selection Committee made available, to demonstrate the criteria fixed for shortlisting candidates for the next stage i.e., the interview. Further, the learned Single Judge further held that shortlisting candidates to the extent of 63 times the number of vacancies was not justified either.

6. The learned Judge observed that several candidates that had been shortlisted for the interview stage had secured very low marks in the written test, and were therefore low on merit. This revealed a disparity in the selection process as no merit list was prepared on the basis of the written test results either.

7. The Court noticed the pattern of marks awarded for practical experience and interview for posts where the eligibility criterion was only matriculation. Awarding marks on these criteria would naturally depend on the subjective satisfaction of the members of an Interview Board, and therefore, vitiate part of the selection process as well. However, considering the fact that scrapping the entire selection process might prejudice those who had applied and subsequently

became over-aged and the fact that the written test for shortlisting was found to have been carried out in a *bona fide* manner, the learned Single Judge noted that candidates should be shortlisted as per the marks scored in the written examination to the extent of five times the number of vacancies, with marks assigned for qualification, experience, knowledge of science practical equipments and interview in such a proportion that they are not more than 1/3rd of the total marks.

8. Therefore, the learned Single Judge set aside the selection while directing the PSEB to publish a revised selection list i.e., to participate in a limited fresh exercise as per the following directions:

> "(i) Candidates five times the number of vacancies be called for second stage of selection in the order of merit as per the test conducted for shortlisting of candidates.
>
> (ii) The minimum marks can still be prescribed even if the result is that some vacancies remain unfilled as the same is in the interest of general merit [Reference S. Vinod Kumar's case (supra)].
>
> (iii) The criteria for award of marks for rural area is set aside.
>
> (iv) The marks assigned for qualification, experience, knowledge of science practical equipments and interview should be in such proportion that marks for knowledge of science practical equipments and interview are not more than 1/3rd of the total marks."

Division Bench's Reversal: Selection Not Mala Fide

9. The Division Bench, vide the impugned judgment dated 20.07.2016, opined that the entire selection process need not be disturbed. The Bench observed that the interviews were conducted elaborately over 19 days to determine the suitability of candidates. It further noted that inviting candidates 63 times the number of posts for the interview stage did not constitute an error fatal enough to vitiate the entire selection process. Additionally, it was noted that the criteria for shortlisting candidates to the extent of 3-5 times the number of vacancies was not a rigid or mandatory criterion either.

10. It was also noted that the adopted selection criteria did not allocate 50 marks solely for the interview component but instead, consisted of a broad range of evaluative criteria (academic qualifications, knowledge of science practical equipment, rural areas, et cetera) as well. In fact, the interview aspect only consisted of 20 marks, and therefore, was not on the higher side.

11. On the question of awarding 5 marks to candidates belonging to rural areas, both the Single Judge and the learned Division Bench were of the same view that awarding such marks on the basis of the residence of the candidates would be legally impermissible. Such a conclusion was drawn on the basis of the ratio in a Full Bench judgment of the Punjab & Haryana High Court, *Abhishek Rishi* v. *State of Punjab & Ors.*, 2013 SCC OnLine P&H 6980.

12. Accordingly, the Division Bench, having acknowledged that the selectees had already worked for about 5-6 years with some of them having become over-aged as well, opined that since the selection process was not *mala fide* or biased, a fresh list should be compiled by the PSEB. This revised list would necessitate the deduction of the 5 marks previously awarded to candidates for belonging to rural areas, on the basis of which appointments should be made.

Discussion & Conclusion

13. Various submissions made by the learned counsels for the parties have been considered. Essentially, the question here is whether the criteria on the basis of which selection was made could be made the legal basis for selection & appointment of Laboratory Attendants or not.

14. Admittedly, the advertisement dated 27.04.2011 indicated that shortlisting of candidates should be done on the basis of merit. However, the Order of the Chairman of the PSEB dated 11.10.2012 (Annexure P-3) indicates that all candidates obtaining 33.3% marks i.e., meeting the 20 marks' cut-off benchmark, were declared eligible for the interview. Therefore, no weightage was given for marks contained in the written test. Instead, the selection was made on the basis of the following criteria:

> "CRITERIA FOR THE SELECTION OF LAB ATTENDANTS
>
> (i) Academic qualifications: Matriculation
>
> a) 1st Division 05 marks

b) 2nd Division 03 marks

c) 3rd Division 02 marks

Supporting Qualifications/Activities:

a) Rural Area 05 marks

b) Knowledge of Science Practical Instrument 15 marks

(ii) Experience:

1 year 01 marks

2 years 02 marks

3 years 03 marks

4 years 04 marks

5 years 05 marks

(iii) Interview Marks: 20

Grand Total: (i) + (ii) + (iii) = 50"

15. Therefore, the merit of the candidates was to be assessed on the cumulative score of 50. These aforesaid criteria, however, were not specified in any rules or instructions. In fact, the said criteria came to be adopted only when the interviews were to be held.

16. It must be noted that despite the fact that records were called for by the Single Judge, the PSEB was unable to produce any material to show that the criteria for selection had been decided upon, prior to the onset of the entire selection process. Therefore, the learned Single Judge concluded, on the basis of file notings that were produced before him, that the selection criteria had been fixed only on the date when interviews were to commence, i.e., after the result of the written test had already been declared.

17. In fact, it is also equally important to note that no deliberations in the form of minutes of the meeting by the Selection Committee have been made available either, to prove that the PSEB fixed a criterion of selection before the entire process had commenced. On the contrary, it is apparent that the criteria decided upon i.e., a benchmark eligibility cut-off of 33%, to call candidates for the interview stage was made after the entire process had begun, tailor-made and did not have any nexus with the object sought to be achieved i.e., shortlisting candidates on the basis of merit either.

18. We must bear in mind that the marks secured by candidates in the written test were not considered or given any weightage for such selection either. Additionally, in a recruitment process where there are only 31 posts up for grabs, subjecting an excessively large number of candidates (in this case, 63 times the number of vacancies) to the interview stage, would inevitably lead to a situation where even those candidates, who may have performed very poorly in the written test, are granted an unfair shot at appointment and many more qualified candidates are potentially overlooked.

19. In such a scenario, therefore, limiting the number of candidates for the *viva voce* segment becomes essential for several reasons. Firstly, it enhances the efficiency of the selection process by providing for a more thorough and fair evaluation of each candidate. Secondly, by restricting the number of candidates, the process becomes more transparent and less susceptible to allegations of favouritism or bias. Consequently, it ensures that the only the most qualified candidates, based on an objective criterion, proceed to the stage of an interview, helping maintain the integrity of the process, upholding principles of meritocracy and reducing chances of oversight.

20. In light of these considerations, the impugned judgment (dated 20.07.2016) can be sustained only to the limited extent of eliminating marks awarded for the rural area criteria. Therefore, we are of the view that the direction given by the learned Single Judge to commence the selection from the stage of written test, deserves our approval.

21. Accordingly, candidates only up to five times the number of vacancies should be permitted to appear in the next segment of the recruitment test i.e., the interview. The direction given in Clause (iv.) of Para 37 in the judgment of the learned Single Judge dated 20.02.2014, for assignment of marks for qualification, experience, knowledge of science practical equipments and an interview should be kept in such proportion, that marks for knowledge of science practical equipments and interview together should not be more than 1/3rd of the total marks. The suggested criteria by the learned Single Judge in the judgment may address a part of the requirement of assessing the merit of the candidates.

22. For the job of a Laboratory Attendant, both theoretical and practical aspects are of equal importance. Therefore, the merit of the candidates should be re-assessed in the following manner:

Criteria	Earlier	Revised
Written Examination	Qualifying	50
Interview	20	20
Academic Qualifications	5 (5 for 1st Division, 3 for 2nd Division & 2 for 3rd Division)	10 (10 for 1st Division, 6 for 2nd Division & 4 for 3rd Division)
Knowledge of Scientific Practical Equipment	15	15
Experience (as on date of notification)	5 (1 for 1 year, 2 for 2 years, so on & so forth)	5
Rural Areas	5	0
Total Marks	50	100

23. To carry out the exercise, depending upon their performance in the written test, candidates to the extent of five times the number of vacancies should be shortlisted to participate in the next segment of the test. As is clear from the aforementioned tabulated chart, candidates should be evaluated on a total of 100 marks, of which 50 marks would be awarded on the basis of a written examination. From the balance, 20 marks should be awarded on the basis of the candidate's performance in an interview, 15 marks on the basis of knowledge of scientific practical equipment, 10 marks on the basis of academic qualifications (10 for 1st Division, 6 for 2nd Division & 4 for 3rd Division) and 5 marks on the basis of experience (as on the date of notification i.e., 27.04.2011).

24. As some of the shortlisted candidates may have become gainfully employed elsewhere or no longer interested in pursuing the same, a waiting list of 10 beyond the 31 notified vacancies should also be prepared. If any vacancy remains unfilled from amongst the 31 in order of merit in the list, those vacancies can be filled up in order of merit from the waitlisted candidates.

25. At this juncture, we have been informed by Mr. Khurana, the learned counsel for the PSEB, that the marks scored by the individual candidates in the written examination are available in the PSEB records. Therefore, a fresh selection exercise is to be carried out in terms of the above directions, within eight weeks from today.

26. With the above order, the appeals are allowed. The parties to bear their own cost.

Result of the Case: Appeals allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 10 S.C.R. 108 : 2024 INSC 735

Vijay Singh @ Vijay Kr. Sharma
v.
The State of Bihar

(Criminal Appeal No. 1031 of 2015)

25 September 2024

[Bela M. Trivedi and Satish Chandra Sharma,* JJ.]

Issue for Consideration

Issue arose as regards sustainablility of the findings of the High Court holding the appellants guilty of commission of offences u/ss. 302/34 and 364/34 IPC; as also the approach of the High Court, if in line with the settled law for reversing an acquittal into conviction.

Headnotes†

Penal Code, 1860 – ss. 302/34 and 364/34 – Kidnapping or abducting in order to murder – Abduction and murder of woman over a property dispute – Factum of her death discovered in furtherance of written report lodged by informant and brother-in-law of the victim – Conviction and sentence of accused nos. 1-5 of the commission of offences u/ss. 302/34 and 364/34, however acquittal of accused nos. 6 and 7 of all the charges – High Court upheld the conviction of accused nos. 1-5, as also convicted accused nos. 6 and 7 of the commission of offences u/ss. 364/34 and 302/34 – Sustainability:

Held: Offence of murder is entirely dependent on circumstantial evidence and in a case based on circumstantial evidence, the chain of evidence must be complete and must give out an inescapable conclusion of guilt – Prosecution case is far from meeting that standard – Mere presence of certain make-up articles cannot be a conclusive proof of the fact that the victim was residing in the said house, especially when another woman was admittedly residing there – No material whatsoever could be found at the house to directly indicate that the deceased as also the informant were residing there – Prosecution failed to examine even one cohabitant to prove the said fact – Evidence of the eye witnesses declared as wholly unreliable including on the aspect of time of death – Thus, no reason to doubt the post mortem report and the findings therein – Prosecution case full of glaring doubts as

* Author

regards abduction – Although, the post mortem report indicates that the death of the deceased was unnatural and the commission of murder cannot be ruled out, however no direct evidence to prove the commission of murder by the accused persons – Link of causation between the accused persons and the alleged offence conspicuously missing – Circumstantial evidence emanating from the facts surrounding the offence of abduction, such as the testimonies of eye witnesses, failed to meet the test of proof and cannot be termed as proved in the eyes of law – No inference could be drawn from it to infer the commission of the offence u/s. 302 by the accused persons – Also motive has a bearing only when the evidence on record is sufficient to prove the ingredients of the offences under consideration – Without the proof of foundational facts, the case of the prosecution cannot succeed on the presence of motive alone – Thus, the prosecution failed to discharge its burden to prove the case beyond reasonable doubt – Reasonable doubts are irreconcilable and strike at the foundation of the prosecution's case – Furthermore, approach of the High Court in reversing the acquittal of A-6 and A-7 not in line with the settled law pertaining to reversal of acquittals – High Court took a cursory view of the matter and reversed the acquittal without arriving at any finding of illegality or perversity or impossibility of the trial court's view or non-appreciation of evidence by the trial tourt – Thus, the appellants to be acquitted of all the charges – Findings of conviction arrived at by the courts below not sustainable and set aside. [Paras 28-32, 34-37]

Judicial deprecation – High Court's observation that the make-up articles found in the house could not have belonged to the widow lady as there was no need for her to put on make-up being a widow:

Held: Said observation not only legally untenable but also highly objectionable – Sweeping observation of this nature not commensurate with the sensitivity and neutrality expected from a court of law, specifically when the same is not made out from any evidence on record. [Para 27]

Case Law Cited

State of Goa v. Sanjay Thakran [2007] 3 SCR 507 : **(2007) 3 SCC 755;** *Chandrappa v. State of Karnataka* [2007] 2 SCR 630 : **(2007) 4 SCC 415;** *Nepal Singh v. State of Haryana* [2009] 6 SCR 982 : **(2009) 12 SCC 351;** *Kashiram v. State of M.P.* [2001] 4 Supp. SCR

263 : **(2002) 1 SCC 71;** *Labh Singh v. State of Punjab* **(1976) 1 SCC 181;** *Suratlal v. State of M.P* **(1982) 1 SCC 488;** *Rai Saheb & Ors. v. State of Haryana* **(1994) Supp.1 SCC 74;** *Sanjeev v. State of H.P* **(2022) 6 SCC 294 – referred to.**

List of Acts

Penal Code, 1860.

List of Keywords

Abduction; Murder; Abduction and murder of woman; Circumstantial evidence; Chain of evidence; Reversal of acquittal; Motive; Burden to prove case beyond reasonable doubt; Judicial deprecation; Observation of High Court highly objectionable; Observation of High Court not commensurate with sensitivity and neutrality expected from court of law.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1031 of 2015

From the Judgment and Order dated 26.03.2015 of the High Court of Judicature at Patna in Govt. Appeal (DB) No. 16 of 1992

With

Criminal Appeal Nos. 1578, 765, 1579 of 2017

Appearances for Parties

R. K. Dash, Sr. Adv., Ms. Fauzia Shakil, Amit Sharma, Dipesh Sinha, Ms. Pallavi Barua, Ms. Aparna Singh, Ajay Kumar Singh, Advs. for the Appellant.

Shivam Singh, Kartikay Aggarwal, Manish Kumar, Shantanu Sagar, Anil Kumar, Prabhat Ranjan Raj, Gunjesh Ranjan, Shashank Kumar Saurav, Vaibhav Jain, Manoneet Dwivedi, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Satish Chandra Sharma, J.

1. On 30.08.1985, Neelam breathed her last in Simaltalla, PS Sikandra, District Munger, Bihar. The factum of her death was discovered in

furtherance of the written report lodged by the informant and brother-in-law of the deceased, namely, Ramanand Singh (examined as PW18 before the Trial Court[1]) wherein he alleged that Neelam was abducted by seven persons from their house in an incident which occurred at around 10:00 PM on the said day. On the basis of this information, an FIR bearing no. 127 of 1985 was lodged at PS Sikandra and investigation was commenced which led to the filing of a chargesheet against the seven accused persons, namely – Krishna Nandan Singh (Accused No.1), Ram Nandan Singh (Accused No.2), Raj Nandan Singh (Accused No.3), Shyam Nandan Singh (Accused No.4), Bhagwan Singh (Accused No. 5), Vijay Singh (Accused No. 6) and Tanik Singh (Accused No.7).

2. The Trial Court charged all seven accused persons for the commission of offences punishable under Sections 323, 302, 364, 449, 450, 380/34 and 120-B of the Indian Penal Code, 1860.[2] Later, accused nos. 6 and 7 were distinctly charged for the commission of offences punishable under Sections 342, 506 read with Section 34 of IPC. After trial, the Trial Court, vide order dated 05.06.1992, convicted the accused persons listed as accused nos. 1, 2, 3, 4 and 5 for the commission of offences under Section 302/34 and 364/34 of IPC. They were acquitted of all other charges, and accused nos. 6 and 7 were acquitted of all the charges.

3. The convicts preferred an appeal before the Patna High Court against the order of conviction and the State preferred an appeal before the High Court against the order of acquittal of the two accused persons. The Patna High Court, vide a common judgment dated 26.03.2015,[3] upheld the conviction of the five convicts and set aside the acquittal of accused nos. 6 and 7 by finding them guilty of the commission of offences under Sections 364/34 and 302/34 of IPC. Accordingly, accused nos. 6 and 7 were also convicted and were sentenced to undergo rigorous life imprisonment on each count. The present batch of appeals assail the order/judgment dated 26.03.2015 of the Patna High Court.

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1 Prosecution witness or PW

2 Hereinafter referred as "IPC"

3 Passed in Govt. Appeal (DB) No. 16/1992, Criminal Appeal (DB) No. 219/1992 and Criminal Appeal (DB) No. 271/1992

BRIEF FACTS

4. Shorn of unnecessary details, the facts reveal that deceased Neelam was the wife of one Ashok Kumar who happened to be the son of PW3/Ganesh Prasad Singh, and the informant PW18/Ramanand Singh was the brother of Ashok Kumar. The informant's case was that at the relevant point of time, the deceased was residing with her husband and the informant in the house belonging to her late father Jang Bahadur Singh, who belonged to Simaltalla. The house was partially occupied by the deceased, her husband and her brother-in-law and the remaining portion was rented out and tenants were residing in those portions.

5. As per the prosecution case, on 30.08.1985 at about 10:00 PM, PW18 was sitting outside the house on a rickshaw along with one Doman Tenti, Daso Mistry and Soordas, and Neelam was sleeping inside the house. Her husband, Ashok Kumar, had gone to his native place Ghogsha. Suddenly, the seven accused persons, including the appellants before us, came from north direction along with 15 other unknown assailants. Accused Vijay Singh/A-6 caught hold of the informant/PW18 and as soon as he raised alarm and started shouting, two unknown persons pointed out pistols towards him and directed him to maintain silence. Thereafter, the accused persons who had caught the informant, assaulted him with fists and slaps, and confined him near the well situated on the north side of the house. Meanwhile, A-1 entered the house with 5-7 other accused persons by getting the house unlatched through a resident namely Kumud Ranjan Singh and dragged Neelam out of the house. As soon as they dragged her out, four persons caught hold of Neelam by her arms and legs, lifted her and started moving towards Lohanda. As per the informant, the accused persons also picked up two sarees, two blouses, two petticoats and a pair of slippers from Neelam's room while going out.

6. As the informant raised alarm, other people of the mohalla also gathered around including PW2 Vinay Kumar Singh, PW4 Chandra Shekhar Prasad Singh and PW5 Ram Naresh Singh. The said three witnesses witnessed the accused persons taking away Neelam but could not stop them. The informant explained that no one dared to follow the accused persons as they had pointed pistols and had threatened of dire consequences. The informant also explained the

motive behind the commission of the crime. It transpires from his statement that Neelam's late father Jang Bahadur Singh had no son and his house was in possession of his daughter Neelam. She was abducted in order to forcefully obtain the possession of the house belonging to her father. The second limb of motive stems from the pending litigation between A-1 to A-5 (appellants) on one side and deceased Neelam, her maternal grandfather and her two sisters on the other side. The accused persons had obtained letters of administration and probate of the Will left by late Jang Bahadur Singh from the competent court and the said order came to be challenged before the Patna High Court by the deceased, her maternal grandfather and younger sisters. In the said appeal, the Patna High Court had injuncted the accused persons from alienating any part of the property. The High Court also restrained the execution of the probate of the Will by restraining the delivery of possession of the property to the accused persons. Thus, deceased Neelam was residing in her father's house along with her husband and brother-in-law in order to retain the possession of the property. In this backdrop, the matter went for trial.

BEFORE THE TRIAL COURT

7. The Trial Court, while acquitting A-6 and A-7, observed that the motive attributed for the commission of the crime was not attributable to the said two accused persons as no interest of theirs could be disclosed in the pending litigation. Further, it also found that A-6 was not named in the FIR registered upon the information supplied by PW18 and in his oral testimony, no statement of assault by A-6 and A-7 was given by him. It further held that no evidence surfaced during the trial to indicate the participation of A-6 and A-7 in the acts of abduction and commission of murder.

8. While convicting A-1 to A-5 on the charges under Sections 302/34 and 364/34 of IPC, the Trial Court primarily relied upon the oral testimonies of PW18/informant, PW2, PW4 and PW5. The motive for the commission of the offence was supplied by the pending legal dispute relating to the property belonging to late Jang Bahadur Singh. The Court also replied upon circumstantial evidence borne out from the testimonies of PW7 (maternal uncle of the de-ceased), PW3 (father-in-law of the deceased), PW23 (sister of the deceased) and PW13 (doctor) to arrive at the finding of guilt.

BEFORE THE HIGH COURT

9. A reading of the impugned judgment passed by the High Court suggests that the High Court carried out a fresh appreciation of evidence. The High Court firstly examined the question whether Neelam was actually residing in the house from which she was abducted. Relying upon the testimonies of PW7 (maternal uncle of deceased), PW18 (brother-in-law of deceased and informant) and PW21 (Investigating Officer), the Court concluded that Neelam was indeed residing in the said house. In doing so, the Court discarded the fact that the other independent occupants of the house such as Ram Chabila Singh, his son, Kumud Ranjan Singh etc. did not come in support of the said fact. To overcome this deficiency, the Court relied upon the statements of PW21 and PW23 (sister of deceased) that some make-up articles were found in a bag lying in the room, which was suggestive of the fact that a woman was residing in the said room.

10. In further consideration, the High Court excluded the evidence of PW5 for the reason that his presence at the place of incident was doubtful. For, PW5 deposed that he was heading towards his home from Deoghar and on the way from Lakhisarai to Simaltalla, he stopped at Sikandra Chowk along with PW2 and PW4. It was at this point that they heard the *hulla* and ended up witnessing the commission of offence. The High Court took note of the fact that while going from Deoghar to Simaltalla, Lakhisarai and Ghogsha would come first and thus, there was no reason for PW5 to come all the way to Sikandra Chowk if he was going to his home in Ghogsha as he could have directly proceeded from Lakhisarai to Ghogsha. Nevertheless, the High Court duly relied upon the evidence of PW2, PW4 and PW18 as well as on circumstantial evidence comprising of the testimonies of PW23, PW13 (doctor) and absence of suitable explanation in the statements of accused persons under Section 313 of the Code of Criminal Procedure, 1973[4] as regards the fatal injuries suffered by the deceased. Thus, the High Court upheld the finding of guilt of A-1 to A-5.

11. As regards A-6 and A-7, the High Court reversed the finding of acquittal of the Trial Court into that of conviction. Primarily, the High

4 Hereinafter referred as "CrPC"

Court observed that the said two accused persons were acquitted on the basis of the exonerating testimony of PW5 and the same cannot be sustained as the testimony of PW5 has been excluded by the High Court in appeal. Further, the Court held that the testimonies of PW2, PW4 and PW18 were consistent regarding the participation of A-6 and A-7 and thus, they were convicted for the commission of the offences under Sections 364 and 302 of IPC read with Section 34 of IPC. The applicability of Section 34 IPC was based on the fact that A-6 and A-7 had confined PW18 near the well in order to eliminate any chances of resistance in the acts committed by the other five accused persons.

SUBMISSIONS

12. On behalf of A-6 and A-7, it is submitted that there was no motive for the said accused persons to have indulged in the commission of the offence in question. The motive, if any, existed only for the remaining five accused persons who were interested in the outcome of the pending litigation between the parties. It is further contended that the High Court ought not to have entered into the exercise of re-appreciation of the entire evidence without finding any infirmity in the view taken by the Trial Court. To buttress this submission, it is submitted that since the view taken by the Trial Court was a possible view, it could not have been disturbed by the High Court in appeal. In this regard, reliance has been placed upon the decisions of this Court in ***State of Goa v. Sanjay Thakran***,[5] ***Chandrappa v. State of Karnataka***,[6] ***Nepal Singh v. State of Haryana***,[7] ***Kashiram v. State of M.P.***,[8] ***Labh Singh v. State of Punjab***[9] ***and Suratlal v. State of M.P.***[10]

13. It is further submitted that no reliance could be placed upon the testimonies of PW2 and PW4 as their presence at the spot was doubtful. Further, if they were 400 yards away when hue and cry was raised, they could not have seen A-6 taking away PW18 towards the well as the said fact took place prior to the hue and cry. It is further

5 [2007] 3 SCR 507 : (2007) 3 SCC 755

6 [2007] 2 SCR 630 : (2007) 4 SCC 415

7 [2009] 6 SCR 982 : (2009) 12 SCC 351

8 [2001] 4 Supp. SCR 263 : (2002) 1 SCC 71

9 (1976) 1 SCC 181

10 (1982) 1 SCC 488

submitted that in the FIR, no pistol was assigned to A-6, whereas, the said fact was brought forward at the time of evidence. The appellants have also raised a question regarding the time of incident on the basis of medical evidence. It is stated that the post-mortem report indicated that half-digested food was found in the stomach of the deceased, whereas, the informant PW18 deposed that the incident took place immediately after dinner. If such was the case, the death ought to have occurred around 1-2 AM in the intervening night of 30.08.1985-31.08.1985, but the post-mortem report, based on the post-mortem conducted at around 05:30 PM on 31.08.1985, indicated that death took place about 24 hours ago and thus, the time of death was around 05:00 PM on 30.08.1985 and not 10:00 PM, as alleged.

14. The appellants have also submitted that the prosecution has not proved that the deceased was actually residing in the concerned house at Simaltalla.

15. Per contra, it is submitted on behalf of the State that mere non-examination of some independent witnesses shall not be fatal to the case of the prosecution. Reliance has been placed upon the decision of this Court in ***Rai Saheb & ors. v. State of Haryana***[11] to contend that at times, independent witnesses may not come forward due to fear. It is further submitted that the High Court has correctly appreciated the evidence in order to arrive at the finding of guilt of the accused persons. It is further submitted that the testimonies of PW2, PW4 and PW18 are consistent and the High Court has correctly placed reliance upon their testimonies. As regards motive as well, it is submitted that the evidence is sufficient to reveal motive for the commission of the crime.

16. We have heard learned counsels for the appellants as well as for the State. We have also carefully examined the record.

DISCUSSION

17. In light of the rival contentions raised by the parties, the principal issue that arises before the Court is whether the finding of guilt of the appellants arrived at by the High Court is sustainable in light of the evidence on record. As a corollary of this issue, it also needs

11 (1994) Supp.1 SCC 74

to be examined whether the approach of the High Court was in line with the settled law for reversing an acquittal into conviction in a criminal appeal.

18. After two rounds of litigation before the Trial Court and the High Court, it is fairly certain the case is to be examined only with respect to the offences under Sections 364 and 302 of IPC read with Section 34 IPC. With respect to the offence under Section 364 IPC, the case of the prosecution is based on direct oral evidence, and with respect to the offence under Section 302 IPC, the case of the prosecution is essentially based on circumstantial evidence as no direct evidence of the commission of murder could be collected. However, it is quite evident that the offence of murder was committed after the commission of the offence of abduction. There is a sequential relationship between the two offences and thus, in order to set up a case for the commission of the offence of murder, it is necessary to prove the commission of the offence of abduction by the accused persons/appellants. For, the chain, in a case based on circumstantial evidence, must be complete and consistent.

19. In order to prove the offence under Section 364 IPC, the prosecution has relied upon the oral testimonies of four eye witnesses – PW-2, PW-4, PW-5 and PW-18. Their testimonies have been assailed on various counts. The appellants have termed the said witnesses as interested and chance witnesses. The former charge originates from the fact that the witnesses were related to the deceased, and the latter charge originates from the fact that the witnesses had no rea-son to be present at the place of offence and they just appeared unexpectedly as a matter of chance. Let us examine both the aspects. We may first examine the testimonies of the witnesses independently, without going into their relationship with the deceased.

20. The informant PW18 has deposed that he was standing near a rickshaw outside his house and the deceased was sleeping inside the house. PW18 was standing along with three independent persons namely, Doman Tenti, Daso Mistry and Soordas. The seven accused persons came along with 15 other persons. A-6 and A-7, along with unknown persons, first came to PW18 and took him away towards the well and confined him there. Thereafter, the remaining accused persons, along with other unknown assailants, entered the house wherein the deceased was sleeping. Interestingly, as

per the version of the informant, the house was bolted from inside and was opened by a tenant namely Kumud Ranjan Singh. The problem with the informant's version begins from this point itself. As per his version, the first eye witnesses of the incident ought to have been Doman Tenti, Daso Mistry, Soordas and Kumud Ranjan Singh. One person, namely Soordas, was stated to be blind and thus, he may be excluded. Nevertheless, the prosecution ought to have examined the three natural witnesses of the incident namely, Doman Tenti, Daso Mistry and Kumud Ranjan Singh. There is no explanation for non-examination of the natural eye witnesses. The version becomes more doubtful when it is examined in light of his statement that he could not prevent the accused persons as A-6 had threatened him with a pistol. In the FIR, no pistol has been attributed to A-6, whereas in the statement recorded before the Trial Court, this fact was introduced for the first time, which is indicative of improvement. Furthermore, PW18 got it recorded in the FIR that A-6 and others had assaulted him with fists and slaps, but the said fact was not deposed before the Trial Court in his examination in chief. The discrepancy assumes greater seriousness in light of the fact that no pistol has been recovered from any of the accused persons and if the factum of branding of pistol is un-der the cloud of doubt, the entire conduct of PW18 becomes doubtful and unnatural, as he did not try to prevent the accused persons from entering the premises or from abducting the deceased or from taking away the deceased on their shoulders in front of his eyes as he was the brother-in-law of the deceased.

21. The other eye witnesses, PW2, PW4 and PW5, de-posed collectively in favour of the prosecution as they had arrived at the scene of crime together. At around 10:00 PM on the fateful night, the said eye witnesses happened to be present at Sikandra Chowk and they heard some hue and cry at the house of the deceased. The witnesses were coming together in a jeep from Lakhisarai and were going towards their home in Ghogsha village, the village wherein the deceased was married and also the native village of PW18/informant. PW2 was the driver of PW4. The testimo-nies of the said PWs have made it clear that while coming from Lakhisarai to Sikandra Chowk, Ghogsha came first, followed by Lohanda and Simaltalla. In such circumstances, their presence at Sikandra Chowk at 10:00 PM must be explained to the satisfaction of the Court. For, if they were going

to their village, there was no occasion for them to come to Simaltalla as it did not fall on their way. But no such ex-planation is forthcoming from the material on record.

22. Interestingly, this lacuna was duly noted by the High Court with respect to PW5 as there was no reason for him to be present at Sikandra Chowk at the time of incident and his testimony was excluded. However, the same logic was not extended to the testimony of PW4 as well, as it was equally improbable for him to be present at Sikandra Chowk at 10:00 PM on the date of incident. His visit to Sikandra Chowk was not necessitated for going to his village. Even otherwise, since the three eye witnesses were similarly placed as per their own version, the rejection of testimony of one witness ought to have raised a natural doubt on the testimonies of the other two witnesses unless they had a better explanation. However, no such doubt was entertained by the High Court and the impugned judgment offers no explanation for the same. In light of their own testimonies, none of the three eye witnesses were required to visit Sikandra Chowk or Simaltalla for going to their village.

23. The testimonies of the eye witnesses are also impeachable in light of the other evidence on record. PW21 was the investigating officer in the case and he had examined the aforesaid PWs as eye witnesses of the incident. The version put forth by the eye witnesses meets a serious doubt when examined in light of the evidence of DW3 and DW4, the concerned Deputy Superintendent and Superintendent of Police respectively who had supervised the investigation of the present case. Both these officers were examined as defence witnesses on behalf of the appellants. As per the supervision notes prepared by DW3 during the course of investigation, PW2 and PW4 got to know about the incident only when PW18 came running to them after the incident. PW2, at that time, was sitting in a hotel with Umesh Singh to have 'prasad'. Similarly, the evidence of DW4 indicates that on the date of incident, at around 10:00 PM, PW4 was coming from Lakhisarai in his jeep and he saw six-seven persons fleeing away in a jeep and he identified them as the accused persons. Thus, PW4 entered the scene after the commission of offence and he did not witness the act of abduction. The testimony of PW2 strengthens the doubt as he deposed that when they reached the police station after the incident with PW18, neither him nor PW4 in-formed the IO that they had directly seen the incident. The stark difference

between the versions put forth by the PW21 and DW3/DW4 raises serious concerns regarding the fairness of investigation conducted by PW21 and it is a reasonable possibility that the eye witnesses were brought in to create a fool proof case. The evidence of DW3 and DW4, both senior officers who had exercised supervision over the investigation conducted by PW21, indicates that the so-called eye witnesses of the incident were actually accessories after the fact and not accessories to the fact.

24. The second limb of the objection against the testimonies of the eye witnesses is that none of the eye witnesses is an independent witness of fact. Ordinarily, there is no rule of law to discard the testimonies of the witnesses merely because they were known to the victim or belonged to her family. For, an offence may be committed in circumstances that only the family members are present at the place of occurrence in natural course. However, the present case does not fall in such category. In the facts of the present case, the natural presence of the eye witnesses at the place of occurrence is under serious doubt, as discussed above, and for unexplained reasons, the naturally present public persons were not examined as witnesses in the matter. The non-examination of natural witnesses such as Doman Tenti, Daso Mistry, Soordas, Kumud Ranjan Singh and many other neighbours who admittedly came out of their houses to witness the offence, coupled with the fact that the projected eye witnesses failed to explain their presence at the place of occurrence, renders the entire version of the prosecution as improbable and unreliable. The eye witnesses, being family members, were apparently approached by PW18 who in-formed them about the incident and later, their versions were fabricated to make the case credible. Notably, when the version put forth by the interested witnesses comes under a shadow of doubt, the rule of prudence demands that the independent public witnesses must be examined and corroborating material must be gathered. More so, when public witnesses were readily available and the offence has not taken place in the bounds of closed walls.

25. Pertinently, the conduct of the eye witnesses also ap-pears to be unnatural considering that they were all relatives of the deceased. Firstly, PW18 did not try to prevent the ab-duction. Even if it is believed that he was held against a pistol, the statement regarding the existence of pistol comes as an improvement from his first information given to the police, as already noted above. Nonetheless, it is admitted

that PW2, PW4 and PW5 came in a jeep and they saw the accused persons leaving with Neelam after abducting her. It is also admitted that they had identified the accused persons, who were essentially the relatives of the eye witnesses. In such circumstances, as per natural human conduct, the least that they could have done was to follow the accused persons in their jeep. They admittedly had a ready vehicle with them. Despite so, there was no such attempt on their part, so much so that the dead body of Neelam was not even discovered until the following morning as none of the eye witnesses had any clue as to where the accused persons had taken away the deceased after abducting her.

26. One crucial foundational fact in the present case is that the deceased was residing in her father's house at Simaltalla. Although, the Trial Court and High Court have not doubted the said fact, we have our reservations regarding the same. In addition to the statements of PW18 (informant), PW23 (sister of deceased) and PW7 (maternal uncle of deceased), no other witness has deposed to prove the factum of residence. The admitted evidence on record sufficiently indicates that various other tenants were residing in the same house, including Kumud Ranjan Singh, Education Officer Ram Chabila Singh along with his daughter and son.

27. The investigating officer PW21 had inspected the house and no direct material, except some make-up articles, could be gathered so as to indicate that Neelam was actually residing there. Admittedly, another woman namely, Chando Devi (sister of Ram Chabila Singh) was also residing in the same portion of the house. The High Court did take note of this fact but explained it away by observing that since Chando Devi was a widow, the make-up articles could not have belonged to her as there was no need for her to put on make-up being a widow. In our opinion, the observation of the High Court is not only legally untenable but also highly objectionable. A sweeping observation of this nature is not commensurate with the sensitivity and neutrality expected from a court of law, specifically when the same is not made out from any evidence on record.

28. Be that as it may, mere presence of certain make-up articles cannot be a conclusive proof of the fact that the deceased was residing in the said house, especially when another woman was admittedly residing there. Furthermore, if Neelam was indeed residing there, her other belongings such as clothes etc. ought to have been found

in the house and even if not so, the other residents of the same house could have come forward to depose in support of the said fact.

29. Notably, certain clothes such as two sarees, two blouses and two petticoats were recovered along with the dead body of the deceased. The prosecution version is that the accused persons had taken away the said clothes from the house of the deceased while abducting her. There is absolutely no explanation for the said conduct on the part of the accused persons. It is difficult to understand as to why the accused persons would take her clothes along while abducting her. On the contrary, this fact actually serves the case of the prosecution in proving that the de-ceased was actually residing at the house in Simaltalla. The clothes appear to have been planted along with the dead body in order to support the fact of actual residence of the deceased at her father's house in Simaltalla. In light of the material on record, it could be concluded that no material whatsoever could be found at the house of Jang Bahadur Singh to directly indicate that the deceased was residing there. The make-up articles were linked with the deceased on the basis of a completely unacceptable reasoning and without any corroborative material. The prosecution has failed to examine even one cohabitant to prove the said fact. Furthermore, no personal belongings of the deceased, such as clothes, footwear, utensils etc., could be found in the entire house. Therefore, we are not inclined to believe that the deceased was actually residing in the house at Simaltalla. In the same breath, we may also note that even for PW18, no material was found in the said house to indicate that he was in fact residing there. Apart from his own statement, no witness has come forward to depose that the informant was a resident of the said house. The prosecution has not spotted any room in the entire house wherein PW18 was residing and thus, his own presence at the place of occurrence is doubtful.

30. The appellants have also raised certain objections with respect to the time of death. The discrepancy has been flagged in light of the post mortem report, based on the post-mortem conducted at around 5:30 PM on 31.08.1985, which indicates that death took place around 24 hours ago. It indicates that the time of death must have been around 5:00 PM on 30.08.1985, which is contrary to the evidence of PW18 that the incident took place around 10:00 PM on 30.08.1985. A post mortem report is generally not considered as conclusive evidence of the facts mentioned in the re-port regarding the cause of death,

time of death etc. It could always be corroborated with other direct evidence on record such as ocular evidence of the eye witnesses. However, when there is no other credible evidence on record to contradict the report, the facts stated in the post mortem report are generally taken as true. In the present matter, the evidence of the eye witnesses has been declared as wholly unreliable including on the aspect of time of death. Thus, there is no reason to doubt the post mortem report and the findings therein.

31. At this stage, we may also note that the approach of the High Court in reversing the acquittal of A-6 and A-7 was not in line with the settled law pertaining to reversal of acquittals. The Trial Court had acquitted the said two accused persons on the basis of a thorough appreciation of evidence and the High Court merely observed that their acquittal was based on the improbable statement of PW5 and since the evidence of PW5 stood excluded from the record, there was no reason left for the acquittal of A-6 and A-7. Pertinently, the High Court did not arrive at any finding of illegality or perversity in the opinion of the Trial Court on that count. Furthermore, it did not arrive at any positive finding of involvement of the said two accused persons within the sphere of common intention with the remaining accused persons. Equally, the exclusion of the evidence of PW5, without explaining as to how the evidence of PW2 and PW4 was not liable to be excluded in the same manner, was in-correct and erroneous.

32. We do not intend to say that the High Court could not have appreciated the evidence on record in its exercise of appellate powers. No doubt, the High Court was well within its powers to do so. However, in order to reverse a finding of acquittal, a higher threshold is required. For, the presumption of innocence operating in favour of an accused through-out the trial gets concretized with a finding of acquittal by the Trial Court. Thus, such a finding could not be reversed merely because the possibility of an alternate view was alive. Rather, the view taken by the Trial Court must be held to be completely unsustainable and not a probable view. The High Court, in the impugned judgment, took a cursory view of the matter and reversed the acquittal of A-6 and A-7 without arriving at any finding of illegality or perversity or impossibility of the Trial Court's view or non-appreciation of evidence by the Trial Court.

33. We may usefully refer to the exposition of law in ***Sanjeev v. State of H.P.***,[12] wherein this Court summarized the position in this regard and observed as follows:

> *"7. It is well settled that:*
>
> *7.1. While dealing with an appeal against acquittal, the reasons which had weighed with the trial court in acquitting the accused must be dealt with, in case the appellate court is of the view that the acquittal rendered by the trial court deserves to be upturned (see* ***Vijay Mohan Singh v. State of Karnataka***[13]***, Anwar Ali v. State of H.P.***[14]*)*
>
> *7.2. With an order of acquittal by the trial court, the normal presumption of innocence in a criminal matter gets reinforced (see* ***Atley v. State of U.P.***[15]*)*
>
> *7.3. If two views are possible from the evidence on record, the appellate court must be extremely slow in interfering with the appeal against acquittal (see* ***Sambasivan v. State of Kerala***[16]*)"*

34. Having observed that the case of the prosecution is full of glaring doubts as regards the offence of abduction, we may briefly note and reiterate that the offence of murder is entirely dependent on circumstantial evidence. Although, the post mortem report indicates that the death of the deceased was unnatural and the commission of murder cannot be ruled out. But there is no direct evidence on record to prove the commission of murder by the accused persons. The link of causation between the accused persons and the alleged offence is conspicuously missing. The circumstantial evidence emanating from the facts surrounding the offence of abduction, such as the testimonies of eye witnesses, has failed to meet the test of proof and cannot be termed as proved in the eyes of law. Therefore, the foundation of circumstantial evidence having fallen down, no inference could be drawn from it to infer the commission

12 (2022) 6 SCC 294

13 (2019) 5 SCC 436

14 (2020) 10 SCC 166

15 AIR 1955 SC 807

16 [1998] 3 SCR 280 : (1998) 5 SCC 412

of the offence under Section 302 IPC by the accused persons. It is trite law that in a case based on circumstantial evidence, the chain of evidence must be complete and must give out an inescapable conclusion of guilt. In the pre-sent case, the prosecution case is far from meeting that standard.

35. As regards motive, we may suffice to say that motive has a bearing only when the evidence on record is sufficient to prove the ingredients of the offences under consideration. Without the proof of foundational facts, the case of the prosecution cannot succeed on the presence of motive alone. Moreover, the motive in the present matter could operate both ways. The accused persons and the eyewitnesses belong to the same family and the presence of a property related dispute is evident. In a hypothetical sense, both the sides could benefit from implicating the other. In such circumstances, placing reliance upon motive alone could be a double-edged sword. We say no more.

36. The above analysis indicates that the prosecution has failed to discharge its burden to prove the case beyond reasonable doubt. The reasonable doubts, indicated above, are irreconcilable and strike at the foundation of the prosecution's case. Thus, the appellants are liable to be acquitted of all the charges.

37. In light of the foregoing discussion, we hereby conclude that the findings of conviction arrived at by the Trial Court and the High Court are not sustainable. Moreover, the High Court erred in reversing the acquittal of A-6 and A-7. Accordingly, the impugned judgment as well as the judgment rendered by the Trial Court (to the extent of conviction of A-1 to A-5) are set aside, and all seven accused persons (appellants) are hereby acquitted of all the charges levelled upon them. The appellants are directed to be released forthwith, if lying in custody.

38. The captioned appeals stand disposed of in terms of this judgment. Interim application(s), if any, shall also stand disposed of. No costs.

Result of the Case: Appeals disposed of.

†*Headnotes prepared by:* Nidhi Jain

[2024] 10 S.C.R. 126 : 2024 INSC 748

V. Vincent Velankanni
v.
The Union of India and Others

(Civil Appeal No(s). 8617 of 2013)

30 September 2024

[Sandeep Mehta* and R. Mahadevan, JJ.]

Issue for Consideration

Whether the seniority of the appellant is to be reckoned from the date of induction/initial appointment or as per the date of promotion/ confirmation in the skilled grade.

Headnotes†

Service Law – Promotion – Seniority – Date of induction – Date of promotion – The GO dated 24.12.2002 issued by the Ordinance Factory Board placed on record clarifies the position regarding counting of seniority by laying down that seniority will be counted from the date of promotion to skilled grade and not from the date of induction/entry/promotion in semi-skilled grade – However, the appellant has placed reliance on GO dated 04.08.2015, the rule position qua the fixation of seniority has been restored to be governed by OM dated 04.11.1992, according to which the relevant date for fixation of seniority would be the date of initial appointment and not the date of upgradation/promotion to the skilled grade:

Held: The clarification issued vide GO dated 04.08.2015 does not operate retrospectively as it is specifically provided in the said GO that "henceforth", the seniority in respect of Industrial Establishments will be governed by the relevant clause of OM dated 04.11.1992 – It is trite law that an Office Memorandum/ Government Order cannot have a retrospective effect unless and until there is an express provision to make its effect retrospective or that the operation thereof is retrospective by necessary implication – If a Government Order is treated to be in the nature of a clarification of an earlier Government Order, it may be made applicable retrospectively – Conversely, if a subsequent Government Order is held to be a modification/amendment of the earlier Government Order, its application would be prospective as retrospective application thereof would result in withdrawal of

* Author

vested rights which is impermissible in law and the same may also entail recoveries to be made – In the instant case, the subsequent GO dated 04.08.2015 cannot be read simply as a clarification and therefore cannot be made applicable retrospectively – The said GO has substantively modified the position governing seniority in the Industrial Establishments by reviving the earlier OM dated 04.11.1992, and supersedes the orders/circulars dated 24.12.2002 and 13.01.2003, which were holding the field over more than a decade – Therefore, giving retrospective effect to the GO dated 04.08.2015 would have catastrophic effect on the seniority of the entire cadre – As much water has flown under the bridge and retrospective application of the GO issued in 2015 would open floodgates of litigation and would disturb the seniority of many employees causing them grave prejudice and heartburn as it would disturb the crystallized rights regarding seniority, rank and promotion which would have accrued to them during the intervening period – This Court is of the view that applicability of the Government Order dated 04.08.2015 cannot enure to the benefit of the appellant as its operation is clearly prospective. [Paras 41, 42, 43, 50, 51]

Case Law Cited

Pawan Pratap Singh and Others v. Reevan Singh and Others [2011] 2 SCR 831 : **(2011) 3 SCC 267;** *Sonia v. Oriental Insurance Co. Ltd. and Others* [2007] 8 SCR 883 : **(2007) 10 SCC 627;** *Sree Sankaracharya University of Sanskrit and Others v. Dr. Manu and Another* [2023] 7 SCR 366 : **2023 SCC OnLine SC 640;** *Malcom Lawrence Cecil D'Souza v. Union of India and Others* **(1976) 1 SCC 599;** *R.S. Makashi and Others v. I.M. Menon and Others* [1982] 2 SCR 69 : **(1982) 1 SCC 379;** *K.R. Mudgal and Others v. R.P. Singh and Others* [1986] 3 SCR 993 : **(1986) 4 SCC 531;** *B.S. Bajwa and Another v. State of Punjab and Others* [1997] Supp. 6 SCR 451 : **(1998) 2 SCC 523 – relied on.**

BSNL v. R. Santhakumari Velusamy [2011] 14 SCR 502 : **(2011) 9 SCC 510;** *Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra* [1990] 2 SCR 900 : **(1990) 2 SCC 715;** *Suresh Chandra Jha v. State of Bihar and Others* [2006] Supp. 8 SCR 831 : **(2007) 1 SCC 405;** *L. Chandrakishore Singh v. State of Manipur and Others* [1999] Supp. 3 SCR 323 : **(1999) 8 SCC 287;** *Ajit Kumar Rath v. State of Orissa and Others* [1999] Supp. 4 SCR 302 : **(1999) 9 SCC 596;** *L. Chandrakishore Singh v. State of Haryana,* **AIR 1975 SC 613 – referred to.**

List of Keywords

Service Law; Promotion; Date of induction; Date of promotion; Seniority; GO dated 04.08.2015; GO dated 24.12.2002 issued by Ordinance Factory Board; Industrial establishment; Skilled grade; Semi-skilled grade; Retrospective effect; Prospective operation.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8617 of 2013

From the Judgment and Order dated 10.10.2011 of the High Court of Madras in WP No. 583 of 2011

With

Civil Appeal Nos. 10944 - 10946 of 2024

Appearances for Parties

R Nedumaran, Vijay Kumar, Prashant Bhushan, Anurag Tiwary, Advs. for the Appellant.

Vikramjeet Banerjee, ASG, Rupesh Kumar, Sr. Adv., Abid Ali Beeran P, Saswat Adhyapak, Sarath S Janardanan, Joydip Bhattacharya, Mrs. Anil Katiyar, Nachiketa Joshi, Ms. Priya Mishra, Rajesh Kumar Singh, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Mehta, J.

Civil Appeal No(s). 8617 of 2013

1. The instant appeal by special leave takes exception to the judgment dated 10th October, 2011 passed by the High Court of Judicature at Madras in Writ Petition,[1] whereby the Division Bench of the High Court accepted the writ petition[2] preferred by the private respondents herein[3] and reversed the judgment dated 24th December, 2010 passed by the Central Administrative Tribunal, Madras Bench[4] in Original

1 Writ Petition No. 583 of 2011

2 *Ibid*

3 Respondent Nos. 3, 4 and 5

4 'CAT', hereafter

Application[5] preferred by the private respondents herein. The CAT had rejected the Original Application,[6] challenging the proposed action of revision and fixation of their seniority in the Engine Factory, Avadi, Chennai.[7]

2. The brief facts in a nutshell, relevant and essential for the disposal of the instant appeal are noted hereinbelow.

3. The appellant and the private respondents were engaged on semi-skilled posts such as Fitters and Machinists in respondent No.2-Factory. A common select list of candidates based on merit was issued by the General Manager of respondent No.2-Factory in the year 1995 wherein the appellant herein was placed at a higher position than the private respondents. An appointment order dated 17th January, 1996 was issued in the favour of the appellant for the post of 'Fitter General(semi-skilled)' in respondent No.2-Factory. He was initially placed on probation for a period of two years which was further extended for a period of six months w.e.f. 17th January, 1998. The appellant satisfactorily completed the probation period on 16th July, 1998. Thereafter, he was promoted to the 'Skilled' grade on 6th January, 1999.

4. A draft seniority list dated 28th July, 2006 was issued by respondent No.2-Factory, whereby the seniority of 'Fitters' was fixed as per their respective dates of promotion to the skilled grade and the appellant was placed at a lower position than the private respondents.

5. Aggrieved of the draft seniority list,[8] the appellant submitted a representation dated 13th November, 2006 to the General Manager of respondent No.2-Factory seeking necessary amendments in the draft seniority list and to fix his position appropriately and thereafter, to publish a final seniority list. The General Manager rejected the aforesaid representation submitted by the appellant *vide* communication dated 9th July, 2007, observing that his seniority had been fixed from the date of holding the skilled grade, and thus the position of the appellant in the seniority list was not liable to be altered.

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5 Original Application No. 318 of 2009

6 *Ibid*

7 'respondent No. 2-Factory', hereafter

8 Dated 28th July, 2006

6. Being aggrieved, the appellant preferred Original Application No. 821 of 2007 before the CAT challenging the draft seniority list dated 28th July, 2006.

7. Another employee, namely, Mr. P. Kumaresan who was appointed as a Mechanist in respondent No.2-Factory in January 1996, also filed Original Application No. 831 of 2007, before the CAT, wherein Mr. P. Kumaresan also claimed that he had to be placed at the 6th position instead of the 27th position as set out in the draft seniority list. Original Application[9] preferred by Mr. P. Kumaresan came to be allowed by the CAT holding that the seniority fixed in the draft list was incorrect. The CAT noted that respondent No.2-Factory had allowed the promotion to the juniors of Mr. P. Kumaresan on the ground that he was still undergoing the extended period of probation. The CAT held that it is settled law that once the extended period of probation is completed, the employee should be confirmed in service from the date of initial selection and should be assigned the original rank in the seniority list. Thus, once the extended period of probation came to an end and the employee was found suitable, he had to be confirmed in service, promoted with seniority and all consequential benefits to the next grade with reference to the date of initial appointment.

8. The CAT allowed Original Application No. 821 of 2007 preferred by the appellant herein *vide* order dated 23rd January, 2009, basing its decision on the order passed in Original Application No. 831 of 2007 considering the fact that both the workers were identically employed in respondent No.2-Factory and directed that the appellant was entitled to be considered for his claim of seniority and directed the respondents[10] to revise the seniority list accordingly.

9. The private respondents herein filed Original Application No. 318 of 2009 before CAT against the proposed action of revision of seniority list and promotions in accordance with the order dated 23rd January, 2009 passed in the Original Application No. 821 of 2007 filed by the appellant. The said Original Application[11] was dismissed by CAT *vide* order dated 24th December, 2010 while granting the liberty to

9 Original Application No. 831 of 2007

10 Respondent Nos. 1 and 2

11 Original Application No.318 of 2009

the applicants therein(private respondents herein) to file a review application for assailing the orders passed in Original Application No. 831 of 2007 and Original Application No. 821 of 2007.

10. However, private respondents herein rather than filing a review application, chose to assail the orders passed by the CAT by preferring a Writ Petition[12] before the Madras High Court which came to be allowed *vide* order dated 10th October, 2011. The Union of India[13] and respondent No. 2-Factory were directed by the High Court to restore the seniority of the writ petitioners(private respondents herein), holding that the writ petitioners are senior to the appellant herein, both as per the date of initial appointment and also in the promotional post of skilled grade. The High Court held that an employee selected in the semi-skilled grade is required to complete the probation period satisfactorily and has to pass the requisite trade test prescribed for the post before he can be confirmed and promoted to the skilled grade. Due to the extension of the probation period of the respondents in the Writ Petition No.583 of 2011(including the appellant herein), they were required to be placed below the persons who were promoted to the skilled grade earlier to them. The High Court held that in the skilled grade, the writ petitioners(private respondents herein) were senior to the third respondent(appellant herein). It was also held that the promotions to the skilled grade and the highly skilled grade were carried out in the years 1998 and 2003, respectively but the third respondent (appellant herein) chose to file the Original Application[14] in the year 2007 and no reason was forthcoming for the gross delay. The relevant extract from the High Court's judgment dated 10th October, 2011 is reproduced hereinbelow: -

> "7. A mere reading of the counter affidavit would show that the probation of the third respondent in W.P. No. 583 of 2011 was extended by six months and for the third respondent in W.P. No. 584 of 2011, it was extended by three months by virtue of their failure to complete probation of two years and to pass the required trade test prescribed for the posts. Accordingly, the third respondent in W.P. No. 583 of

12 Writ Petition No. 583 of 2011

13 Respondent No. 1

14 Original Application No. 821 of 2007

2011 was placed in the skilled grade only with effect from 6.1.1999 and third respondent in W.P. No. 584 of 2011 was promoted only with effect from 5.10.1998 whereas the petitioners in both the petitions were promoted to the skilled grade on 3.7.1998.

8. It is not in dispute that the Semi-Skilled grade is only has to complete the probation period satisfactorily and pass the requisite trade tests prescribed for the posts. In the present case, it is clear that due to extension of the probation period, the respondents were placed below the persons who were promoted to Skilled grade earlier than them. Even if the date of appointment is taken into consideration, the petitioners are seniors to the third respondent in these petitions.

9. That apart, the petitioners were promoted to the skilled grade in the year 1998 and to the highly skilled grade in the year 2003. But the third respondent in these petitions have chosen to file the original applications only in the year 2007 and no reason is forthcoming for the delay.

10. In view of the counter affidavit filed by the Department which is in favour of the petitioners and the fact that the petitioners are seniors to the third respondent in these petitions both as per the date of initial appointment and also the date of promotion to the skilled grade, we are of the view that revising the seniority list at the instance of the third respondent in the Writ Petitions in the guise of implementing the order of the Tribunal, is illegal. Therefore, in our considered opinion, the order of the Tribunal is to be interfered with.

11. For the aforesaid reasons, the writ petitions are allowed and the order of the Tribunal is set aside. The respondents 1 and 2 are directed to restore the seniority of the petitioners confirming their original date of promotion to the Highly Skilled Grade. After revising the seniority, the respondents are further directed to consider the case of the petitioners for subsequent promotion on par with their juniors."

(quoted verbatim from the paper book)

The judgment dated 10th October, 2011 passed by the Division Bench of the High Court is the subject matter of challenge in the instant appeal.

Submissions on behalf of the appellant:

11. Learned counsel appearing for the appellant urged that the High Court premised its findings on a totally erroneous reasoning that the challenge laid by the appellant to the draft seniority list was delayed and that the private respondents herein(writ petitioners) were senior to the appellant as on the date of initial appointment.

12. Learned counsel contended that the draft seniority list in the appellant's cadre was published in the year 2006 for the first time after the appointment of the appellant as well as the private respondents. Immediately on receiving the draft seniority list, the appellant herein made a representation against the same and when a favourable decision was not forthcoming, he approached the CAT for challenging the validity thereof. He submitted that the finding of the High Court that the private respondents herein(writ petitioners) were senior to the appellant as on the date of initial appointment is totally against the record.

13. He further urged that the extant rules do not provide that the promotion from Fitter(semi-skilled) to Fitter(skilled) would be dependent on passing the trade test. Thus, as soon as the appellant completed the probation period, his services would have to be confirmed and reckoned from the date of initial appointment, and by virtue thereof, the appellant would be entitled to be placed above the private respondents in the order of seniority.

14. Learned counsel submitted that the period spent during training/ probation has to be reckoned for computation of length of service and the same cannot be excluded while assigning seniority to an employee. In support of his arguments, learned counsel placed reliance on the judgment of this Court in the case of ***L. Chandrakishore Singh v. State of Haryana***.[15]

15. He further submitted that the movement of the employee from semi-skilled to skilled grade tantamounts to confirmation/ upgradation and

15 AIR 1975 SC 613

not a promotion. In support of this contention, reliance was placed on the judgment of this Court in the case of ***BSNL v. R. Santhakumari Velusamy***.[16]

16. Learned counsel also placed reliance on the Office Memorandum[17] dated 4th November,1992, issued by the Government of India, Department of Personnel and Training, which was in force at the time when the appellant and the private respondents were appointed, wherein, it is provided: -

> "Seniority for Promotion
>
> Order effective from 4th November, 1992
>
> [Government of India, Department of Personnel and Training, Office Memorandum No. 20011/5/90-Estt. (D), dated the 4th November, 1992]
>
> Seniority to be determined by the order of merit indicated at the time of initial appointment.- The seniority of Government servants is determined in accordance with the general principles of seniority contained in M.H.A., O.M. No. 9/11155-RPS, dated the 22nd December, 1959 (See Section II). One of the basic principles enunciated in the said OM is that, seniority follows confirmation and consequently permanent officers in each grade shall rank senior to those who are officiating in that grade.
>
> 2. This principle has been coming under judicial scrutiny in a number of cases in the past; the last important judgment being the one delivered by the Supreme Court on 2-5-1990, in the case of Class II Direct Recruits Engineering Officers' Association v. State of Maharashtra. In Para. 47 (A) of the said judgment, the Supreme Court has held that once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not-according to the date of his confirmation.
>
> 3. The general principle of seniority mentioned above has been examined in the light of the judicial pronouncement

16 [2011] 14 SCR 502 : (2011) 9 SCC 510

17 'OM', hereafter

> referred to above and it has been decided that seniority may be delinked from confirmation as per the directive of the Supreme Court in Para, 47 (A) of its judgment, dated 2-5-1990. **Accordingly, in modification of the General Principle 3, proviso to General Principle 4 and proviso to General Principle 5 (i) contained in O.M. No. 9/11155-RPS, dated the 22nd December, 1959 and Para. 2.3 of O.M., dated the 3rd July, 1986, it has been decided that the seniority of a person regularly appointed to a post according to rule would be determined by the order of merit indicated at the time of initial appointment and not according to the date of confirmation.**
>
> 4. These orders shall take effect from the date of issue of this Office Memorandum. Seniority already determined according to the existing principles on the date of issue of these orders will not be reopened even if in some cases seniority has already been challenged or is in dispute and it will continue to be determined on the basis of the principles already existing prior to the date of issue of these orders."
>
> (emphasis supplied)

He thus urged that the seniority of a person regularly appointed would have to be reckoned based on the merit indicated at the time of the initial appointment and not as per the date of confirmation. To support this submission, he also placed reliance on the Constitution Bench decision of this Court in ***Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra***.[18]

He thus implored the Court to accept the appeal, set aside the impugned judgment rendered by the High Court, and restore the judgment of the CAT.

Submissions on behalf of the respondents:

17. *Per contra*, learned counsel appearing for respondent Nos. 1 and 2 submitted that the appellant was appointed as Fitter General(semi-

18 [1990] 2 SCR 900 : (1990) 2 SCC 715

skilled) on 17th January, 1996. The semi-skilled grade is only a trainee grade and in order to be confirmed in service and for being promoted to the skilled grade, the employee would have to complete the probation period satisfactorily and pass the requisite trade test prescribed for promotion to the skilled grade. Only on passing the trade test, the employee would qualify for a permanent status and promotion to the skilled grade.

18. He further submitted that it is a settled law that in cases where there are no rules governing the field, it is the placement in the initial merit list that will decide the seniority, however, if the rules are in vogue, then the same will prevail. In this regard, he placed reliance on ***Suresh Chandra Jha v. State of Bihar and Others***.[19]

19. Learned counsel for the respondents placed reliance on Statutory Regulatory Order[20] No. 185 of 1994 dated 1st November, 1994 to urge that any appointment in the industrial establishment is done against the skilled grade and hence, the period spent in the semi-skilled grade till completion of probation period and qualifying the prescribed trade test for promotion to the skilled grade is considered only as a trainee grade. Resultantly, the seniority/merit position at the time of induction in the trainee grade would have no bearing on the *inter se* seniority of the employees which would have to be reckoned from the date the employee is confirmed and promoted to the skilled grade upon completing the probation period and clearing the trade test.

20. He further placed reliance upon the Government Order[21] dated 24th December, 2002 issued by the Ordinance Factory Board, Ministry of Defence, Government of India, which was issued to clarify the counting of seniority in trades mentioned in SRO No. 185 of 1994 applicable to the Industrial Establishments and urged that the said GO clarifies beyond the pale of doubt that the semi-skilled grade is a trainee grade and the seniority will be counted from the date of promotion to the skilled grade and not from the date of induction/ entry in the semi-skilled grade.

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19 [2006] Supp. 8 SCR 831 : (2007) 1 SCC 405

20 'SRO', hereafter

21 'GO', hereafter

21. Learned counsel pointed out that the two years' probation period of the appellant was extended by six months w.e.f. 17th January, 1998, and the appellant could complete the probation period only on 16th July, 1998. Subsequently, upon passing the trade test, he was promoted to the skilled grade w.e.f. 6th January, 1999. The appellant lost the seniority on account of his failure to complete probation in the period of two years and clearing the trade test whereas, the private respondents herein had completed probation in time and were found to be fit in the trade test and therefore, they were promoted to the skilled grade much before the appellant. Consequently, these employees i.e. private respondents herein were placed higher in seniority, as per clarification issued by Ordinance Factory Board *vide* GO dated 24th December, 2002.

On these grounds, learned counsel for the respondents implored the Court to dismiss the appeal and affirm the order passed by the High Court.

22. Learned counsel for the private respondents herein[22] adopted the submissions advanced by learned counsel for respondent Nos. 1 and 2.

23. We have given our thoughtful consideration to the submissions advanced at the bar by learned counsel for the parties and have gone through the impugned judgment and the material placed on record.

Discussion and Conclusion:

24. The fact that the appellant and private respondents were inducted as semi-skilled grade employees in respondent No. 2-Factory in the year 1996 is not in dispute. The common select list dated 22nd November, 1995 is not placed on record by the parties. However, appellant filed an RTI,[23] and the reply thereto dated 29th December, 2011 clearly shows that at the time of initial induction, appellant was placed at the 7th position, whereas the private respondents[24] were placed at the 30th, 31st and 32nd positions, respectively in the select list based on merit.

22 Respondent Nos. 3, 4, and 5

23 Right to Information

24 Respondent Nos. 3, 4 and 5

25. The Division Bench of the High Court in the impugned judgment dated 10th October, 2011 has recorded a categoric finding that even if the date of appointment is taken into consideration, the writ petitioners(private respondents herein) are senior to respondent No.3(appellant herein). This finding seems to be *prima facie* erroneous because admittedly, the appellant herein was placed at 7th position and the private respondents were placed at the 30th, 31st and 32nd positions in the order of merit, as borne out from the record. Further, in writ petition[25] filed by the private respondents before the High Court and the counter affidavit filed by the respondents herein before this Court, there is no averment that these respondents were placed above to the appellant at the time of initial appointment. Rather the sole ground taken by the writ petitioners(private respondents herein) to oppose the prayer of the appellant was that the appellant was not able to complete his probation period and pass the trade test on time and thus, he was placed below the private respondents in the draft seniority list.

26. Before we adjudicate upon the issue of *inter se* seniority amongst the litigating parties, we find it necessary to comment on the appellant's approach towards filing his claim concerning his promotion in the highly skilled grade.

27. The appellant and the private respondents faced a common selection process and were appointed in the semi-skilled grade in the year 1996. The private respondents herein were promoted to the skilled grade on 11th January, 1998 and further promoted to the highly skilled grade on 20th May, 2003. On the other hand, the appellant was promoted to the skilled grade on 17th July, 1998(after completing his extended probation period of 6 months and clearing the mandatory trade test). Considering that the private respondents were promoted to highly skilled grade in May, 2003, the appellant in the normal course should also have been promoted to highly skilled grade by the end of the year 2003. However, as per the factual matrix, he was promoted to the highly skilled grade after around 5 years i.e. on 26th March, 2008. A tabular chart depicting the date of appointment and the date of promotion to skilled and highly skilled grade is placed below: -

25 Writ Petition No. 583 of 2011

Name	Date of appointment in the Semi Skilled grade	Extension of probation	Effective date of satisfactory completion of probation	Date of promotion to Skilled grade	Date of promotion to the Highly skilled grade
V. Sivaraman **(Respondent No. 3)**	11.01.1996	NA	11.01.1998	03.07.1998	20.05.2003
G. Sudhakar **(Respondent No. 4)**	11.01.1996	NA	11.01.1998	03.07.1998	20.05.2003
P. Ramesh **(Respondent No. 5)**	11.01.1996	NA	11.01.1998	03.07.1998	20.05.2003
V. Vincent Velankanni **(Appellant)**	**17.01.1996**	**By 6 months w.e.f. 17.1.1998 by order dated 5.2.1998**	**17.07.1988**	**06.01.1999**	**26.03.2008**

28. The draft seniority list was published on 28th July, 2006. The appellant never questioned the denial of promotion to the highly skilled grade, till much after the publication of the draft seniority list. Admittedly, co-employees who were below the appellant in the select list of the year 1996 were promoted in the intervening period without any objection being raised by the appellant. After the publication of the draft seniority list in the year 2006, he chose to challenge the same and to consider his promotion to highly skilled grade with effect from 20th May, 2003 by filing an Original Application[26] before CAT only in the year 2007. Thus, it was the first time in 2007 that the appellant claimed his promotion with retrospective effect. However, this benefit of retrospective promotion was neither granted by the CAT nor by the High Court and thus, there is no need to delve into this aspect further.

29. The primary issue which requires adjudication is as to whether the seniority of the appellant is to be reckoned from the date of induction/ initial appointment or as per the date of promotion/confirmation in the skilled grade.

30. It is a well-settled proposition that once an incumbent is appointed to a post according to the rules, his seniority has to be reckoned from

26 Original Application No. 821 of 2007

the date of the initial appointment and not according to the date of confirmation, unless the rules provide otherwise.

31. In the case of ***L. Chandrakishore Singh v. State of Manipur and Others***,[27] this Court held that in cases of probationary or officiating appointments which are followed by a confirmation, unless a contrary rule is shown, the services rendered as the officiating appointment or on probation cannot be ignored while reckoning the length of service for determining the position in the seniority list. This view has been reiterated in the case of ***Ajit Kumar Rath v. State of Orissa and Others***.[28]

32. The Constitution Bench of this Court in ***Direct Recruit Class II Engg Officers' Assn.*** *(supra)* stated the legal position with regard to *inter se* seniority of direct recruits and promotees and while doing so, *inter alia*, it was held that once an incumbent is appointed to a post according to rules, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

33. This Court summarised the legal principles with regard to the determination of seniority in ***Pawan Pratap Singh and Others v. Reevan Singh and Others***[29] in the following terms:

> **45.** From the above, the legal position with regard to determination of seniority in service can be summarised as follows:
>
> *(i)* The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.
>
> *(ii)* Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between

27 [1999] Supp. 3 SCR 323 : (1999) 8 SCC 287

28 [1999] Supp. 4 SCR 302 : (1999) 9 SCC 596

29 [2011] 2 SCR 831 : (2011) 3 SCC 267

one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

(iii) Ordinarily, notional seniority may not be granted from the backdate and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.

34. Thus, it is trite that when an employee completes the probation period and is confirmed in service *albeit* with some delay, the confirmation in service shall relate back to the date of the initial appointment. Any departure from this principle in the form of statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution of India.

35. In the backdrop of the above legal and factual background, let us now examine if whether the extant rules/regulations/circulars prevailing in the establishment[30] contained any stipulation that the completion of the probation period and the passing of the trade test is *sin qua non* for being promoted to the skilled grade and if so, whether the seniority of the employees selected on the same date would have to be reckoned from the date of confirmation/passing the trade test or from the date of initial appointment.

36. A pertinent averment is made in the counter affidavit filed by the respondents emphasizing their stand that the semi-skilled grade is only a trainee grade and in order to place an employee in the skilled grade, he would have to complete the probation period satisfactorily

30 Respondent No. 2-Factory

and also clear the trade test as laid down in the SRO No. 185 of 1994. The relevant extract from SRO No. 185 of 1994 dated 1st November, 1994 is reproduced hereinbelow for the sake of ready reference. Note 6 of the said SRO reads as below: -

> "Note 6. Wherever "Trade Test" is laid down in Column 12 of this Schedule such trade test shall be prescribed by the General manager of the factory or the Ordnance Factory Board. The term "Trade Test" will include written, oral and practical examination and aptitude test and interview and also statutory qualification test where applicable."

37. The GO dated 24th December, 2002 issued by the Ordinance Factory Board placed on record clarifies the position regarding counting of seniority in the trades of SRO No. 185 of 1994 for the industrial establishments. The language of this GO is considered germane to the controversy and hence, the relevant portion thereof is extracted hereinbelow: -

> "With a view to overcome doubts in counting of seniority in respect of industrial employees who are working in trades listed at Annexure 'A' of SRO 185/1994 it has been decided to interpret rules relating to seniority in consonance with existing SRO provisions. Accordingly, the following rules for determining seniority may be followed in all OFs with immediate effect.
>
> **1) Semi-skilled posts are training post for skilled posts of trades listed at Annexure 'A' of SRO 185/1994**.
>
> 2) Educational Qualification/Technical Qualification will not be deciding factor while counting seniority for trades listed at Annexure 'A' of SRO 185/1994.
>
> **However, where passing of trade test/competency test or any other statutory certificate is required, the same must be adhered to and cannot be done away with.**
>
> **3) Seniority will be counted from the date of promotion to Skilled grade and not from the date of induction/ entry/promotion in semi-skilled grade.**
>
> 4)……

5)……

6) The above orders are in consonance with the existing SRO provisions and various court orders on the subject."

(emphasis supplied)

38. The validity of this GO[31] was never assailed by the appellant at any stage either before the CAT or the High Court. A conjoint reading of SRO No. 185 of 1994 and the GO dated 24th December, 2002, which indisputably were applicable to the cadre of semi-skilled and skilled fitters in the respondent establishment[32] at the relevant point of time would make it clear that the seniority in the skilled grade would have to be reckoned from the date of promotion to the skilled grade and not from the date of induction/entry in the semi-skilled grade and the candidate joining service in the semi-skilled grade would be mandatorily required to complete the probation period and also to clear the trade test for being promoted to the skilled grade. In the event of either of the two conditions not being met, the employee concerned would not be entitled to be promoted to the skilled grade.

39. The appellant, in support of his plea, has placed reliance on a GO dated 4th August, 2015, whereby the GO dated 24th December, 2002 has been superseded and it has been decided by the Competent Authority that "henceforth", the seniority in respect of Industrial Establishments would be governed by the relevant clause of OM dated 4th November, 1992(reproduced *supra*). The said GO dated 4th August, 2015 is reproduced hereinbelow for the sake of ready reference: -

"No. Per/I/Seniority/2015-16 Date: 04-08-2015

To

The Sr. General Managers/ General Managers

All Ordnance & Ordnance Equipment Factories

Sub: Determination of Seniority in connection with direct Recruitment in the Industrial Establishment.

Ref: (i) OFB Circular No. 590/OFBOL/A/I dated 24.12.2002

31 Dated 24th December, 2002

32 Engine Factory, Avadi, Chennai

(ii) OFB Circular No. 590/OFBOL/A/I dated 13.01.2003

In connection with counting of Seniority in Annexure-A trades of SRO 185/1994 in the Industrial Establishment, above referred OFB Circulars clarified and directed that seniority in respect of Industrial Employees will be counted from the date of up-gradation to Skilled Grade and not from the date of induction/entry/promotion in the Semi-skilled grade.

Several references in this regard have been received at OFB and after due examination, it has been observed that the OFB Circulars under reference are not in line with the principles of seniority as laid down by DOPT from time to time.

Therefore, the Competent Authority has decided that in supersession of the above referred OFB Circulars dated 24.12.2002 and 13.01.2003, **henceforth**, seniority in respect of IEs will be governed by the relevant clause of DOPT OM No.20011/5/90-Estt(D) dated 4th November, 1992 and OM No.22011/7/86-Estt(D) dated 3rd July, 1986. Accordingly, promotion from Skilled to Highly Skilled Grade-II will be made as per the seniority fixed for Semi-skilled grade (entry grade) which will be arrived at as per merit of the select panel, without making any linkage to the date of up-gradation to the Skilled Grade.

It may so happen that a person lower in the merit list of recruitment (in Semi-skilled grade) joins earlier due to early clearance of PVR. In such case, the person lower in the merit list will complete his/her qualifying service and be up-graded to Skilled Grade on earlier date as compared to a person higher in the merit list. However, person higher in the merit list will not lose his seniority and will be placed above the person lower in the merit list after getting up-gradation to Skilled Grade.

(S. K. Singh)
Director/IR
For Director General, Ordnance Factories"

(emphasis supplied)

40. By virtue of the above GO,[33] the rule position *qua* the fixation of seniority has been restored to be governed by OM dated 4th November, 1992(*reproduced supra*), according to which the relevant date for fixation of seniority would be the date of initial appointment and not the date of upgradation/promotion to the skilled grade. The OM dated 4th August, 2015 further clarifies that the person higher in the merit list will not lose his seniority and will be placed above the person lower in the merit list after getting upgradation to the skilled grade.

41. However, the clarification issued *vide* GO dated 4th August, 2015 does not operate retrospectively as it is specifically provided in the said GO that **"henceforth"**, the seniority in respect of Industrial Establishments will be governed by the relevant clause of OM dated 4th November, 1992.

42. It is trite law that an Office Memorandum/Government Order cannot have a retrospective effect unless and until there is an express provision to make its effect retrospective or that the operation thereof is retrospective by necessary implication. In this regard, we are benefitted by the observations of this Court in ***Sonia v. Oriental Insurance Co. Ltd. and Others***,[34] wherein it was held that:

> "**11.** ….In any view of the matter, law is well settled that an Office Memorandum cannot have a retrospective effect unless and until intention of the authorities to make it as such is revealed expressly or by necessary implication in the Office Memorandum."

43. If a Government Order is treated to be in the nature of a clarification of an earlier Government Order, it may be made applicable retrospectively. Conversely, if a subsequent Government Order is held to be a modification/amendment of the earlier Government Order, its application would be prospective as retrospective application thereof would result in withdrawal of vested rights which is impermissible in law and the same may also entail recoveries to be made. The principles in this regard were culled out by this Court in a recent judgment of ***Sree Sankaracharya University of***

33 Dated 4th August, 2015

34 [2007] 8 SCR 883 : (2007) 10 SCC 627

***Sanskrit and Others v. Dr. Manu and Another*,**[35] in the following terms: -

> **"52.** From the aforesaid authorities, the following principles could be culled out:
>
> i) If a statute is curative or merely clarificatory of the previous law, retrospective operation thereof may be permitted.
>
> ii) In order for a subsequent order/provision/amendment to be considered as clarificatory of the previous law, the pre-amended law ought to have been vague or ambiguous. It is only when it would be impossible to reasonably interpret a provision unless an amendment is read into it, that the amendment is considered to be a clarification or a declaration of the previous law and therefore applied retrospectively.
>
> iii) An explanation/clarification may not expand or alter the scope of the original provision.
>
> iv) Merely because a provision is described as a clarification/explanation, the Court is not bound by the said statement in the statute itself, but must proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is a substantive amendment which is intended to change the law and which would apply prospectively."

44. Applying these principles to the case at hand, we are of the view that the subsequent GO dated 4th August, 2015 cannot be read simply as a clarification and therefore cannot be made applicable retrospectively. The said GO has substantively modified the position governing seniority in the Industrial Establishments by reviving the earlier OM dated 4th November, 1992, and supersedes the orders/circulars dated 24th December, 2002 and 13th January, 2003, which were holding the field over more than a decade. Therefore, giving retrospective effect to the GO dated 4th August, 2015 would have catastrophic effect on the seniority of the entire cadre.

35 [2023] 7 SCR 366 : 2023 SCC OnLine SC 640

45. This Court has time and again dealt with the effect of altering the seniority list at a belated stage and how it may adversely affect the employees whose seniority and rank has been determined in the meantime. In this connection, reference may be made to ***Malcom Lawrence Cecil D'Souza v. Union of India and Others***,[36] wherein this Court held that: -

> **"9.** Although security of service cannot be used as a shield against administrative action for lapses of a public servant, by and large one of the essential requirements of contentment and efficiency in public services is a feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after lapse of many years….. Raking up old matters like seniority after a long time is likely to result in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time."

46. In ***R.S. Makashi and Others v. I.M. Menon and Others***,[37] this Court observed as follows: -

> **"33.** …. We must administer justice in accordance with law and principles of equity, justice and good conscience. It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years. …."

47. In ***K.R. Mudgal and Others v. R.P. Singh and Others***,[38] this Court observed in the following terms: -

> **"2.** … A government servant who is appointed to any post ordinarily should at least after a period of 3 or 4 years

36 (1976) 1 SCC 599

37 [1982] 2 SCR 69 : (1982) 1 SCC 379

38 [1986] 3 SCR 993 : (1986) 4 SCC 531

> of his appointment be allowed to attend to the duties attached to his post peacefully and without any sense of insecurity."

48. In ***B.S. Bajwa and Another v. State of Punjab and Others***,[39] this Court held that the seniority list should not be reopened after a lapse of reasonable period as it would disturb the settled position which is unjustifiable. The relevant extract is as follows: -

> "**7**. … It is well settled that in service matters the question of seniority should not be reopened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable…."

49. It can easily be inferred that in the intervening period, before the GO dated 4th August, 2015 came to be issued, seniority of multitudes of employees must have been fixed according to the GO dated 24th December, 2002, which is according to the date of promotion to skilled grade and not from the date of induction/entry in semi-skilled grade. As a matter of fact, respondent Nos. 3, 4 and 5 who were below the appellant in the order of merit at the time of induction in the semi-skilled grade, have been promoted to the skilled grade and the highly skilled grade much before the appellant by application of the GO dated 24th December, 2002. The appellant did not question their promotions before any Court or Tribunal at any stage.

50. Thus, much water has flown under the bridge and retrospective application of the GO issued in 2015 would open floodgates of litigation and would disturb the seniority of many employees causing them grave prejudice and heartburn as it would disturb the crystallized rights regarding seniority, rank and promotion which would have accrued to them during the intervening period. To alter a seniority list after such a long period would be totally unjust to the multitudes of employees who could get caught in the labyrinth of uncertainty for no fault of theirs and may suffer loss of their seniority rights retrospectively.

51. Keeping in mind the afore-stated principles, we are of the view that applicability of the Government Order dated 4th August, 2015 cannot enure to the benefit of the appellant as its operation is clearly prospective.

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39 [1997] Supp. 6 SCR 451 : (1998) 2 SCC 523

52. In wake of the above discussion, we find that the impugned judgment of the High Court does not suffer from any infirmity warranting interference.

53. This appeal is dismissed as being devoid of merit. No order as to costs.

54. Pending application(s), if any, shall stand disposed of.

CIVIL APPEAL @ SLP(Civil) D. No. 3704-3706 of 2012)

55. Delay condoned.

56. Leave granted.

57. In terms of the judgment passed in Civil Appeal No(s). 8617 of 2013, the present appeals are disposed of. No order as to costs.

58. Pending application(s), if any, shall stand disposed of.

Result of the Case: Appeals disposed of.

†*Headnotes prepared by:* Ankit Gyan

[2024] 10 S.C.R. 150 : 2024 INSC 749

Atul Kumar
v.
The Chairman (Joint Seat Allocation Authority) and Others

(Writ Petition (Civil) No 609 of 2024)

30 September 2024

[Dr Dhananjaya Y Chandrachud, CJI, J B Pardiwala and Manoj Misra, JJ.]

Issue for Consideration

Matter pertains to Schedule caste category student who lost his admission to IIT since he was late in paying the online admission fee of Rs 17,500/- by a few minutes.

Headnotes†

Constitution of India – Art. 142 – Exercise of power under – Indian Institute of Technology IIT-Admission – Schedule caste category student allotted seat in Electrical Engineering course at IIT – Took all steps to comply with all formalities pursuant to the allotment to him of a seat for the course, however, lost his admission to IIT since he was late in paying the online admission fee of Rs 17,500/- by a few minutes – Challenge to:

Held: Petitioner logged in as many as on six occasions and uploaded the documents, which evidently indicates that he was making earnest efforts to log into the portal – No conceivable reason why the petitioner would not have done so if he had the wherewithal to pay the fees of Rs 17,500 – Talented student like the petitioner who belongs to a marginalized group of citizens and has done everything to secure admission should not be left in the lurch – Power of this Court u/Art.142 to do substantial justice is meant precisely to cover such a situation – Petitioner to be granted admission to IIT Dhanbad against the seat which was allotted to him in the branch of Electrical Engineering – Supernumerary seat to be created for the petitioner, if so required. [Paras 6, 7]

List of Acts

Constitution of India.

Atul Kumar v. The Chairman
(Joint Seat Allocation Authority) and Others

List of Keywords

IIT-Admission; Schedule caste category; Electrical Engineering course; Made efforts to log into the portal; Lost admission to IIT; Late in paying online admission fee by few minutes; Marginalized group of citizens; Granted admission to IIT; Supernumerary seat.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 609 of 2024

(Under Article 32 of The Constitution of India)

Appearances for Parties

Amol Chitale, Sarthak Sharma, Mrs. Pragya Baghel, Advs. for the Petitioner.

Sonal Jain, Ms. Kajal Sharma, Arjun Mitra, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

1. The petitioner is a meritorious student. He belongs to the Scheduled Caste category. He appeared for the JEE (Advanced) 2024 Examination and secured a rank of 1455 in his category. He was allotted a seat at the Indian Institute of Technology Dhanbad for a four year Bachelor of Technology course in Electrical Engineering. This was the second attempt and, therefore, the last chance for the petitioner to secure admission since only two attempts are permissible. The petitioner has disclosed that his father is a daily wager. The petitioner completed his higher secondary education from Khatauli, District Muzaffarnagar, Uttar Pradesh. The family income is below the poverty line.

2. The time frame for the completion of online reporting, including the payment of fees and uploading of documents was till 5 pm on 24 June 2024. The petitioner has stated that his parents arranged the funds required for the payment of fees. The fees were deposited in his brother's account by 4.45 pm. The petitioner states that he logged into the portal of the first respondent at 4.45 pm and applied in the 'float category' of admission and uploaded the documents. The portal closed at 5 pm and his payment was not processed.

3. The petitioner thereafter addressed an email to the first respondent. A response was received on 26 June 2024 from the IIT Bombay Office

for JEE (Advanced) redirecting the candidate to the organizing IIT, which is IIT Madras. Eventually, these attempts did not bear any fruit.

4. The petitioner approached the Jharkhand High Court Legal Aid Service Committee and he was directed to the Legal Services Committee of the Madras High Court. A writ petition was instituted before the High Court of Madras, but when the case came up for hearing, he was advised to approach this Court.

5. The facts as they have been revealed before this Court indicate that there is no dispute about three critical aspects: (i) the allotment of the seat in Electrical Engineering to the petitioner at IIT Dhanbad; (ii) the Scheduled Caste status of the petitioner; and (iii) the steps which were taken by the petitioner to comply with all formalities pursuant to the allotment to him of a seat for the course.

6. Counsel appearing on behalf of the first respondent has furnished to the Court the log-in details of the petitioner, which indicate that he was diligent in accessing the portal and did everything within his power to secure the realization of his admission. The petitioner logged in on 24 June 2024 between 15.12 hours and 16.57 hours, on as many as six occasions. This evidently indicates that he was making earnest efforts to log into the portal. There is no conceivable reason why the petitioner would not have done so if he had the wherewithal to pay the fees of Rs 17,500. A talented student like the petitioner who belongs to a marginalized group of citizens and has done everything to secure admission should not be left in the lurch. The power of this Court under Article 142 of the Constitution to do substantial justice is meant precisely to cover such a situation.

7. We accordingly order and direct that the petitioner should be granted admission to IIT Dhanbad against the seat which was allotted to him in the branch of Electrical Engineering. The petitioner will be admitted to the same batch to which he would have been admitted in pursuance of the order of allotment. The petitioner is ready and willing to pay fees of Rs 17,500, which may be paid over personally at the time when admission is granted to him. A supernumerary seat shall be created for the petitioner, if so required, for the purpose of complying with this order and no existing student shall be disturbed in consequence. The petitioner would be entitled to all the consequential benefits of admission, including allotment of hostel accommodation and other facilities.

8. Since the admission of the petitioner has been delayed for no fault of his, we request the Director of IIT Dhanbad to use his good offices to ensure that the petitioner can duly complete the course work for the period which has already elapsed during this academic year. This will ensure that the petitioner is abreast of his class and does not suffer for the delay in granting him admission.

9. The Petition is disposed of in the above terms.

10. Pending applications, if any, stand disposed of.

Result of the Case: Writ Petition disposed of.

†*Headnotes prepared by:* Nidhi Jain

[2024] 10 S.C.R. 154 : 2024 INSC 716

Just Rights for Children Alliance & Anr.
v.
S. Harish & Ors.

(Criminal Appeal No(s). 2161-2162 of 2024)

23 September 2024

[Dr. Dhananjaya Y. Chandrachud, CJI, J.B. Pardiwala,* J.]

Issue for Consideration

What is the scope of Section 15 of the Protection of Children from Sexual Offences Act, 2012 (POCSO); what is the underlying distinction between sub-section(s) (1), (2) and (3) respectively of the POCSO; whether, mere viewing, possessing or storing of any child pornographic material is punishable under the POCSO; what is the true scope of Section 67B of the IT Act; what is the scope of Section 30 of the POCSO; what are the foundational facts necessary for invoking the statutory presumption of culpable mental state in respect of Section 15 of the POCSO; whether, the statutory presumption contained in Section 30 of the POCSO can be invoked only at the stage of trial by the Special Court alone established under the POCSO; whether it is permissible for the High Court in a quashing petition filed under Section 482 of the Cr.P.C. to resort to the statutory presumption of culpable mental state contained in Section 30 of the POCSO.

Headnotes†

Protection of Children from Sexual Offences Act, 2012 – s.15 – Scope – Interpretation – Protection of Children from Sexual Offences (Amendment) Act, 2019 – Mere viewing, possessing or storing of any child pornographic material, if punishable under the POCSO:

Held: Yes – Any activity of viewing, distributing or displaying etc., of any child pornographic material by a person over the internet without any actual or physical possession or storage of such material in any device or in any form or manner would amount to 'possession' in terms of Section 15 of the POCSO, provided the said person exercised an invariable degree of control over such material, by virtue of the doctrine of constructive possession (possession beyond physical control, having the power and intention to control the contraband) – s.15 provides for three distinct offences that penalize

* Author

either the storage or the possession of any child pornographic material when done with any particular intention specified under sub-section(s) (1), (2) or (3) respectively – It is in an inchoate offence which penalizes the mere storage or possession of any pornographic material involving a child when done with a specific intent as prescribed, without requiring any actual transmission, dissemination etc. – 2019 Amendment Act made three different forms of storage or possession of child pornography a punishable offence u/s.15, unlike the unamended s.15, which criminalized only the storage of child pornography for a commercial purpose – s.15(1) penalizes the failure to delete, destroy or report any child pornographic material found to be stored or in possession of any person with an intention to share or transmit the same – The mens-rea or the intention required under this provision is to be gathered from the actus reus itself i.e., from the manner in which such material is stored or possessed and the circumstances in which the same was not deleted, destroyed or reported – s.15(2) penalizes both the actual transmission, propagation, display or distribution of any child pornography as-well as the facilitation of any of the said acts – The mens rea is to be gathered from the manner in which the pornographic material was found to be stored or in possession and any other material apart from such possession or storage indicative of any facilitation or actual transmission, propagation, display or distribution of such material – Further, s.15(3) penalizes the storage or possession of any child pornographic material when done for any commercial purpose wherein there must be some additional material or attending circumstances that may sufficiently indicate that the said storage or possession was done with the intent to derive any gain or benefit however, to constitute an offence under sub-section (3) there is no requirement to establish that such gain or benefit had been actually realized – Sub-section(s) (1), (2) and (3) of Section 15 constitute independent and distinct offences with distinction between the varying degree of culpable mens-rea required under the three sub-sections – The three offences cannot co-exist simultaneously in the same set of facts. [Paras 73, 76, 86, 114, 118, 222]

Information Technology Act, 2000 – s.67B – Scope:

Held: s.67B is a comprehensive provision designed to address and penalize the various electronic forms of exploitation and abuse of children online – It not only punishes the electronic dissemination of child pornographic material, but also the creation, possession,

propagation and consumption of such material as-well as the different types of direct and indirect acts of online sexual denigration and exploitation of the vulnerable age of children – s.67B ought to be interpreted in a purposive manner that suppresses the mischief and advances the remedy and ensures that the legislative intent of penalizing the various forms of cyber-offences relating to children and the use of obscene/pornographic material through electronic means is not defeated by a narrow construction. [Paras 151, 153, 222]

Protection of Children from Sexual Offences Act, 2012 – s.15 – "Punishment for storage of pornographic material involving child" – Inchoate Crime/Offence – 'Actus Reus'; 'Mens Rea' – If there is any requirement for an actual transmission of any child pornographic material in order to fall within the ambit of s.15:

Held: No – s.15 is in the nature and form of an inchoate offence wherein it is the intention which is being punished and not the commission of any criminal act in the traditional sense – What is sought to be penalized under Section 15 is the storage or possession of any child pornographic material when done with a particular intention or purpose as stipulated in sub-section(s) (1), (2) or (3), as the case may be. [Paras 81, 86]

Criminal jurisprudence – Doctrine of Inchoate Crimes – Concept and aim – Discussed.

Interpretation of Statutes – Aid of marginal note – Protection of Children from Sexual Offences Act, 2012 – s.15 – "Punishment for storage of pornographic material involving child" – Interpretation with the aid of marginal note when there is no contradiction between marginal note and the substantive parts:

Held: In the absence of any inherent conflict or contradiction between the marginal note and the substantive parts of a particular provision, the marginal note may be used to aid in the interpretation of the provision – s.15 along with the marginal note indicates, that it punishes only the storage of pornographic material involving a child when done with a specific intent prescribed thereunder and that there is no requirement for any actual transmission – Thus, s.15 is in the nature and form of an inchoate offence which penalizes the mere storage or possession of any pornographic material involving a child when stored with a specific intent prescribed thereunder, without requiring any actual transmission, dissemination etc. [Para 86]

Criminal jurisprudence – Inchoate Crimes – Protection of Children from Sexual Offences Act, 2012 – s.15 – Child pornographic material – "Possession" – Doctrine of constructive possession – "actus-reus":

Held: Under inchoate crimes possession is sought to be punished – Constructive possession extends the concept of possession beyond physical control to situations where an individual has the power and intention to control the contraband, even if it is not in their immediate physical possession – For establishing constructive possession both the power to control the material in question and the knowledge of exercise of such control are required – Wherever a person indulges in any activity such as viewing, distributing or displaying etc. pertaining to any child pornographic material without actually possessing or storing it in any device or in any form or manner, such act would still tantamount to 'possession' in terms of Section 15 of the POCSO, if he exercised an invariable degree of control over such material, applying the doctrine of constructive possession – Thus, in terms of the Doctrine of Constructive Possession, any form of intangible or constructive possession of any child pornographic material will also amount to "possession" under Section 15 of the POCSO – There is no requirement of a physical or tangible "storage" or "possession" of such material in Section 15 – Thus, where any child pornographic material is in the constructive possession of an accused, the failure or omission to report the same would constitute the requisite actus-reus for the purposes of Section 15 sub-section (1) of POCSO. [Paras 114, 117, 118, 122]

Protection of Children from Sexual Offences Act, 2012 – s.15(1), (2), (3) – 'mens rea' required under – Distinction between:

Held: Section 15 sub-section (1) requires the existence of the requisite mens rea or intention due to which the child pornographic material was not deleted, destroyed or reported whereas, Section 15 sub-section (2) requires the existence of the requisite mens rea or intention which propelled or led the person accused to not only store or possess the said material but also to take some additional steps towards either the actual transmission, propagation, display or distribution or the facilitation of the same – In contrast, Section 15 sub-section (3) requires the existence of the requisite mens rea or intention due to which the person accused not only stored or possessed the child pornographic material but also compelled him to take some additional steps either for any gain or benefit or

in lieu or expectation of some form of gain or benefit – Distinction further explained through examples. [Para 95]

Protection of Children from Sexual Offences Act, 2012 – s.15 – Protection of Children from Sexual Offences (Amendment) Act, 2019 – 'Possession' added to make s.15 more stringent to deter the dissemination and use of child pornography:

Held: Word "possession" was originally absent in the unamended Section 15 and the legislature specifically added it in the amended Section 15 – Hence, now both the storage or the possession of any child pornographic material would be liable to be punished when done with any of the specified intention thereunder. [Para 112]

Protection of Children from Sexual Offences Act, 2012 – s.15 – 'storage'; 'possession' of child pornographic material – To constitute offence u/s.15, 'storage' and 'possession' not to continue to be there at the time of registration of FIR:

Held: Section 15 does not fixate any particularly time-frame – What is simpliciter required to constitute an offence under Section 15 of the POCSO is the establishment of 'storage' or 'possession' of any child pornographic material with the specified intention under sub-section(s) (1), (2) or (3), at any relevant point of time – Thus, an offence can be made out under Section 15 even if the said 'storage' or 'possession' no longer exists at the time of registration of the FIR, if it is established that the person accused had 'stored' or 'possessed' of any child pornographic material with the specified intention at any particular point of time even if it is anterior in time. [Para 124]

Protection of Children from Sexual Offences Act, 2012 – s.15 – Information Technology Act, 2000 – s.67B – Ingredients necessary to constitute offences under – Divergent views of different High Courts – Discussed.

Protection of Children from Sexual Offences Act, 2012 vis-à-vis Protection of Children from Sexual Offences (Amendment) Act, 2019 – Statement of Object and Reasons – Discussed.

Information Technology Act, 2000 – ss.67, 67A, 67B – Information Technology (Amendment) Act, 2008 – History of amendment traced.

Interpretation of Statutes – Information Technology Act, 2000 – Information Technology (Amendment) Act, 2008 – ss.67, 67A vis-à-vis s.67B – Purposive interpretation:

Held: A conjoint reading of Section(s) 67 and 67A vis-a-vis 67B would reveal that unlike the former which penalizes only the publication or transmission of any obscene material or pornographic material,scope and ambit of Section 67B is much wider as it recognizes and penalizes five different forms/categories of actus reus – s.67B not only punishes the electronic dissemination of child pornographic material, but also the creation, possession, propagation and consumption of such material as well as the different types of direct and indirect acts of online sexual denigration and exploitation of the children – ss.67, 67A, s.67B being a complete code, ought to be interpreted in a purposive manner that suppresses the mischief and advances the remedy and ensures that the legislative intent of penalizing the various forms of cyber-offences relating to children and the use of obscene/pornographic material through electronic means is not defeated by a narrow construction. [Paras 150, 153]

Protection of Children from Sexual Offences Act, 2012 – Protection of Children from Sexual Offences (Amendment) Act, 2019 – ss.15, 2(1)(d), 2(1)(da) – "child"; "child pornography" – Pornographic material must prima facie appear to involve a Child – "Subjective satisfaction" criteria – "Subjective satisfaction" criteria, as existing in various countries discussed:

Held: Any visual depiction of a sexually explicit act which any ordinary person of a prudent mind would reasonably believe to prima facie depict a child or appear to involve a child, would be deemed as 'child pornography' – Courts are only required to form a prima facie opinion to arrive at the subjective satisfaction that the material appears to depict a child from the perspective of any ordinary prudent person for any offence under the POCSO that relates to child pornographic material, such as Section 15 – Such satisfaction may be arrived at from any authoritative opinion such as a forensic science laboratory (FSL) report of such material or from any expert opinion or by the assessment of such material by the courts themselves – Practical difficulties in conclusively establishing the age of an individual in a pornographic material through objective means or criteria resulting in absurd consequences, enumerated. [Paras 131, 222]

Protection of Children from Sexual Offences Act, 2012 – Protection of Children from Sexual Offences (Amendment) Act, 2019 – ss.15, 2(1)(da), 2(1)(d) – "but appear to depict a

child" – Purport of s.2(1)(da) – Section 2(1)(da) is a departure from the existing objective criterion of determination of age in terms of Section 2(1)(d):

Held: Neither Section 15 of the POCSO nor Section 2(1)(da) can be interpreted or invoked in isolation from the other – Section 2(1)(da) of the POCSO, made a conscious departure from the already existing objective criterion of determination of age in terms of Section 2(1)(d) which is generally applicable to the POCSO, as the legislature was alive to inherent difficulty posed by such criteria – Section 2(1)(da) of the POCSO was inserted to explicitly define and delineate what type of visual depictions would be considered 'child pornography' to remove any ambiguity that existed earlier and more importantly, to mitigate the tendency of the courts to refer and apply the objective criteria of age determination prescribed under Section 2(1)(d) of the POCSO, even when dealing with matters involving child pornography – Thus, the legislature in addition to explaining the contour of visual depiction in Section 2(1)(da) of the POCSO, also specifically added the words "but appear to depict a child" in the end – If the courts while dealing with any matter involving child pornography, continue to refer and rely on Section 2(1)(d) of the POCSO, then the same will frustrate the intention behind Section 2(1)(da), rendering the words "but appear to depict a child" otiose and nugatory – The true purport of Section 2(1)(da) of the POCSO is to ensure that for offences pertaining to child pornography, it is Section 2(1)(da) that is given due regard and not Section 2(1)(d) – Thus, it is the definition of 'child pornography' which is of relevance while considering whether Section 15 of the POCSO can be invoked or not. [Paras 139-143]

Protection of Children from Sexual Offences Act, 2012 – ss.2(1)(d), 2(1)(da)– Protection of Children from Sexual Offences (Amendment) Act, 2019 – "child"; "child pornography" – Whether the individual involved is a 'child' or not – Determination – "but appear to depict a child":

Held: Under s.2(1)(d), an objective criterion is prescribed based on the age of the individual in question which involves ascertaining and establishing whether he or she is under eighteen years of age, if so, such person would be considered a 'child' for the purposes of any offence in respect of such child that is punishable under the POCSO – Further, under the unamended Section 15, there was only one criteria for ascertaining whether the material in

question can be regarded as 'child pornography' or not, which was by establishing that the material depicts or involves a person who is under the age of eighteen years – "child pornography" was specifically defined after the 2019 Amendment Act meaning any visual depiction of a child involved in any sexually explicit conduct wherein the expression 'visual depiction' is inclusive in nature – Further, "but appear to depict a child" lays down the test or criteria for ascertaining, whether any of the mentioned visual depiction is a 'child pornography' or not, by prescribing a prima facie subjective satisfaction that the material appears to depict a child – The use of the comma before the words "but appear to depict a child" is significant which is used both as a disjunctive and a conjunctive to the words preceding it – It has been used as a disjunctive to stress, that the subjective criteria that the material in question appears to depict a child is not inextricably linked or limited to just one category of visual depictions i.e., the last category being "image created, adapted, or modified" – At the same time, it has been used as a conjunctive in relation to all types of visual depictions that have been illustrated in the said provision, to clearly indicate, that this subjective criterion applies to the entire provision i.e., to all types of visual depictions mentioned therein or in other words to 'child pornography'. [Paras 126-130]

Protection of Children from Sexual Offences Act, 2012 – s.30 – Culpable mental state under – Presumption mandatory yet, rebuttable:

Held: The statutory presumption of culpable mental state on the part of the accused as envisaged under Section 30 of the POCSO can be made applicable provided the prosecution is able to establish the foundational facts necessary to constitute a particular offence under the POCSO that may have been alleged against the accused – Such presumption can be rebutted by the accused either by discrediting the prosecution's case or by leading evidence to prove the contrary, beyond a reasonable doubt – The standard prescribed for rebutting the said statutory presumption of culpable mental state is beyond a reasonable doubt. [Paras 156, 222]

Protection of Children from Sexual Offences Act, 2012 – s.30 – Statutory presumption of culpable mental state under – Reasons therefor, stated – Principle of Foundational Facts:

Held: Statutory presumption of culpable mental state is in view of the exigency posed by the difficulty that exists in establishing certain

types of offences such as inchoate offences due to its clandestine nature – Such presumptions are in essence an exception to the cardinal principle of criminal jurisprudence that the act does not make a person guilty unless the mind is also guilty – Before the statutory presumption of culpable mental state could be validly invoked, the prosecution must first establish certain foundational facts beyond a reasonable doubt – Initial burden always lies on the prosecution – Thus, the establishment of foundational facts by the prosecution is a prerequisite for triggering the statutory presumption for shifting the onus on the accused to prove the contrary – It is a delicate balance struck between the practical need for such presumption in law and the cardinal principles of criminal jurisprudence to ensure that the presumption does not cross or transgress the fine line that demarcates presumption of 'culpable mental state' from the 'presumption of guilt' itself – Even if the prosecution establishes such foundational facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution's case as improbable or absurd or could lead evidence to prove his defence, in order to rebut the presumption, however the said presumption under Section 30 of the POCSO will be said to have been rebutted only where the accused by way of his defence establishes a fact contrary to the presumption and proves the same beyond a reasonable doubt. [Paras 166, 171, 172, 174]

Protection of Children from Sexual Offences Act, 2012 – s.15(1), (2), (3) – Statutory presumption of culpable mental state for offence u/s.15 – Necessary foundational facts to be established for invocation thereof:

Held: For the purpose of sub-section (1), the foundational facts that the prosecution may have to first establish is the storage or possession of any child pornographic material and that the person accused had failed to delete, destroy or report the same – In order to invoke the statutory presumption of culpable mental state for an offence under sub-section (2), the prosecution would be required to first establish the storage or possession of any child pornographic material, and also any other fact to indicate either the actual transmission, propagation, display or distribution of any such material or any form of an overt act such as preparation or setup done for the facilitation of the transmission, propagation, display or distribution of such material, whereafter it shall be presumed by the court that the said act was done with the intent of transmitting, displaying, propagating or distributing such material and that the

said act(s) had not been done for the purpose of either reporting or for use as evidence – Further, for the purpose of sub-section (3) the prosecution must establish the storage or possession of such material and further prove any fact that might indicate that the same had been done to derive some form of gain or benefit or the expectation of some gain or benefit. [Para 222]

Protection of Children from Sexual Offences Act, 2012 – s.30 – Code of Criminal Procedure, 1973 – s.482 – Presumption u/s.30, if can be resorted to in a quashing proceeding – Two videos depicting children involved in a sexual activity were recovered from the mobile phone of respondent no.1-accused – FIR alleged offences u/ss.14(1) of the POCSO and 67B of the IT Act, however, in the chargesheet, the offence u/s.14(1) of the POCSO was substituted and instead offence u/s.15(1) of the POCSO was alleged – Criminal proceedings quashed by High Court – Correctness:

Held: There is no bar for the High Court to invoke the statutory presumption at the stage of deciding the quashing petition in respect to any offence to which such a presumption is applicable – The statutory presumption envisaged under Section 30 of the POCSO is applicable and can be invoked in any proceeding which involves an offence under the said Act that requires a culpable mental state, irrespective of the court where such proceeding is taking place – Once the investigation is over and chargesheet is filed, the FIR pales into insignificance – Child pornographic material that was recovered from the personal mobile phone of the accused which was regularly in use by him, which prima facie establishes the storage or possession of child pornographic material – Further, since the aforesaid child pornographic material was found to have been stored in the said personal mobile phone since 2016 and 2019, prima facie there was a failure on his part to delete, destroy or report such material – High Court failed to advert to Section 15 of the POCSO especially when the chargesheet had already been filed at the time of passing of the Impugned Order and erred in quashing the criminal proceedings – In view of the statutory presumption of culpable mental state being attracted, any defence of the accused such as the absence of knowledge or intention would be a matter of trial – Absence of culpable mental state has to be established before the trial court by leading cogent evidence in that regard, such defences should not be looked into at this stage – Impugned judgment set aside, criminal proceedings restored. [Paras 185, 193, 201, 203, 221, 261]

Code of Criminal Procedure, 1973 – s.482 – Duty of High Court – Quashing of criminal proceedings, when justified – Discussed.

Protection of Children from Sexual Offences Act, 2012 – s.15 – Ignorance of law vis-à-vis incognizance of law – Ignorance of law, when can be used as a valid defence – Plea of the accused that he was unaware that storing of child-pornography was a punishable offence under Section 15 of POCSO along with the bona-fide belief that such storage was not an offence:

Held: Rejected – For a plea of ignorance of law, the ignorance or mistake of law must be such which legitimately gives rise to a bona-fide belief of the existence of a right or a claim, and the said person commits any act on the strength of such right or claim – Even if a person is unaware that the possession or storage of such material is punishable, it by no stretch can be considered to give rise to any right or assertion as there exists no such right to either store or possess such material, and thus it is not a valid defence – No person of an ordinary prudent mind with the same degree of oblivion or unawareness as to the law, more particularly Section 15 of POCSO could as a natural corollary be led to a belief of existence of a right to store or possess any child pornographic material – The ignorance or unawareness must have a reasonable nexus with the right or assertion claimed i.e., the ignorance or unawareness must be such which could legitimately and reasonably give rise to a corresponding right or claim and the existence of which must be bona-fidely believed – Thus, even if the accused was unaware about Section 15 of POCSO, this by itself does not give rise to a corresponding legitimate or reasonable ground to believe that there was any right to store or possess child pornographic material – As such the four-prong test for a valid defence is not fulfilled and the defence of ignorance of law by the accused fails – Even otherwise, one must be mindful to the fact that such a plea is not a statutory defence with any legal backing, but rather a by-product of the doctrine of equity – Unawareness or incognizance of law should not be conflated with ignorance of law. [Paras 212, 214, 217]

Suggestions by Court – Protection of Children from Sexual Offences Act, 2012 – Suggestions made to Ministry of Women and Child Development, Union of India:

Held: The term "child pornography" is a misnomer that fails to capture the full extent of the crime – Each case of what is traditionally termed "child pornography" involves the actual abuse of a child, the use of the term "child pornography" trivializes the crime, as pornography is often seen as a consensual act between adults – It undermines the victimization because the term suggests a correlation to pornography- conduct that may be legal, whose subject is voluntarily participating in, and whose subject is capable of consenting to the conduct – The term "child sexual exploitation and abuse material"("CSEAM") more accurately reflects the reality that these images and videos are not merely pornographic but are records of incidents, where a child has either been sexually exploited and abused or where any abuse of children has been portrayed through any self-generated visual depiction – CSEAM rightly places the emphasis on the exploitation and abuse of the child, highlighting the criminal nature of the act and the need for a serious and robust response – Courts forbidden from using the term "child pornography" and instead the term CSEAM should be used in judicial orders and judgements of all courts across the country – Parliament should consider to amend the POCSO for substituting the term "child pornography" with "child sexual exploitation and abuse material" (CSEAM) – Further, though, there is a tangible difference between the act of viewing CSEAM and the act of engaging in sexual abuse of children, yet the latter desire is always inherent in the former – Need for and importance of positive age-appropriate sex education emphasized – Implementation of comprehensive sex education programs – Impact of CSEAM on victims; need for legal, social, therapeutic support to the victims and rehabilitation programs for the offenders, stated – These services should include psychological counselling, therapeutic interventions and educational support to address the underlying issues and promote healthy development – For those involved in viewing or distributing child pornography, CBT has proven effective in addressing the cognitive distortions that fuel such behaviour – Raising awareness about the realities of child sexual exploitative material and its consequences through public campaigns can help reduce its prevalence – Identifying at-risk individuals early and implementing intervention strategies for youth with problematic sexual behaviours (PSB) involves several steps and requires a coordinated effort among various stakeholders, including schools, educators, healthcare providers, law enforcement, and child welfare services – Union of India may consider constituting an Expert

Committee for devising a comprehensive program or mechanism for health and sex education, as well as raising awareness about the POCSO among children – Obligation of the appropriate government and the commission under Section(s) 43 and 44 of the POCSO does not end at just spreading awareness about the provisions of the POCSO – Their efforts must go beyond just the textual wording of the said provisions and to earnestly take into account the pragmatic necessities for curtailing the issue of child abuse, exploitation and addiction to pornography – Collective responsibility of the society u/s.19, 20 of the POCSO, specified – Parliament to consider amending Section 15(1) of POCSO to make it more convenient for the general public to report by way of an online portal, any instance of storage or possession of CSEAM to the specified authorities for the purpose of the said provision. [Paras 227-229, 248, 260]

Protection of Children from Sexual Offences Act, 2012 – Information Technology Act, 2000 – ss.2(w), 79 – Protection of Children from Sexual Offences Rules, 2020 – Role and obligations of "intermediaries":

Held: Significance of role of "intermediaries" as defined under Section 2(w) of the IT Act in checking the proliferation of child pornography; obligation on the intermediaries under Protection of Children from Sexual Offences Rules, 2020, enumerated – Social media intermediaries in addition to reporting the commission or the likely apprehension of commission of any offence under POCSO to the National Centre for Missing & Exploited Children (NCMEC) are also obligated to report the same to authorities specified under Section 19 of POCSO – Courts to refrain from showing any leniency or leeway in offences under Section 21 of the POCSO, particularly to schools/educational institutions, special homes, children's homes, shelter homes, hostels, remand homes, jails, etc. who fail to discharge their obligation of reporting the commission or the apprehension of commission of any offence or instance of child abuse or exploitation under the POCSO – Section(s) 19, 20 and 21 of the POCSO are mandatory in nature, and there can be no dilution of the salutary object and purport of these provisions – In view of the the mandatory character of Sections 19 and 20 of the POCSO read with Rule 11 of the POCSO Rules, an intermediary cannot claim exemption from the liability under Section 79 of the IT Act for any third-party information, data, or communication link made available or hosted by it, unless due diligence is conducted

by it and compliance is made of these provisions of the POCSO – Such due diligence includes not only removal of child pornographic content but also making an immediate report of such content to the concerned police units in the manner specified under the POCSO Act and the Rules thereunder. [Paras 254-256, 258-260]

Words and Phrases – Protection of Children from Sexual Offences Act, 2012 – s.2(da) – "child pornography"; 'Possession', 'Constructive Possession'; 'Immediate Control' u/s.15 – Concept.

Case Law Cited

Chandi Kumar Das Karmarkar v. Abanidhar Roy **AIR (1965) SC 585;** *Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P.* [1979] 2 SCR 641 **: (1979) 2 SCC 409 - held inapplicable.**

Independent Thought v. Union of India & Anr. [2017] 13 SCR 821 **: (2017) INSC 1030;** *Attorney General for India v. Satish* [2021] 10 SCR 955 **: (2021) INSC 762;** *Eera through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr.* [2017] 7 SCR 924 **: (2017) INSC 658;** *Nawabuddin v. State of Uttarakhand* [2022] 1 SCR 1083 **: (2022) INSC 162;** *Sharat Babu Digumarti v. Govt. of NCT of Delhi* [2016] 8 SCR 1015 **: (2017) 2 SCC 18;** *State of M.P. v. Harsh Gupta* **(1998) 8 SCC 630;** *Prakash Nath Khanna v. CIT* [2004] 2 SCR 434 **: (2004) 9 SCC 686;** *R. Kalyani v. Janak C. Mehta & Ors.* [2008] 14 SCR 1249 **: (2009) 1 SCC 516;** *Rathis Babu Unnikrishnan v. The State (Govt. of NCT of Delhi) & Anr.* [2022] 4 SCR 989 **: (2022) INSC 480;** *R.P. Kapur v. State of Punjab* **AIR (1960) SC 866;** *State of Haryana v. Bhajan Lal* **(1992) AIR SC 604;** *S.M. Datta v. State of Gujarat* [2001] Supp. 2 SCR 140 **:(2001) 7 SCC 659;** *National Spot Exchange Ltd. v. Anil Kohli, Resolution Professional for Dunar Foods Ltd.* [2021] 7 SCR 1024 **: (2022) 11 SCC 761;** *M. Siddiq v. Mahant Suresh Das* **(2020) 1 SCC 1;** *Shankar Kisanrao Khade v. State of Maharashtra* [2013] 6 SCR 949 **: (2013) 5 SCC 546;** *State of Maharashtra & Anr. v. Maroti* [2022] 8 SCR 821 **: (2023) 4 SCC 298 – relied on.**

Bhanabhai Khalpabhai v. Collector of Customs [1994] 2 SCR 348 **: (1994) Supp. (2) SCC 143;** *Devchand Kalyan Tandel v. State of Gujarat* [1996] Supp. 4 SCR 382 **: (1996) 6 SCC 255;** *State of Punjab v. Baldev Singh* [1999] 3 SCR 977 **: (1999) 6 SCC 172;** *Seema Silk Sarees v. Directorate of Enforcement* [2008] 8 SCR 201 **: (2008) 5 SCC 580;** *Noor Aga v. State of Punjab & Anr.* [2008]

10 SCR 379 : (2008) 16 SCC 417; *Bhola Singh v. State of Punjab* **[2011] 2 SCR 642 : (2011) 11 SCC 653;** *Baldev Singh v. State of Haryana* **[2015] 12 SCR 969 : (2015) 7 SCC 554 – referred to.**

Nupur Ghatge v. State of Madhya Pradesh **(MCRC No. 52596 of 2020);** *P.G. Sam Infant Jones v. State represented by Inspector of Police* **(2021) SCC OnLine Mad 2241;** *Ajin Surendran v. State of Kerala & Anr.* **(2022) KER 7207;** *Manuel Benny v. State of Kerala* **(2022) KER 9730;** *Lakshya v. State of Maharashtra & Anr.* **(Criminal Writ Petition No. 479 of 2022);** *Shantheeshlal T. v. State of Kerala* **(2024) KER 35968;** *Akash Vijay v. State of Kerala* **(2024) KER 42626;** *Akhil Johny v. State of Kerala* **(2024) KER 53767;** *Inayathulla N (1) v. State* **(2024) KHC 26513;** *Inayathulla N (2) v. State* **(2024) KHC 28204 – referred to.**

U.S. v. Tucker **150 F. Supp. 2d 1263 (D. Utah. 2001);** *U.S. v. Romm* **455 F. 3d. 990 (9th Cir., 2006);** *Regina v. Michael Land* **(1997) EWCA Crim J1010-15;** *John Leadbetter v. Her Majesty's Advocate* **(2020) HCJAC 51;** *United States v. Katz* **178 F.3rd 368 (5th Cir. 1999);** *Commonwealth v. Robert* **(829 A.2d. 127) – referred to.**

Books and Periodicals cited

50th Report of the Standing Committee on Information Technology on the 'Information Technology (Amendment) Bill, 2007; Eva J. Klain, Heather J Davies, Molly A. Hicks Et. Al., Child Pornography: The Criminal Justice-System Response, 8 (Penn State University Press, 2001); Philip Jenkins, Beyond Tolerance: Child Pornography on the Internet (New York University Press, 2003); Burgess, Ann W. & C.R. Hartman, Child Abuse Aspects of Child Pornography, 7 PSYCHIATRIC ANNALS, 248 (1987); Audrey Rogers, The Dignity Harm of Child Pornography – From Producers to Possessors, in Carissa Byrne Hessick (Eds.), Refining Child Pornography Law – Crime, Language and Social Consequences (University of Michigan Press, 2016); Tali Gal, Child Victims and Restorative Justice – A Needs Rights Model, 17 (Oxford University Press, 2011); Jonah R. Rimmer, Child Sexual Exploitation, (Oxford Research Encyclopaedia Criminology, 2024); Mary Graw Leary, The Language of Child Sexual Abuse and Exploitation, in Carissa Byrne Hessick (Eds.), Refining Child Pornography Law – Crime, Language and Social Consequences (University of Michigan Press, 2016); Danijela Frangež, Anton Toni Klančnik, Mojca Žagar Karer Et. Al., The Importance of Terminology Related to Child Sexual

Exploitation, 66(4) REV. ZA. KRIM. KRIMINOL. 291 (2015); Kathryn C. Seigfried Spellar & Virginia Soldino, Child Sexual Exploitation: Introduction to a Global Problem, in Thomas J. Holt & Adam M. Bossler (Eds.); The Palgrave Handbook of International Cybercrime and Cyberdeviance, (Palgrave Macmillian, Cham, 2020); Vaughn I. Rickert & Owen Ryan, Is the Internet the Source, 40 J. ADOLESC. HEALTH 104 (2007); Dr. Ethel Quayle, Assessment issues with young people who engage in problematic sexual behaviour through the Internet, in M.C. Calder (Ed.), New Developments with young people who sexually abuse (Russel House Publishing, Lyme Regis, UK, 2007); Matthew L Long, Laurence A. Alison & Michelle A McManus, Child pornography and likelihood of contact abuse: a comparison between contact child sexual offenders and noncontact offenders, 25(4) SEX ABUSE, 370 (2013); Dr. Ethel Quayle Et. Al., The role of sexual images in online and offline sexual bheaviour with minors, 17(6) CURR. PSYCHIATRY REP. 1 (2019); Melissa Hamilton, The Child Pornography Crusade and Its Net- Widening Effect, 33 CARDOZO L. REV. 1694 (2012); Esposito & Lesli C., Regulating the Internet: The Battle Against Child Pornography, 30 CASEW. RES. J. INT'L. L. 5 (1998); Jason S. Carrol Et Al., Generation XXX, Pornography Acceptance and Use Among Emerging Adults, 23 J. ADOLESCENT RES. 6 (2008); Clare McGlynn & Dr. Hannah Bows, Possessing Extreme Pornography: policing, prosecutions and the need for reform, 83(6) J. CRIM. LAW., 473 (2019); Dr. Ethel Quayle, Lars Loof and Tink Palmer, Child Pornography and Sexual Exploitation of Children Online, 64 (ECPAT International, 2008); Michael C. Seto, Kailey Roche, Nicole C Rodrigues Et. Al., Evaluating Child Sexual Abuse Perpetration Prevention Efforts: A Systematic Review, 33 J. CHILD SEX. ABUS. 22 (2024); Paul G. Cassel, James Marsh & Jeremy M. Christiansen, The Case for Full Restitution for Child Pornography Victims, 82 GEO. WASH. L. REV. 61 (2013); Padminin Iyer & Peter Aggleton, Seventy years of sex education – A Critical Review, 74(1) HEALTH EDUC. J. 3 (2015); Udaan Adolescent Education Program by the Centre for Catalyzing Change in Jharkhand in India; Cortney Lollar, Child Pornography and the Restitution Revolution, 103 J. CRIM. L. & CRIMINOLOGY 343 (2013); Jagdish Khubchandani, Jeffrey Clark & Raman Kumar, Beyond Controversies: Sexuality Education for Adolescents in India, 3(3) J. FAMILY MED. PRIM. CARE. 175 (2014) **– referred to.**

List of Acts

Protection of Children from Sexual Offences Act, 2012; Protection of Children from Sexual Offences (Amendment) Act, 2019; Information Technology Act, 2000; Information Technology (Amendment) Act, 2008; Protection of Children from Sexual Offences Rules, 2020.

List of Keywords

Section 15 of the Protection of Children from Sexual Offences Act, 2012; Section 67B of the Information Technology Act, 2000; POCSO; Child pornography; Child; Pornographic content; Child pornographic material; Child sexual exploitation; Child sexual abuse; Exploitation and abuse of children; Use of obscene/ pornographic material through electronic means; Online sexual denigration and exploitation of children; Cyber-offences relating to children; Videos showing children involved in a sexual activity; Statutory presumption of culpable mental state; Quashing; Storage or possession; Mere storage or possession; Intangible possession; Constructive possession; "Deleted, destroyed, reported"; Failure or omission to report; Transmission; Propagation; Display or distribution; Foundational facts; Marginal note; Commercial purpose; Inchoate offence; Mens-rea; Culpable mens-rea; Requisite mens rea; Intention; Actus reus; Purposive interpretation; "Subjective satisfaction" criteria; Ignorance of Law; Incognizance of Law; Suggestions by Court; Due diligence; Intermediaries; "Child Sexual Exploitation and Abuse Material"(CSEAM).

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 2161-2162 of 2024

From the Judgment and Order dated 11.01.2024 of the High Court of Judicature at Madras in CRLOP No. 37 of 2024 and CRLMP No. 79 of 2024

Appearances for Parties

H.S. Phoolka, Sr. Adv., Jagjit Singh Chhabra, Bhuwan Ribhu, Ms. Rachna Tyagi, Saksham Maheshwari, Ms. Shashi, Ms. Taruna Panwar, Ms. Tanvi Chaudhry, Advs. for the Appellants.

Ms. Swarupama Chaturvedi, Sr. Adv., Prashant S. Kenjale, Amol Nirmalkumar Suryawanshi, Ms. Srishty Pandey, Ashutosh Chaturvedi, M/s. Juristrust Law Offices, Abhaid Parikh, Ms. Katyayani Anand, Ms. Saumya Kapoor, Aayush Shivam, D. Kumanan, Sheikh F. Kalia, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.:

For the convenience of exposition, this judgment is divided into the following parts: -

INDEX*

* Ed. Note: Pagination as per the original Judgment.

1. Since the issues raised in both the captioned appeals are same and the challenge is also to a self-same judgment and order passed by the High Court those were taken up for hearing analogously and are being disposed of by this common judgment and order.

2. The present appeals arise out of the final judgment and order passed by the High Court of Judicature at Madras dated 11.01.2024 in Criminal Original Petition (Crl. O.P.) No. 37 of 2024 ("**Impugned Order**") filed by the respondent no. 1 (accused) herein under Section 482 of the Code of Criminal Procedure, 1973 (for short, the "**Cr.P.C.**") by which the High Court allowed the petition and thereby quashed the chargesheet dated 19.09.2023 filed for the offences punishable under Section 67B of the Information Technology Act, 2000 (for short, the "**IT Act**") and Section 15(1) of the Protection of Children from Sexual Offences Act, 2012 (for short, the "**POCSO**") arising out of the FIR No. 03 of 2020, P.S. Ambattur, Chennai. As a consequence, the criminal proceedings in Special Sessions Case No. 170 of 2023 stood terminated.

3. It may be necessary to clarify that the appellant no. 1 herein, 'Just Rights for Children Alliance' is a collation comprising of five different NGOs that work in unison against child trafficking, sexual exploitation and other allied causes. Whereas the appellant no. 2 is a child rights organization working towards protecting children from exploitation and one of the partner NGOs to the aforesaid collation. The appellants herein were not a party to the proceedings before the High Court. However, having regard to the serious issue of public importance involved in the matter they sought leave of this Court to challenge the impugned judgment of the High Court. The respondent nos. 2 & 3 are the State of Tamil Nadu and the Inspector of Police, All-Women's Police Station Ambattur, Chennai, respectively.

A. FACTUAL MATRIX

4. On 29.01.2020, the All-Women's Police Station Ambattur, Chennai, Tamil Nadu i.e., the respondent no. 3 herein, received a letter from the Additional Deputy Commissioner of Police (Crime against women and children Branch) wherein it was mentioned that as per the Cyber Tipline Report of the National Crimes Record Bureau (NCRB), the respondent no. 1 herein is an active consumer of pornography and has allegedly downloaded pornographic material involving children in his mobile phone.

5. Accordingly, in view of the aforesaid letter an FIR was registered against the respondent no. 1 herein on the very same day i.e., 29.01.2020 at the All-Women's Police Station Ambattur, Chennai, Tamil Nadu as Crime No. 03 of 2020 for the offence punishable under Section(s) 67B of the IT Act and 14(1) of the POCSO. The relevant portion of the FIR reads as under: -

> *"Today on 29.01.2020 at 12.00 noon, I, the Inspector of W28, All Women Police Station was on duty, received letter RC. No. 03/ADC CWC/West/Camp/2020 dated 28.01.2020 from Thirumathi S. Megalina, Additional Deputy Commissioner of Police, Prevention of Crimes against Women and Children Division, Chennai, West Zone. On perusal of the same, 4 References were mentioned therein viz.*
>
> *Ref: 1. DO.Lr.No.05/ADGP-CWC/NCMEC/2020*
>
> *2. C. No.30/COP/CO/2020*

3. *R.C. No. 228 VIII/DC CWC/Genl/2020 (CTR No. 49303278)*

4. *RC No. 68 /Japu – ii/NCMEC/2020*

As per the notice issued in CTR No. 49303278 by National Crime Record Bureau, it is seen that Harris, resident of Door No.2, 1st Main Road, VPC Nagar, Kallikuppam, Ambattur, Mobile No. 99406 87836, has for the past more than two years, been watching child pornographic films. Details have also been obtained with regard to child pornographic films which were made by using children who have been exploited, children who have gone missing, and by collecting information from centres which deal with missing children, and details have been provided with regard to the persons who have downloaded such child pornographic films. When those notices were perused, it was seen that the above said person had downloaded those films through Old Site ID-KALLI/OLD/ Chm ID-CHM2307, with a view to indulge in sexual activities, and these films were made at the address 'Gopalsamy, No.2, Gangai Amman Kovil 3rd Main Road, Kallikuppam, Ambattur' by exploiting children in this area. Since this bad activity is a crime against good social order, it was directed to take appropriate action against the said person, and therefore, Crime No. 03/2020 U/S 67B IT ACT r/w 14(1) POCSO Act 2012 was registered, and the original FIR has been sent to the concerned Court of learned Judicial Magistrate, and copies have been sent to the concerned superior officers of police without any delay, and investigation has been taken up.

13. Action Taken: Since the above information reveals commission of offence(s) u/s as mentioned at Item No. 2, registered the case and took up the investigation.

FIR read over to the complainant/Informant, admitted to be correctly recorded and a copy given to the Complainant/ Informant free of cost."

6. During the course of the investigation, the mobile phone belonging to the respondent no. 1 was seized and sent to the Forensic Science

Laboratory for analysis. The respondent no. 1 was also questioned whether he had ever viewed any pornographic content, to which the respondent no. 1 admitted that he used to regularly view pornography while he was in college.

7. As per the Computer Forensic Analysis Report dated 22.08.2020 it was found that the mobile phone of the respondent no. 1 contained two video files relating to child pornography depicting two underage boys involved in sexual activity with an adult woman. The Computer Forensic Analysis Report further stated that more than hundred other pornographic video files were downloaded and stored in the said mobile phone. The relevant portion of the said Computer Forensic Analysis Report reads as under: -

"COMPUTER FORENSIC ANALYSIS REPORT

Received from	:	*The Sessions Judge, Mahalir Neethi Mandram, (Fast Track Mahila Court) Tiruvallur.*
Crime No. & P.S.	:	*03/2020 of Ambattur AWPS*
Organization Report No.	:	*CF/52/2020*
Case received Date	:	*28.02.2020*
Case received through	:	*WHC 43450, Tmt. Poornima*
Seals status	:	*Correct & Intact*
Nature of crime	:	*67(B) IT Act and 14(1) of POCSO Act 2012*
Tools used	:	*UFED 4 PC.*
Report date	:	*22.08.2020*
Head of the Division	:	*A. Visalakshi, M.Sc, PGDCA*
Examiner	:	*S. Hemalatha, M.Sc., (FS), M.Sc., (CS)*

RECEIVED DEVICE DESCRIPTION

One (1) sealed cloth-lined paper parcel marked, "PI No. 5/2020. Cr. No. 3/2020, Ambattur AWPS …" containing the following item:

Marked as	***Name of the Item received***	***Details of the Item***	***Packing / Labelling details***

1	*Mobile phone* *SIM 1* *Memory Card* *Battery*	*Make: MOTO* *Model: XT 1804* *IMEI1: 356477088126073* *IMEI2: 356477088126081* *Airtel 4G 128K* *ICCID: 899100090253366247 3U* *Strontium 16 GB* *Inbuilt*	*Kept in a plastic box marked, "PI No: 05/2020".*

Objective

The above item was examined with a view to find if there is any facility of viewing video files using YouTube application and the details. And also to find if any media files pertaining to pornography were found accessed/downloaded/saved.

EXAMINATION

Mobile Phone : [MOTO]

*The internal memory of the mobile phone was acquired using file system extraction and examined using the forensic software tool "UFED 4 PC". The retrieved details such as contacts, call logs, SMS messages and media files are generated as a report and the report (in pdf) is copied on to a Compact Disc marked as "**CF 52/20**". Selected pages from the report are given as **Annexure-I**. Some of the findings from the report are as follows: - [...]*

*[...] **Above findings indicated that the mobile phone was found to be equipped with the facility of viewing videos through YouTube Application**.*

*4. (a) Video files pertaining to pornography (more than 100 Nos.) were found downloaded and stored in different paths, the details of the same are given as **Annexure – II**. [...]*

*(b) Some of the vide files pertaining to pornographic nature were found stored under the path "**Motorola GSM_XT1806 MotoG5SPlus.zip/sdcard/ProgramData/Android/Language/.fr/Videos/wat up pono**". [...]*

(c) Under the same path two video files which could be accounted for Child Pornography content were found stored. In the videos boys (under-teen) were found involved in sexual activity with a adult woman/girl. The details of the same are pasted below: -

S. No.	***File Info***	***Additional File Info***
1.	*Name: VID-20190614-WA0006.mp4* *Path: Motorola GSM_XT1806 MotoG5SPlus.zip/sdcard/ ProgramData/Android/Language/.fr/Videos/wat up pono/ VID-20190614-WA0006.mp4*	*Size (bytes): 11256288* *Modified: 6/14/2019 15:44 (UTC +5:30)*
2.	*Name: Unmayal sollungal Ennodu sellungal with Vadivel Balaji in AIE 4-8-2012 – Youtube.3GP* *Path: Media/Internal shared storage/trending/adhu idu/Unmayal sollungal Ennodu sellungal with Vadivel Balaji in AIE 4-8-2012 – Youtube.3GP*	*Size (bytes): 20467994* *Modified: 9/5/2016 23:12 (UTC +5:30)*

[...]

Memory Card: [Strontium 16 GB]

*The memory card was acquired and examined using the forensic software tool "UFED 4 PC". The retrieved details such as document, image and video files are generated as a report and the report (in pdf) is copied on to a Compact Disc marked as "**CF 52/20**". The full report is given as **Annexure-III**.*

On perusing the medial files, multiple video snapshot images and video files were found related to pornography. The representative samples of the same are copied onto the CD mentioned earlier under a specified folder. [...]"

8. Upon completion of the investigation, chargesheet dated 19.09.2023 was filed against the respondent no. 1 for the offences punishable under Section(s) 67B of the IT Act and 15(1) of the POCSO

respectively. It may not be out of place to state at this stage, that although the FIR was registered for the offence punishable under Section 14(1) of the POCSO yet in light of the materials collected in the course of the investigation and the findings recorded in the Computer Forensic Analysis Report, the chargesheet was ultimately filed for the offence punishable under Section 15(1) of the POCSO. The relevant portion reads as under: -

*"**Final Report***

Before the Hon'ble Mahila Fast Track Mahila Court, Tiruvallur

Police Final Report under 173(i) W28 Ambattur All Women Police Station Crim no- 3/2020 U/s 67(B) IT ACT & 14 (1) of POCSO ACT 2012 @67 (B) IT ACT 15(1) of POCSO ACT 2012. [...]

Nature of the case

Mrs. Megallina, Additional Deputy Commissioner of Police, Women and Child Crime Branch, Chennai, West Zone LETTER RC.NO. 03/ADC CWC/West/Camp/2020 Dated: 28.01.2020 in that mentioned Ref: 1. Do. Lr. No. 05/ ADGP- CWC/ camp/ NCMEC/ 2020, 2. C.No.30/ COP/ CO/ 2020, 3. R.CNO. 228 VIII/ DC CWC/ Genl/ 2020 (CTR No. 49303278), 4. RC.No. 68/ japu- ii/ NCMEC/ 2020 as per the detail, Haris residing at 1st Main Road, Door No.03, VPC Nagar, Kallikuppam, Ambattur has reported to NCRB (National Crime Record Bureau) that he had seen child pornography on his mobile phone number 99406 87836 for more than two years at CTR No. 49303278 has been obtained and a report on child exploitation and missing persons and details of those who have downloaded child pornography against children banned by the data collection system has been obtained. Aforesaid person OLD Size ID- KALLI 4/OLD Chm Id- CHM2307 Downloaded from the address No.2 Gopalsamy, 3rd Main Road, Gangaiyamman Temple, Ampathur, Kallikuppam, with the malicious intention of viewing children's pornographic films for sexual purposes. As this evil act is considered to be a crime of disturbance of social morals, after being instructed to

take appropriate action against the said person, the All Women Police Station registered a case in CRIME NO. 03/20 U/ S 67B IT ACT r/ w 14(1) POCSO Act 2012 and the copy of the same was sent to the concerned court and the copies to the higher police officers without delay for investigation. [...]

In the investigation conducted so far, crime scene no. 2, VPC Nagar to Main Road Kallikuppam Ambattur, Chennai is within the jurisdiction of Ambattur All Women Police Station.

On 28.01.2000 Additional Deputy Commissioner, Women and Child Prevention Division, Chennai West Zone gone through the case received from (NCMEC) According to the National Center for Exploited Children in this case accused Harish AGE 24/S/o. Santhanam No. 2 VPC Nagar First Main Road Kallikuppam Ampathur Chennai has been using his phone number (99406 87836) for more than two years from his mobile phone number OLD Size ID- KALLI 4/OLD Chm Id- CHM2307 Downloaded from the address No.2 Gopalsamy, 3rd Main Road, Gangaiyamman Temple, Ampathur, Kallikuppam, with the malicious intention of viewing children's pornographic films for sexual purposes As this evil act is considered to be a crime of disturbance of social morals, as per CTR NO 49303278 a report of the crime has been received by NCRB.

Therefore, the accused in this case is considered to have committed an offense of disturbing public morals and therefore has committed a cognizable offense under Section 67 (B) IT ACT & 15 (1) of the POCSO Act 2012. [...]"

B. IMPUGNED ORDER

9. Aggrieved by the aforesaid, the respondent no. 1 went before the High Court of Judicature at Madras by way of a quashing petition being the Criminal Original Petition (Crl. O.P.) No. 37 of 2024 for the purposes of getting the aforesaid chargesheet and the criminal proceedings arising therefrom quashed.

10. The impugned judgment of the High Court is in three-parts. In other words, the High Court quashed the criminal proceedings essentially on three grounds: -

(i) ***First,*** the High Court was of the view that to constitute an offence under Section 14(1) of POCSO, a child must have been used by the person accused for pornographic purposes. It observed that although the two videos depicting children engaged in a sexual activity were found to have been downloaded and stored in the mobile phone belonging to the respondent no. 1, and assuming that the accused had watched the same yet the same would not constitute an offence under Section 14(1) of the POCSO. The relevant observations read as under: -

> *"9. To make out an offence under Section 14(1) of Protection of Child from Sexual Offences Act, 2012, a child or children must have been used for pornography purposes. This would mean that the accused person should have used the child for pornographic purposes. Even assuming that the accused person had watched child pornography video, that strictly will not fall within the scope of Section 14(1) of Protection of Child from Sexual Offences Act, 2012. Since he has not used a child or children for pornographic purposes, at the best, it can only be construed as a moral decay on the part of the accused person."*

(ii) ***Secondly,*** the High Court held that, to constitute an offence under Section 67B of the IT Act, the person accused must have published, transmitted or created material depicting children in sexually explicit act or conduct. It held that although the respondent no. 1 had admitted that he was addicted to watching pornography, yet mere watching or downloading of child pornography without any transmission or publication of the same does not fall within the purview of Section 67B of the IT Act. The relevant portion reads as under: -

> *"6. This Court enquired the petitioner and he stated that his date of birth is 13.11.1995 and that he has an elder brother. After a lot of persuasion, the petitioner admitted that during his teens, he had the habit of watching pornography. However, the petitioner made it clear that he had never watched child pornography. That apart, he also stated that he had never attempted to publish or transmit any of the pornographic*

materials to others. He had merely downloaded the same and he had watched pornography in privacy.

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10. In order to constitute an offence under Section 67-B of Information Technology Act, 2000, the accused person must have published, transmitted, created material depicting children in sexual explicit act or conduct. A careful reading of this provision does not make watching a child pornography, per se, an offence under Section 67-B of Information Technology Act, 2000. Even though Section 67-B of Information Technology Act, 2000, has been widely worded, it does not cover a case where a person has merely downloaded in his electronic gadget, a child pornography and he has watched the same without doing anything more."

(iii) ***Lastly,*** the High Court in light of its aforesaid discussion and by placing reliance on Section 292 of the Indian Penal Code, 1860 (for short, the "**IPC**") took the view that although the pornographic content was found to have been downloaded and stored in the mobile phone of the respondent no. 1 yet in the absence of any material to show that the respondent no. 1 had transmitted or published the same, no offence whatsoever could be said to have been made out either under the POCSO, IT Act or the IPC and thus quashed the criminal proceedings. The relevant observations read as under: -

"8. This Court had the advantage of going through the entire CD file. The mobile phone that was seized from the petitioner did contain pornographic materials. However, for the purposes of this case, only two videos were identified as child pornography. Those two videos contain boys (under teen) involved in sexual activity with an adult woman/girl. Admittedly, those two videos were downloaded and available in the mobile phone belonging to the petitioner and it was neither published nor transmitted to others and it was within the private domain of the petitioner.

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> *11. The Kerala High Court had an occasion to deal with the scope of Section 292 IPC. That was a case where a person was caught watching porn videos and a First Information Report came to be registered against him. While dealing with this issue, the Kerala High Court held that, watching an obscene photo or obscene video by a person by itself will not constitute an offence under Section 292 IPC. This is in view of the fact that this act is done by the concerned person in privacy without affecting or influencing anyone else. The moment the accused person tries to circulate or distribute or publicly exhibits obscene photos or videos, then the ingredients of the offence starts kicking in.*

11. Thus, the High Court *vide* its impugned judgment and order dated 11.01.2024 allowed the petition and thereby quashed the criminal proceedings in Spl. S.C. No. 170 of 2023 on the ground that no offence could be said to have been made out against the respondent no. 1 either under Section 14(1) of the POCSO or Section 67B of the IT Act. The operative portion of the Impugned Order reads as under: -

> *"12. In the considered view of this Court, the materials that have been placed before this Court does not make out an offence against the petitioner under Section 67-B of Information Technology Act, 2000 and Section 14(1) of Protection of Child from Sexual Offences Act, 2012.*
>
> *xxx xxx xxx*
>
> *18. In the light of the above discussion, the continuation of the proceedings against the petitioner will amount to abuse of process of Court. That apart, it will be a stumbling block for the petitioner's career in future. Therefore, this Court is inclined to quash the proceedings in Spl.S.C.No.170 of 2023 on the file of the Sessions Judge, Mahila Neethi Mandram (Fast Track Court), Tiruvallur District.*
>
> *Accordingly, this Criminal Original Petition stands allowed and the proceedings in Spl.S.C.No.170 of 2023 on the file of the Sessions Judge, Mahila Neethi Mandram (Fast Track Court), Tiruvallur District, is hereby quashed. Consequently, connected criminal miscellaneous petition is closed."*
>
> (Emphasis supplied)

12. From the aforesaid it could be said that the High Court laid down three propositions of law which are as follows: -

i. Mere possession or storage of any pornographic material is not an offence under the POCSO. We are mindful of the fact that, whilst endorsing the aforesaid proposition of law, the High Court in its impugned Order either consciously did not deem it necessary to refer to Section 15 of the POCSO or inadvertently failed to refer to Section 15 of the POCSO. Nevertheless, in either case that may be, the aforesaid proposition of law found favour with the High Court.

ii. Section 67B of the IT Act only makes the act of transmission, publication or creation of material depicting children in sexually explicit manner an offence. Mere watching or downloading of child pornography in private domain is not punishable under the same.

iii. In the absence of any material to indicate any transmission or publication of pornographic content involving child, no offence could be said to have been committed under the POCSO or the IT Act, and the criminal proceedings would be liable to be quashed. In other words, to attract the provisions of the POCSO or the IT Act it is not sufficient to merely establish storage or possession of child pornography and that transmission or publication of the same is also required to be established. In the absence of the same the criminal proceedings are liable to be quashed.

13. In such circumstances referred to above, the appellants being aggrieved with the Impugned Order passed by the High Court have come up before this Court with the present appeal.

C. SUBMISSIONS OF THE PARTIES

i. Submissions on behalf of the Appellants.

14. Mr. H.S. Phoolka, the learned Senior Counsel appearing for the appellants submitted that the interpretation of the relevant provisions of POCSO by the High Court for the purpose of holding that mere storage or possession of any child pornographic material does not amount to an offence, poses a significant threat to the well-being of children and may result in proliferation of child pornography, posing a significant threat to the very social fabric of the society at large.

In support of his submissions, Mr. Phoolka relied on the Convention on Cybercrime and the United Nations Convention on the Rights of the Child, 1989.

15. He further submitted that the chargesheet filed by the investigating agency specifically records that, as per the information received from the National Commission for Missing and Exploited Children, USA (NC-MEC), the accused had been watching child pornographic videos for the past two years.

16. He further contended that the High Court erroneously proceeded under Section 14(1) of the POCSO, which deals with the use of children for pornographic purposes, without giving due consideration to Section 15(1) of the Act.

17. He further submitted that Section 15(1) explicitly penalizes the downloading and failure to delete child pornography. In the present case, the respondent's stance that he had received two files containing child pornography via WhatsApp is falsified by the NC-MEC report. Furthermore, there is nothing on record to substantiate that the videos were received on WhatsApp.

18. It was further argued that the High Court committed a serious error in quashing the criminal proceedings without addressing itself on Section 15 of the POCSO. He submitted that the impugned judgment poses a significant threat to child welfare and is contrary to several national and international commitments.

19. He further submitted that the High Court also failed to distinguish between adult pornography and child pornography, as Sections 67 and 67A of the IT Act deal with adult pornography, while Section 67B was specifically introduced in 2009 to provide more stringent punishment for collecting, downloading, or watching child pornographic material.

20. He further submitted that in view of Section 30 of the POCSO the High Court was legally obliged to presume the existence of a culpable mental state on the part of the accused for having committed any offence under the Act that requires such a mental state.

21. In the last, Mr. Phoolka submitted that a conjoint reading of Section 67B of the IT Act, Section 15, and Section 30 of the POCSO leaves no manner of doubt as regards the culpability of persons in possession of child pornography.

ii. Submissions on behalf of the National Commission for Protection of Child Rights (NCPCR).

22. Ms. Swarupama Chaturvedi, the learned Senior Counsel appearing for the National Commission for Protection of Child Rights (NCPCR), submitted that there was a serious lapse on the part of the State in failing to register the FIR for the offence punishable under Section 15 of the POCSO, 2012, as the possession of pornographic material involving a child in any form by itself is an offence under Section 15(1) of the Act. It was also argued that the State as a Prosecuting agency failed in its duty to bring it to the notice of the High Court that chargesheet was ultimately filed for the offence under Section 15(1) of the POCSO & not Section 14.

23. She further submitted that the accused had downloaded pornographic material involving a child onto his mobile phone, retained possession of it, and failed to take any steps to delete the same for two years, as mandated under Section 19 of the POCSO, 2012.

24. She contended that the High Court failed to appreciate the mandate of Section 30, which raises a presumption of a culpable mental state on the part of the accused for any offence under the Act that necessitates such a mental state. The provision, therefore, shifts the burden of proving the absence of a culpable mental state onto the accused.

25. She would further submit that Section 19 of the POCSO imposes mandatory reporting of an offence under the Act if there was an apprehension that such offence is likely to be committed or knowledge that such an offence has been committed. It was pointed out that the failure to discharge this obligation by itself is punishable under Section 21 of the POCSO. She pointed out that the social media platforms claim to report such instances to the National Center for Missing and Exploited Children (NCMEC), a US-based NGO, which then reports them to the National Crime Records Bureau (NCRB). However, Section 19 mandates reporting such cases to the Special Juvenile Police Unit (SJPU) or the Special Police. Therefore, reporting to an NGO cannot absolve the social media platforms of its liability under Section 21 of the POCSO.

26. In the last, it was submitted that the issue as regards the plight of minors involved or used in child pornography is a matter of serious

concern for one and all. She prayed for issuance of appropriate directions. She submitted that in an age when children require internet access for educational purposes, it has become imperative to provide them with a safe online environment in accordance with Article 12 of the United Nations Convention on the Rights of the Child (UNCRC).

iii. Submissions on behalf of the respondent no. 1 / the Sole Accused.

27. Mr. Prashant S. Kenjale, the learned Counsel appearing for the respondent no. 1 / the accused, submitted that the FIR was lodged for the offence under Section 14(1) of the POCSO and Section 67B of the IT Act, and thus, no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned order.

28. He further submitted that the date of the receipt of the videos recovered from the mobile phone of the respondent no. 1 phone is 14.06.2019, at which point the 2019 amendment to Section 15 was not yet in force.

29. He further contended that the two files found from the Respondent's phone were named (a.) VID-20190614-WA005.mp4 and (b.) VID-20190823-WA0020.mp4. The use of "WA" in the file names indicates that they were automatically downloaded by WhatsApp, which has an auto-download feature, as shown in a research study. He would submit that in such circumstances, the said videos had been automatically downloaded onto his phone and that the respondent no. 1 was unaware of their existence. He argued that the forensic evidence clearly indicates both the creation and modification date as 14.06.2019, thereby indicating that the files were never accessed.

30. He further submitted that the mere possession of the aforesaid videos does not constitute an offence under Section 15(1) of the POCSO, as the respondent never had any intention to share or distribute them. He also argued that even if it is assumed that the respondent no. 1 had watched the said videos once and then failed to delete it, he cannot be charged under Section 15(1) of the POCSO, as he was unaware of its presence due to the government's failure to publicize the law.

31. He submitted that ignorance of law on the part of the respondent no. 1 was accompanied by a *bona fide* belief, and as such it would not constitute an offence under Section(s) 15 of the POCSO and 67B of the IT Act. In support of this argument, he placed reliance on the decisions of this Court in ***Chandi Kumar Das Karmarkar v. Abanidhar Roy***, reported in **AIR 1965 SC 585**, and ***Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P.***, reported in **(1979) 2 SCC 409**.

iv. Submissions on behalf of the respondent nos. 2 & 3 / the State.

32. Mr. D. Kumanan, the learned Counsel appearing for the State, submitted that the High Court, whilst passing the Impugned Order proceeded on an erroneous footing that an offence under Section 14 of the POCSO had been alleged against the accused, even-though both the chargesheet as-well as the quashing petition clearly mentioned that the indictment against the accused was under Section 15(1) of the POCSO.

33. He further submitted that the High Court in its Impugned Order failed to look into Section 67B of the IT Act. The High Court whilst quashing the criminal proceedings neither discussed nor gave any due consideration to Section 67B, eventhough chargesheet had been filed for an offence under it.

34. It was submitted that both Section 15 of the POCSO and Section 67B of the IT Act had been enacted with the salutary object of curtailing child abuse by penalizing any form of use of child pornography, including watching of such pornographic content in order to tackle the larger problem of creation and dissemination of such material by the perpetrators.

35. He submitted that more than hundred pornographic videos were found stored in the mobile phone of the respondent no. 1 / accused herein. Furthermore, the accused had himself admitted before the High Court that he along with his friends would regularly watch such pornographic material. In such circumstances it was argued that the accused had stored such material in his phone with the intention of sharing it with his friends.

36. It was further submitted that the marginal note of Section 15 of the POCSO i.e. "*Punishment for storage of pornographic material involving child*" is self-explanatory and that sub-section (1) of the

said provision punishes the storage or possession of any such pornographic material when done with an intention to share or transmit it. Reliance was placed on Section 30 of the POCSO to argue that the said provision specifically provides for presumption of a culpable mental state on part of the accused for any offence under the Act which requires such mental state, and as such the onus was on the accused to prove that he had no intention to share the material that was found stored in his phone, which was also overlooked by the High Court.

37. In the last, it was submitted that once the chargesheet and the other materials on record *prima-facie* disclosed the commission of an offence, more particularly the pornographic videos that were found stored in the mobile phone of the accused, it was not proper for the High Court to exercise its inherent powers under Section 482 of the Cr.P.C to quash the criminal proceedings.

D. ISSUES FOR DETERMINATION

38. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions of law fall for our consideration: -

I. What is the scope of Section 15 of the POCSO? In other words, what is the underlying distinction between sub-section(s) (1), (2) and (3) respectively of the POCSO?

II. Whether, mere viewing, possessing or storing of any child pornographic material is punishable under the POCSO?

III. What is the true scope of Section 67B of the IT Act?

IV. What is the scope of Section 30 of the POCSO? In, other words, what are the foundational facts necessary for invoking the statutory presumption of culpable mental state in respect of Section 15 of the POCSO?

V. Whether, the statutory presumption contained in Section 30 of the POCSO can be invoked only at the stage of trial by the Special Court alone established under the POCSO? In other words, whether it is permissible for the High Court in a quashing petition filed under Section 482 of the Cr.P.C. to resort to the statutory presumption of culpable mental state contained in Section 30 of the POCSO?

E. ANALYSIS

i. Relevant Statutory Scheme and Provisions.

a. Legislative History and Scheme of the POCSO.

39. Before adverting to the rival submissions canvassed on either side, it would be apposite to first look into the statutory scheme and refer to the relevant provisions of the POCSO.

40. As the long title, 'Protection of Children from Sexual Offences Act, 2012' suggests, the POCSO was enacted by the Parliament to address the urgent need for a comprehensive law to protect children from sexual abuse and exploitation.

41. Sexual exploitation of children is a pervasive and deeply rooted issue that has plagued the societies worldwide and has been a matter of serious concern in India. Prior to the enactment of the POCSO, India lacked a specific legal framework dedicated to dealing with sexual offenses against children. While the provisions related to sexual offenses existed in the IPC, they were not adequately tailored to address the unique vulnerabilities and the needs of children.

42. The inadequacy of the existing laws to effectively deal and combat with the sexual abuse of children was starkly evident. The IPC, though equipped to handle sexual offences, did not explicitly recognize the various forms of sexual abuse that children might face. Under the IPC there was no distinction between an adult and a child victim for the purposes of the offences punishable under the Code nor did it account for the specific psychological and developmental needs of such child victims. Moreover, the procedural laws were not child-friendly, often resulting in secondary victimization during the legal process. The increasing incidence of child sexual abuse in India and the growing awareness of the long-term psychological impact on the victims underscored the need for a dedicated law. The POCSO was introduced to fill this gap and provide a robust legal mechanism to safeguard children from sexual crimes and protect them from offences of sexual assault, sexual harassment and pornography.

43. The Statement of Objects and Reasons for the enactment of the POCSO makes it abundantly clear that since the sexual offences against children were not adequately addressed by the existing laws and a large number of such offences were neither specifically

provided for nor were they adequately penalized, the POCSO has been enacted to protect the children from the offences of sexual assault, sexual harassment and pornography and to provide for establishment of Special Courts for trial of such offences and for matters connected therewith and incidental thereto.

44. It further states that the POCSO is a 'self-contained comprehensive legislation' for the purpose of enforcing the rights of all children to safety, security and protection from sexual abuse and exploitation countered through commensurate penalties as an effective deterrence for sexual offences and pornography and has been enacted keeping in mind Articles 15 and 39 of the Constitution respectively and the United Nations Convention on the Rights of the Children. The Statement of Objects and Reasons of the POCSO reads as under: -

"STATEMENT OF OBJECTS AND REASONS

Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Further, Article 39, inter alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

The United Nations Convention on Rights of Children, ratified by India on 11th December,1992, requires the State Parties to undertake all appropriate National, By-lateral and Multi lateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the 'study on child abuse: India 2007' conducted by the Ministry of Women and Child Department. Moreover, sexual offences against children are not adequately addressed by the extent laws. A large number of such offences are neither

> *specifically provided for nor are they adequately penalized. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.*
>
> *It is, therefore, proposed to enact a self-contained comprehensive legislation inter-alia to provide for protection of children from the sexual offences 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.*
>
> (Emphasis supplied)

45. The primary legislative intent behind the enactment of the POCSO was to create a comprehensive legal framework that would not only punish offenders but also provide a child-friendly system for the recording of evidence, investigation, and trial of offenses. The POCSO was designed to cover all forms of sexual abuse against children, including sexual harassment, child pornography, and aggravated sexual assault, among others. It aimed to ensure the safety and dignity of child victims during the legal process, with specific provisions that mandate in-camera trials, the presence of a trusted adult during the proceedings, and the prohibition of aggressive questioning of child victims.

46. The POCSO is a manifestation of the unique scheme formed by Article(s) 15 and 39 respectively of the Constitution and the obligation cast by the United Nations Convention on Rights of Children that was ratified by India. Article 15 more particularly sub-article (3) read with Article 39(f) of the Constitution **i)** enables the State to make special provisions for children **AND ii)** at the same time obligates the State to direct its policy towards ensuring that the tender and vulnerable age of children is not exploited or abused and to secure a dignified and healthy childhood and youth, free from any moral or material abandonment or exploitation. The UN Convention on Rights of Children prescribes a set of standards that have to be ensured

by all State parties including India to secure the best interest of the child and to specifically undertake preventive measures against any form of exploitation of children such as prostitution, unlawful sexual activity or pornographic performances and depictions. The POCSO is a legislative manifestation towards realization of these constitutional provisions, by providing a specialized framework to combat and prevent any and all forms of sexual abuse and exploitation as stated in its long Preamble. The relevant portion of the long Preamble of the POCSO reads as under: -

> *"An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.*
>
> *Whereas clause (3) of article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;*
>
> *And whereas, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child;*
>
> *And whereas it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;*
>
> *And whereas it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;*
>
> *And whereas the State parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent –*

(a) the inducement or coercion of a child to engage in any unlawful sexual activity;

(b) the exploitative use of children in prostitution or other unlawful sexual practices;

(c) the exploitative use of children in pornographic performances and materials;

And whereas sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed."

47. Section 2(1) sub-clause (d) of the POCSO defines the term "child" to mean any person below the age of eighteen years. Thus, the definition of the term "child" used under the POCSO is denuded of any gender i.e., the term is both gender neutral and gender fluid and as such will include any person who is below the age of 18-years. The relevant provision reads as under: -

*"**2. Definitions.** –*

(1) In this Act, unless the context otherwise requires, –

(d) "child" means any person below the age of eighteen years;"

48. Section 2(1)(da) defines the term "child pornography" to mean and include any visual depiction of a child involved in any sexually explicit conduct such as photograph, video, image generated digitally or by a computer which is indistinguishable from an actual child i.e., any self-generated image of an actual child or any other image that has been created, adapted or modified, that appears to depict a child. The relevant provision reads as under: -

*"**2. Definitions.** –*

(1) In this Act, unless the context otherwise requires, –

(da) "child pornography" means any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer generated image indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child;"

49. Section 15 of the POCSO delineates and provides when the storage or possession of pornographic material involving a child shall be a punishable offence under the POCSO and further prescribes the punishment for such storage or possession of pornographic material involving a child. The relevant provision reads as under: -

> *"**15. Punishment for storage of pornographic material involving child.** –*
>
> *(1) Any person, who stores or possesses pornographic material in any form involving a child, but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography, shall be liable to fine not less than five thousand rupees and in the event of second or subsequent offence, with fine which shall not be less than ten thousand rupees.*
>
> *(2) Any person, who stores or possesses pornographic material in any form involving a child for transmitting or propagating or displaying or distributing in any manner at any time except for the purpose of reporting, as may be prescribed, or for use as evidence in court, shall be punished with imprisonment of either description which may extend to three years, or with fine, or with both.*
>
> *(3) Any person, who stores or possesses pornographic material in any form involving a child for commercial purpose shall be punished on the first conviction with imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both and in the event of second or subsequent conviction, with imprisonment of either description which shall not be less than five years which may extend to seven years and shall also be liable to fine."*

50. It would be worthwhile to note that Section 15 of the POCSO had undergone a significant change by virtue of the Protection of Children from Sexual Offences (Amendment) Act, 2019 (for short, the "**2019 Amendment Act**"), whereby several key changes were introduced. We shall discuss the said provision *viz-à-viz* the unamended provision of Section 15 along with the object and purpose behind the 2019 Amendment Act in more detail in the latter part of this judgment.

51. Section 30 of the POCSO provides for the presumption of culpable mental state and provides that where any offence under the POCSO requires a culpable mental state on the part of the accused, the existence of such mental state on the part of the accused shall be presumed by the Special Court, and that it shall be open for the accused to rebut this presumption. In other words, the accused can prove that he had no such mental state with respect to any offence under the Act. The relevant provision reads as under: -

> *"**30. Presumption of culpable mental state.** –*
>
> *(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*
>
> *(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.*
>
> *Explanation. – In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."*

52. This Court in its decision in ***Independent Thought v. Union of India & Anr.*** reported in **2017 INSC 1030** held that the preamble to the POCSO recognizes and mandates that the Act and its provisions ought to operate and be interpreted in a manner that would be in the best interest and well-being of the child. It should **i)** ensure that the sexual exploitation and abuse of children are addressed effectively and **ii)** induce a healthy physical, emotional, intellectual and social development of the child. The relevant observations read as under: -

> *"42. [...] The Preamble to the POCSO Act also recognizes that it is imperative that the law should operate "in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development of the child". Finally,*

the Preamble also provides that "sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed". [...]"

(Emphasis supplied)

53. In ***Attorney General for India v. Satish*** reported in **2021 INSC 762** this Court had the occasion to examine the entire legislative scheme of the POCSO. It held that each provision of the POCSO should be construed *viz-a-viz* the other provisions of the Act and with reference to the context or background with which the legislation was enacted, so as to make the Act and its provisions more meaningful and effective. This Court further emphasized that, while construing the provisions of the POCSO, the impact of sexual assault and exploitation on the children should not be ignored and further the courts should avoid a narrow or pedantic interpretation that would the defeat the statute; rather, where the intention of the legislature cannot be given effect to or cannot be realized, a meaningful construction of the statute should be adopted to bring about a more effective result. The relevant observations read as under: -

"33. [...] 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 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. [...]

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37. [...] However, it is equally settled legal position that the clauses of a statute should be construed with reference to the context vis-a-vis the other provisions so as to make a consistent enactment of the whole Statute relating to the subject matter. The Court can not be oblivious to the fact that the impact of traumatic sexual assault committed on children of tender age could endure during their whole life, and may also have an adverse effect on their mental state. The suffering of the victims in certain cases may be immeasurable. Therefore, considering the objects of the

POCSO Act, its provisions, more particularly pertaining to the sexual assault, sexual harassment etc. have to be construed vis-a-vis the other provisions, so as to make the objects of the Act more meaningful and effective."

(Emphasis supplied)

54. Justice S. Ravindra Bhat in his concurring opinion in ***Attorney General for India*** (supra) further observed that the POCSO and its nuanced provisions were designed keeping in mind the need to protect the autonomy and dignity of children. It was enacted to criminalize those acts and behaviour that have the propensity to harass, discomfit or demean minors, and as such it is the duty of the courts to ensure that the provisions of the POCSO are not interpreted in a manner that would undermine its purpose or the pressing needs of the times. The relevant observations read as under: -

"*11. The limitations in law in dealing with acts that undermined the dignity and autonomy of women and children, ranging from behaviour that is now termed "stalking" to pornography, or physical contact, and associated acts, which were not the subject matter of any penal law, were recognized and appropriate legislative measures adopted, in other countries. These have been alluded to in Trivedi, J's judgment, in detail. These laws contain nuanced provisions criminalizing behaviour that involve unwanted physical contact of different types and hues, have the propensity to harass and discomfit women and minors (including minors of either sex), or demean them.*

xxx xxx xxx

33. In the end, I cannot resist quoting Benjamin Cardozo that "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." It is, therefore, no part of any judge's duty to strain the plain words of a statute, beyond recognition and to the point of its destruction, thereby denying the cry of the times that children desperately need the assurance of a law designed to protect their autonomy and dignity, as POCSO does."

(Emphasis supplied)

55. Similarly in ***Eera through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr.*** reported in **2017 INSC 658**, this Court observed that the POCSO had been brought with the purpose of protecting the children from sexual exploitation and harassment. It had been designed to secure the well-being and the best interests of the child with the protection of the child's dignity being the backbone of the legislation. The dignity, protection and interest form the bedrock of the POCSO. The relevant observations read as under: -

> *"18. The purpose of referring to the Statement of Objects and Reasons and the Preamble of the POCSO Act is to appreciate that the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the preamble, it is manifest that it recognizes the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. 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. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The statement of objects and reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child-friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act.*
>
> *xxx xxx xxx*

> *63. [...] The POCSO Act, as I have indicated earlier, comprehensively deals with various facets that are likely to offend the physical identity and mental condition of a child. The legislature has dealt with sexual assault, sexual harassment and abuse with due regard to safeguard the interest and well being of the children at every stage of judicial proceeding in an extremely detailed manner. The procedure is child friendly and the atmosphere as commanded by the provisions of the POSCO Act has to be congenial. The protection of the dignity of the child is the spine of the legislation. [...]"*
>
> (Emphasis supplied)

56. In ***Nawabuddin v. State of Uttarakhand*** reported in **2022 INSC 162** this Court held that any act of sexual assault, exploitation or harassment of the children should be dealt with in a stringent manner and that no leniency should be shown when dealing with an offence under the POCSO in view of the object that is sought to be achieved by the Act. The relevant observations read as under: -

> *"10. Keeping in mind the aforesaid objects and to achieve what has been provided under Article 15 and 39 of the Constitution to protect children from the offences of sexual assault, sexual harassment, the POCSO Act, 2012 has been enacted. Any act of sexual assault or sexual harassment to the children should be viewed very seriously and all such offences of sexual assault, sexual harassment on the children have to be dealt with in a stringent manner and no leniency should be shown to a person who has committed the offence under the POCSO Act. By awarding a suitable punishment commensurate with the act of sexual assault, sexual harassment, a message must be conveyed to the society at large that, if anybody commits any offence under the POCSO Act of sexual assault, sexual harassment or use of children for pornographic purposes they shall be punished suitably and no leniency shall be shown to them. Cases of sexual assault or sexual harassment on the children are instances of perverse lust for sex where even innocent children are not spared in pursuit of such debased sexual pleasure."*
>
> (Emphasis supplied)

b. Relevant Provisions of the IT Act.

57. For better and effective adjudication of the issues involved in the case at hand, it would be apposite to refer to the IT Act which also contains several provisions, more particularly Section(s) 67, 67A and 67B respectively, that penalize the use, transmission and publication of obscene materials including child pornography. These provisions together encompass and collectively form the umbrella scheme of comprehensive penal provisions contained in the IT Act in this regard.

58. Section 67 of the IT Act is the principal provision that criminalizes the publication or transmission of "obscene material" in any electronic form and constitutes an offence. Section 67A of the IT Act, is a more aggravated offence, prescribing enhanced punishment than the preceding provision. It does so by further amplifying the scope of 'obscene material' by stipulating that any obscene material that contains or depicts any sexually explicit act or conduct, when published or transmitted shall be punishable under the said provision.

59. Section 67B of the IT Act specifically deals with child pornographic materials. It provides for an even more severe form of offence by bringing within its ambit those obscene materials in any electronic form that depict a child in any sexually explicit act or conduct and by further expanding the scope of 'actus reus' which is punishable under the provision to include not just publication or transmission but also the browsing, creation, collection, online facilitation or enticement of children into any sexual act or conduct etc. The said provision reads as under: -

> *"**67B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form**. — Whoever —*
>
> *(a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct; or*
>
> *(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or*
>
> *(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually*

explicit act or in a manner that may offend a reasonable adult on the computer resources; or

(d) facilitates abusing children online; or

(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children,

shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

Provided that provisions of Section 67, Section 67-A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form—

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

(ii) which is kept or used for bona fide heritage or religious purposes.

Explanation. — For the purpose of this section, "children" means a person who has not completed the age of 18 years."

ii. Scope of Section 15 of the POCSO and Section 67B of the IT Act.

60. In the case at hand, we are concerned with the interpretation of Section 15 of the POCSO and Section 67B of the IT Act, more particularly the scope of these two provisions and what would constitute an offence under each of them. In other words, what exactly has been made punishable under Section(s) 15 of the POCSO and 67B of the IT Act respectively and what are the necessary ingredients or elements to establish or make out an offence under it.

a. Contradictory Views of different High Courts on the subject.

61. Before proceeding with the analysis of the aforesaid two provisions, it would be appropriate to refer to the decisions of various High Courts and the cleavage of opinion that have been expressed as regards the scope of Section 15 of the POCSO and Section 67B of the IT Act.

62. In ***Nupur Ghatge v. State of Madhya Pradesh*** (**MCRC No. 52596 of 2020**), the accused therein was alleged to have uploaded child pornographic videos and photographs on his social media account, and thus, a case was registered against him under Section 67B of the IT Act. The Gwalior Bench of the Madhya Pradesh High Court held that Section 67B penalizes various forms of acts including the act of watching or transmitting any child pornographic material in electronic form. It further held that any defence of the accused as to the absence of any involvement in transmission or sharing of such material or the mental state of the accused cannot be looked into at the stage of quashing under Section 482 of the Cr.P.C. The relevant observations read as under: -

> *"From the whats-app chats filed by the applicant, it appears that the applicant himself was involved in porn activities, therefore, the provision of Section 67B of the Act, 2000 would be applicable as Section 67-B of the Act, 2000 also includes records in any electronic form own abuse or that of others pertaining to sexually explicit act with children.*
>
> *xxx xxx xxx*
>
> *The burden is on the applicant to prove his defence which cannot be decided by this Court in exercise of powers under Section 482 of CrPC."*

63. In ***P.G. Sam Infant Jones v. State represented by Inspector of Police*** reported in **2021 SCC OnLine Mad 2241** the accused therein was alleged to have browsed, downloaded and transmitted child pornographic material through his e-mail and social media account. Accordingly, a case was registered against him for the offences under Section 15(1) of POCSO and Section 67B of the IT Act, whereupon the accused therein preferred an anticipatory bail application before the Madurai Bench of the Madras High Court. The Madras High Court observed that while viewing of pornography in private domain may not be an offence in view of an individual's

right to expression and privacy, child pornography falls outside the ambit of such individual rights and stands on a different footing. It held that Section 67B penalizes various kinds of acts pertaining to child pornography including the act of viewing such material. The relevant observations read as under: -

> *3.The case of the prosecution is that on 27.06.2020 at 17.38:51 hours, the petitioner browsed, downloaded and transmitted child pornographic material by using Airtel Sim bearing No.9787973370 through his e-mail and Facebook Account.*
>
> *xxx xxx xxx*
>
> *5. Viewing pornography privately will not constitute an offence. Offence is an act that is forbidden by law and made punishable. That is the definition found in Section 40 of IPC. As on date, there is no provision prohibiting such private acts. There are some who even elevate it as falling within one's right to free expression and privacy. But child pornography falls outside this circle of freedom. Section 67-B of the Information Technology Act, 2000 penalises every kind of act pertaining to child pornography. [...] Therefore, even viewing child pornography constitutes an offence.*
>
> (Emphasis supplied)

64. In ***Ajin Surendran v. State of Kerala & Anr.*** reported in **2022 KER 7207** child pornographic videos were found stored in the mobile phone of the accused therein. The High Court of Kerala at Ernakulam observed that Section 15 of POCSO gets attracted when any person stores or possesses pornographic material in any form involving a child, with an intention to share or transmit it, whereas Section 67B of the IT Act gets attracted when a person browses or downloads any such material in any electronic form. Accordingly, it held that in view of the videos that were found stored in the accused's mobile phone, *prima-facie* both of the aforesaid provisions are said to be squarely attracted, and thus the power under Section 482 cannot be invoked for quashing the criminal proceedings. The relevant observations read as under: -

> "*3. I have gone through the first information statement as well as the final report. It would show that the mobile phone belongs to the petitioner and the sim card was examined and it was found that in the memory card, pornographic video of children were stored. Section 15 of POCSO Act gets attracted when any person stores or possesses pornographic material in any form involving a child, with an intention to share or transmit child pornography. Section 67B(b) of the IT Act gets attracted when a person among other things, browses or downloads material in any electronic form depicting children in obscene or indecent or sexually explicit manner. Thus, both the sections are squarely attracted. When prima facie case is made out, power under Section 482 cannot be invoked.*"
>
> (Emphasis supplied)

65. In ***Manuel Benny v. State of Kerala*** reported in **2022 KER 9730** it was found that the accused person therein had downloaded and stored pornographic videos depicting children in a sexually explicit manner in his mobile phone from a messaging app; 'Telegram' for private viewing. Accordingly, a case was registered against the accused therein under Section 15 of the POCSO and Section 67B of the IT Act. When the final report came to be filed, the offence under Section 15 of the POCSO was dropped, and chargesheet was filed only for the offence under Section 67B of the IT Act. The accused preferred a quashing petition before the High Court of Kerala at Ernakulam on the ground that even if the materials in the chargesheet were taken at their face value, no ingredients were made out to constitute the offence under Section 67B of the IT Act. A learned Single Judge of the High Court whilst quashing the criminal proceedings held that in order to attract the offence under Section 67B of the IT Act, the pornographic material in question must be voluntarily downloaded. It held that there should be an intention on the part of the accused to download any pornographic content in order to view it so as to constitute an offence under Section 67B of the IT Act. The learned Single Judge further observed that as per the FSL report, the child pornographic videos had been accessed through the messaging app 'Telegram' wherein there is a possibility of automatic download of videos. Since there was no material to show that the accused therein had voluntarily downloaded or browsed the pornographic material in

question, no *prima facie* offence had been made out under Section 67B of the IT Act, and thus the High Court quashed the criminal proceedings. The relevant observations read as under: -

> *"5. A perusal of the final report would show that the only allegation against the petitioner is that he downloaded and enjoyed material depicting children in obscene, indecent and sexually explicit manner from the application called 'Telegram'. In order to attract the offence under Section 67B of the IT Act, the videos or material has to be voluntarily downloaded into any device. In other words, there should be intention on the part of the petitioner to download the material in order to view it. The definite case of the petitioner is that he did not download any offensive material. Even in Annexure A3 FSL report it is seen that the path of those images is from Android backup and the child pornographic videos were accessed through 'Telegram'. The learned Additional DGP submitted that the contents transmitted in the 'Telegram' can be automatically downloaded in the mobile phone by default. Hence, it cannot be said that the petitioner has intentionally downloaded the material, considering the features of the 'Telegram' App.*
>
> *Since there is no material to show that the petitioner has browsed or downloaded child pornographic material, the offence under Section 67B of the IT Act is not attracted. Hence, no purpose will be served in proceedings with the matter further. Accordingly, the Crl.M.C is allowed. All further proceedings pursuant to Annexure A2 final report in Crime No.531/2020 of Melukavu Police Station now pending as C.C.No.257/2021 on the files of the Judicial Magistrate of the First Class, Erattupetta stands hereby quashed."*
>
> (Emphasis supplied)

66. In ***Lakshya v. State of Maharashtra & Anr.*** (**Criminal Writ Petition No. 479 of 2022**), the accused therein had viewed and stored a child pornographic video in his mobile, which he subsequently showed to his other friends and co-accused therein. On the basis of the aforesaid, a case was registered against the accused persons under Section(s) 15(1) and (3) of the POCSO along with Section 67B of the

IT Act. The accused preferred a discharge application which came to be rejected by the Trial Court whereafter the accused therein went in appeal before the High Court of Judicature at Bombay, Nagpur Bench. The learned Single Judge of the High Court dismissed the appeal and upheld the rejection of the discharge application by the Trial Court. The High Court held that merely because the accused therein was not the creator of the pornographic material in question it cannot be said that no offence had been made out. It held that the act of the accused to store and forward the pornographic material and the failure on his part to delete or report the same would squarely fall within the ambit of Section(s) 15(1) and (2) of the POCSO and Section 67B of the IT Act. However, the High Court chose not to advert to the offence under Section 15(3) of the POCSO that was contained in the chargesheet as a *prima facie* case had already been established against the accused therein for the other offences with which they were charged. The relevant observation reads as under: -

> *"8. With the assistance of the learned Advocate for the accused and the learned APP for the State, I have gone through the provisions of Section 67-B of the I. T. Act and Section 15 of the POCSO Act. The main allegation against the accused is that they stored, forwarded and shared with each other porn video. Even if it is assumed for the sake of argument that they are not creators of the porn video, in my view, the benefit of discharge cannot be granted to them. [...]*
>
> *9. In my view, perusal of Section 15 of the POCSO Act in entirety would show that the act of the accused persons to store, forward and possess pornographic material involving a child is squarely covered under Section 15(1) and (2) of the POCSO Act. They failed to delete or destroy or report the same to the designated authority. As per the case of the prosecution, they stored, possessed and circulated the said porn video. Therefore, in my view, at this stage, it is very difficult for the accused to come out of the tentacles of Section 15(1) and (2) of the POCSO Act.*
>
> *10. Section 67-B of the I.T. Act provides a punishment for publishing or transmitting the material depicting children in Sexually explicit act, etc., in an electronic form. If the*

basic ingredient of Section 67-B, prima facie, are applied to the facts of the case on hand, it would show beyond doubt that the act of the accused is squarely covered within the ambit of Section 67-B of the I. T. Act. In my view, in the teeth of the allegations against the accused and the material collected during the course of investigation and compiled in the charge-sheet, it would be very difficult to accept the contention of the accused persons. It is true that the applicants are young. They are students. They are from reputed family. However, while deciding the discharge application this could not be the consideration. If this submission is accepted on this ground then this would be nothing short of showing misplaced sympathy to the persons who are prima facie accused of the commission of offence."

(Emphasis supplied)

67. In ***Shantheeshlal T. v. State of Kerala*** reported in **2024 KER 35968**, during investigation certain pornographic videos involving a child had been recovered from the device of the accused thereunder. Accordingly, chargesheet was submitted against the accused therein for the offences punishable under Section(s) 15(1) of the POCSO and 67B of the IT Act. The accused thereunder preferred a quashing petition before the High Court of Kerala at Ernakulam, wherein the learned Single Judge quashed the aforesaid chargesheet and the criminal proceedings taking the view as under: -

(i) ***First,*** the learned Single Judge held that in order to attract the provision of Section 15(1) of the POCSO there must be a storage or possession of child pornographic material and further such material should be shown to have been shared or transmitted by the person accused. Mere possession or storage of pornographic material by itself is not an offence under Section 15(1) of the POCSO unless it is shown that the accused person had indeed shared or transmitted such material. In other words, to constitute an offence under Section 15(1) there must be an actual act of transmission or sharing of the pornographic material depicting a child in a sexually explicit act or conduct that was found to be stored or in possession of the accused. The relevant observation reads as under: -

"9. Reading the provision, it is emphatically clear that storing or possessing pornographic materials in any form involving a child and failure to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography, shall be an offence. So mere storing or possessing pornographic material is not an offence under Section 15(1) of POCSO Act, if the said storing or possession is without any intention to share or transmit the same. Therefore, mere storing or possessing pornographic materials by itself is not an offence. Thus, in order to attract an offence under Section 15(1) of the POCSO Act, the stored or possessed pornographic materials should be shared or transmitted. In the instant case, there is no material available to hold that the accused either shared or transmitted pornographic materials, though storing of the same was detected. Therefore, the offence under Section 15(1) of the POCSO Act is not made out in the instant case."

(Emphasis supplied)

(ii) ***Secondly,*** it observed that, even for the purposes of Section 67B of the IT Act there must be some material to show that the accused person had either browsed, downloaded, published, transmitted or created any material in electronic form depicting a child in a sexually explicit act or conduct. To constitute an offence under Section 67B of the IT Act the accused person must have intentionally either downloaded, browsed, recorded or transmitted a pornographic material involving a child. In the absence of any material to show or establish specific intention on the part of the accused to share or transmit the pornographic material found, no offence could be said to have been made out under Section 67B of the IT Act. Any accidental or automatic download of such material will not fall within the purview of the said provision. The relevant observations read as under: -

"11. Publishing, transmitting or causing any material in electronic form which depicts children engaged in sexually explicit act or conduct or creation of text or digital images etc. are the ingredients under Section 67B of the IT Act also.

xxx xxx xxx

> *13. Therefore, going by the decision, automatic or accidental downloading of children engaged in sexually explicit act or conduct is not an offence under Section 67B, once the specific intention to do so is not established, by the materials which form part of the prosecution records.*
>
> *14. In the present case, the materials collected during investigation would show that some pornographic messages, which would depict children engaged in sexually explicit act or conduct were found in the devise of the accused. But there are no materials to show that the petitioner intentionally downloaded or browsed or recorded the same. More particularly there are no materials to show that the petitioner had either shared, transmitted or published the same in any manner.*
>
> *15. Thus, the materials available do not suggest the ingredients to find prima facie, commission of offence under Section 67B of the IT Act."*
>
> (Emphasis supplied)

As besides the recovery of the pornographic material from the device of the accused there was nothing to show that he had either shared or transmitted or intentionally downloaded the same in the first place. In such circumstances, the learned Single Judge held that no *prima facie* offence had been made out either under Section(s) 15(1) of the POCSO or 67B of the IT Act and thus, proceeded to quash the criminal proceedings.

68. Similarly, in ***Akash Vijay v. State of Kerala*** reported in **2024 KER 42626**, the Kerala High Court placing reliance on the decision of ***Shantheeshlal T*** (supra) held that mere storage or possession of any pornographic material involving a child will not constitute an offence under Section(s) 15 of the POCSO or 67B of the IT Act in the absence of any material to show that the accused person either intentionally downloaded or browsed the said material or that he shared or transmitted the same. The relevant observations read as under: -

> *"6. On perusal of the prosecution records, no materials collected during investigation to show that the petitioner intentionally downloaded or browsed or recorded the*

same and there are no materials available to show that the petitioner had either shared, transmitted or published the video, in any manner. The allegation is confined to that of presence of porn video in the mobile phone of the accused alone.

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8. Reading the facts of this case, the same is similar to the facts dealt in Shantheeshlal T.'s case (supra). Therefore, applying the same ratio, this Crl.M.C. is liable to be allowed."

(Emphasis supplied)

69. In ***Akhil Johny v. State of Kerala*** reported in **2024 KER 53767**, the learned Single Judge of the Kerala High Court held that where the allegations are limited only to the presence of pornographic material involving a child in the mobile phone or hard disk of the accused, no offence could be said to have been made out under Section(s) 15 of the POCSO or 67B of the IT Act and as such the criminal proceedings would be liable to be quashed. The relevant observations read as under: -

"6. On perusal of the prosecution records, no materials collected during investigation to show that the petitioner intentionally downloaded or browsed or recorded the same and there are no materials available to show that the petitioner had either shared, transmitted or published the video, in any manner. The allegation is confined to that of presence of porn video in the mobile phone of the accused alone.

xxx xxx xxx

8. Reading the facts of this case, the same is similar to the facts dealt in Shantheeshlal T.'s case (supra). Therefore, applying the same ratio, this Crl.M.C. is liable to be allowed."

(Emphasis supplied)

70. In ***Inayathulla N (1) v. State*** reported in **2024 KHC 26513**, the accused therein was charged for browsing a website and viewing pornographic materials involving a child. Accordingly, a case was registered against him under Section(s) 67B of the IT Act. A learned Single Judge of the High Court of Karnataka held that the soul and

essence of Section 67B lies in the act of publication or transmission of any material depicting a child in any sexually explicit conduct, and that mere browsing or watching of such material would not attract the aforesaid provision. It further held that in such cases even investigation should not be permitted to be continued and thus, proceeded to quash the criminal proceedings. The relevant observations read as under: -

> *"7. [...] Section 67B of the IT Act punishes those persons who would publish, transmit the material depicting children in sexually explicit acts in electronic form. The soul of the provision is publishing or transmitting of material depicting children in sexually explicit act.*
>
> *8. The allegation against the petitioner is that he has watched a pornographic website. This, in the considered view of the Court, would not become publishing or transmitting of material, as is necessary under Section 67B of the IT Act. At best, as contended, the petitioner could be a porn addict, who has watched pornographic material. Nothing beyond this, is alleged against the petitioner. If the facts are pitted against the ingredients necessary to drive home Section 67B of the IT Act, what would unmistakably emerge is, further proceedings cannot be permitted to be continued, as it would become an abuse of process of law. [...]*
>
> *9. The Apex Court in the afore laid postulates holds that even if the facts that forms the complaint is accepted as true, it would not make out any offence. In such cases, even investigation should not be permitted to be continued. Therefore, the impugned proceedings cannot be permitted to be continued, as it does not make out an offence under Section 67B of the IT Act."*
>
> (Emphasis supplied)

71. We are conscious of the fact that the aforesaid decision of ***Inayathulla N (1)*** (supra) was subsequently taken in review by the learned Single Judge of the Karnataka High Court under the nomenclature "recall" upon realising that Section 67B of the IT Act had been misinterpreted more particularly the failure to advert to sub-section (b) of the said provision which criminalizes the browsing of child pornographic sites.

Consequently, in ***Inayathulla N (2) v. State*** reported in **2024 KHC 28204** the learned Single Judge set aside its earlier order in ***Inayathulla N (1)*** (supra) by observing that although Section 67B sub-section (a) of the IT Act may not apply in the absence of any transmission or publication of any child pornography, yet sub-section (b) of the said provision would indeed be applicable where the allegations involve browsing or viewing of any child pornographic material. It is relevant to note that although the court was apprised of the fact that even Section 15 of the POCSO was being contemplated to be added in the chargesheet, yet the High Court in view of the limited question before it did not deem it necessary to go into the applicability of the said provision at that stage. The relevant observations read as under: -

> *"5. This Court accepting the facts had allowed the petition in terms of its order dated 10-07-2024. [...] After release of the order, the State appears to have noticed the short assistance rendered by it, as also the fact that the cyber tipline/2nd respondent was not heard in the matter. The further fact is that the State has filed an application before the Court to bring in Section 15 of the Protection of Children from Sexual Offices Act, 2012 ('POCSO Act' for short). [...] By a separate order passed on 19-07-2024, the I.A. filed by the State stood answered and the order dated 10-07-2024, by accepting the reasons indicated in the affidavit was recalled and the matter was restored to file.*
>
> *xxx xxx xxx*
>
> *8. [...] The reliance placed by the petitioner is on Section 67B(a) of the Act which was relied on and proceedings quashed. What becomes applicable to the case at hand is Section 67B(b). Section 67B(b) open up prosecution against a person who creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner. It is not in dispute that the petitioner, in the case at hand, has browsed child pornographic material for about 50 minutes. Browsing child pornographic material makes it an offence under Section 67B(b) of the Act."*
>
> (Emphasis supplied)

72. Thus, it appears from the aforesaid that there are divergent views expressed by different High Courts of the country as regards the ingredients necessary to constitute an offence under Section 15 of the POCSO and Section 67B of the IT Act. The Kerala High Court has taken the view that mere possession or viewing of pornographic material involving a child will not fall within the ambit of Section 15 of the POCSO, rather what the provision criminalizes is the actual act of transmission or sharing of the said material. It has held that where the allegations are confined only to the possession of pornographic material and there is nothing to indicate the actual transmission of the same, the criminal proceedings shall be liable to be quashed. Whereas, the Bombay High Court appears to have taken the view that under Section 15(1) of the POCSO, what is penalized is the storage of child pornography and resultant failure to delete or report the same while under Section 15(2), it is the storage and consequent transmission of child pornography. Similarly, with respect to Section 67B, both the Karnataka High Court and the Kerala High Court have held that what is criminalized is the intentional browsing or transmission of child pornography, and not the mere possession of such material.

b. Three distinct offences punishable under Section 15 of the POCSO.

73. Prior to the 2019 Amendment Act, Section 15 of the POCSO as originally enacted, stipulated that any person who stores any pornographic material involving a child for commercial purposes shall be punishable under the said provision. Thus, under the erstwhile Section 15 of the POCSO only one act was criminalized; in other words, only the storage of child pornography for a commercial purpose was made a punishable offence. Storage of such material for any other purpose was outside the scope and purview of the said provision. The said provision as it then stood, reads as under: -

> ***"15. Punishment for storage of pornographic material involving child. –***
>
> *Any person, who stores, for commercial purposes any pornographic material in any form involving a child shall be punished with imprisonment of either description which may extent to three years or with fine or with both."*

74. Over a period of time, the legislature realized that despite the enactment of POCSO, there had been an increase rather than a decline in the number of cases pertaining to child sexual abuse. The legislature noted that some of the provisions of the POCSO were not proving to be effective in addressing the various forms of sexual degradation, abuse and exploitation of children in the country. The Protection of Children from Sexual Offences (Amendment) Act, 2019 earmarked a significant step by the legislature in response to the aforesaid problem, by introducing several new offences and further making the existing offences more stringent with enhanced punishments, as a form of deterrence to sexual predators and to combat the sexual exploitation of children in order to safeguard a secure and dignified environment for them. The Statement of Objects and Reasons of the 2019 Amendment Act read as under: -

"STATEMENT OF OBJECTS AND REASONS

"1. The Protection of Children from Sexual Offences Act, 2012 (the said Act) has been enacted to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

2. The said Act is gender neutral and regards the best interests and welfare of the child as a matter of paramount importance at every stage so as to ensure the healthy physical, emotional, intellectual and social development of the child.

3. However, in the recent past incidences of child sexual abuse cases demonstrating the inhumane mind-set of the abusers, who have been barbaric in their approach towards young victims, is rising in the country. Children are becoming easy prey because of their tender age, physical vulnerabilities and inexperience of life and society. The unequal balance of power leading to the gruesome act may also detriment the mind of the child to believe that might is right and reported studies establish that children who have been victims of sexual violence in their childhood become more abusive later in their life. The report of the National Crime Records Bureau for the year 2016 indicate

increase in the number of cases registered under the said Act from 44.7 per cent. in 2013 over 2012 and 178.6 per cent. in 2014 over 2013 and no decline in the number of cases thereafter.

4. The Supreme Court, in the matter of Machhi Singh vs. State of Punjab [1983 (3) SCC 470], held that when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so in rarest of rare cases when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The same analogy has been reiterated by the Supreme Court in the matter of Devender Pal Singh vs. State (NCT of Delhi)[AIR 2002 SC 1661] wherein it was held that when the collective conscience of the community is so shocked, the court must award death sentence.

5. In the above backdrop, as there is a strong need to take stringent measures to deter the rising trend of child sex abuse in the country, the proposed amendments to the said Act make provisions for enhancement of punishments for various offences so as to deter the perpetrators and ensure safety, security and dignified childhood for a child. It also empowers the Central Government to make rules for the manner of deleting or destroying or reporting about pornographic material in any form involving a child to the designated authority.

6. The Protection of Children from Sexual Offences (Amendment) Bill, 2019, for the aforementioned purpose, which was introduced and pending consideration and passing in the Lok Sabha, lapsed on the dissolution of the Sixteenth Lok Sabha. Hence, the present Bill.

7. The Bill seeks to achieve the above objectives. NEW DELHI; The 12th July, 2019."

(Emphasis supplied)

75. Pursuant to the aforesaid 2019 Amendment Act, a slew of amendments were brought within the POCSO, which *inter alia* included **i)** the insertion of Section 2(da) by which "child pornography" came to be defined under the Act **AND ii)** the amendment of Section 15 of the Act whereby now three distinct offences are made punishable under the said provision. Again, at the cost of repetition, the amended Section 15 of the POCSO is reproduced hereunder: -

> *"**15. Punishment for storage of pornographic material involving child.** –*
>
> *(1) Any person, who stores or possesses pornographic material in any form involving a child, but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography, shall be liable to fine not less than five thousand rupees and in the event of second or subsequent offence, with fine which shall not be less than ten thousand rupees.*
>
> *(2) Any person, who stores or possesses pornographic material in any form involving a child for transmitting or propagating or displaying or distributing in any manner at any time except for the purpose of reporting, as may be prescribed, or for use as evidence in court, shall be punished with imprisonment of either description which may extend to three years, or with fine, or with both.*
>
> *(3) Any person, who stores or possesses pornographic material in any form involving a child for commercial purpose shall be punished on the first conviction with imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both and in the event of second or subsequent conviction, with imprisonment of either description which shall not be less than five years which may extend to seven years and shall also be liable to fine."*
>
> (Emphasis supplied)

76. A bare perusal of the aforesaid provision makes it abundantly clear that Section 15 of the POCSO is in three parts. The legislature by virtue of the 2019 Amendment Act has now made three different forms

of storage or possession of child pornography a punishable offence under the said provision, unlike the erstwhile provision, which had criminalized only one form of storage of child pornography.

77. Section 15 sub-section (1) of the POCSO now provides that any person who either stores or possesses any pornographic material involving a child and fails to either delete, destroy or report the same with the intention to share or transmit such material, shall be liable to fine of not less than rupees five thousand for the first offence, and a fine of not less than rupees ten thousand for any subsequent offence.

78. On the other hand, Section 15 sub-section (2) of the POCSO provides that any person who either stores or possesses any pornographic material involving a child for transmitting, displaying, propagating, or distributing the same in any manner except for either reporting it or for using it as evidence shall be punishable with either imprisonment extending upto three-years or with fine or both.

79. Whereas, Section 15 sub-section (3) of the POCSO stipulates that any person who either stores or possesses any pornographic material involving a child for commercial purpose shall be punishable with imprisonment of not less than three-years, which may extend upto five-years, or with fine, or both for the first offence, and for any subsequent offence, he shall be punishable with imprisonment not less than five-years, that may extend upto seven-years and along with fine.

I. Concept of an Inchoate Crime – The 'Actus Reus' and 'Mens Rea' required under Section 15.

80. Before proceeding further to discuss the scope of Section 15 of the POCSO and the ingredients necessary to constitute an offence thereunder, it would be apposite to first understand the true purpose and the nature of the said penal provision.

81. A plain reading of Section 15 of the POCSO and the marginal note appended thereto would reveal that the common theme permeating across sub-section(s) (1), (2) and (3) respectively is that there is no requirement whatsoever for an actual transmission of any child pornographic material in order to fall within the ambit of the said provision. What is sought to be penalized under Section 15 of the POCSO is the storage or possession of any child pornographic material when done with a particular intention or purpose as stipulated

in sub-section(s) (1), (2) or (3), as the case may be. Thus, the bare textual reading of the said provision makes it clear that it is the intention which is being punished and not the commission of any criminal act in the traditional sense. This in the criminal jurisprudence is known as an 'Inchoate Crime' or 'Inchoate Offence'.

82. Inchoate crimes are defined as criminal acts that are committed in preparation for a further offence. The term "inchoate" itself means "undeveloped" or "incomplete."

83. The Doctrine of Inchoate Crimes is a cornerstone of criminal jurisprudence. It is aimed at addressing the legal culpability of those who engage in a conduct that is preparatory to the commission of any substantive offence. Inchoate crimes, are often referred to and described as an incomplete or preliminary offence, that capture the essence of criminal intent and the preparatory actions that precede the commission of a criminal act. It underscores the principle that the law does not merely respond to offences already committed but also intervenes when a crime is in the process of being committed, thus thereby protecting public order and safety. Inchoate crimes represent a critical aspect of criminal law, embodying the legal system's proactive and deterrent approach to crime itself.

84. The primary rationale for the existence of inchoate crimes within the legal framework is the prevention of harm by intervening at an early stage i.e before the potential damage is caused. It recognizes that though certain actions do not result in an offence, nonetheless those actions pose a sufficient threat to society to warrant legal intervention. The jurisprudence surrounding inchoate crimes has evolved as a balance struck between **i)** the need for early intervention on the one hand with **ii)** the cardinal principle of criminal law that no one should be punished merely for their thoughts or intentions on the other, by criminalizing only those actions of an individual that demonstrate a clear movement towards the commission of a criminal offense. It is deeply rooted in the preventive or deterrent nature or approach of a particular law by criminalizing those conduct, actions or intentions that pose a significant risk of harm. An inchoate offence requires towing a delicate balance between the need for prevention of potential threat to the society and the risk of undoing the sacrosanct fundamental principle of '*actus non facit reum nisi mens sit rea*' in order to ensure that the law remains a powerful tool

in the maintenance of public order. This inherent tension between respecting the autonomy of an individual's thought and state of mind with the societal interest and safety is often balanced and resolved by carefully shaping and defining the point at which any particular action or preparatory step becomes sufficiently proximate to the commission of an offence. In other words, the law would only intervene at the point where an individual has acquired the means to commit a further offence, and will not punish the mere thought of committing an offence in the absence of any overt steps towards the same. Thus, the critical or central component of any inchoate crime is the preliminary or preparatory *actus reus* that sufficiently reflects the essence or existence of a criminal intent.

85. Offence pertaining to the possession of any contraband is a prime example and one of the facets of an inchoate crime, as they involve the possession of items that are prohibited by law due to their inherent dangerousness or their use in the commission of further criminal offences. The criminalization of possession as an inchoate crime is predicated on the idea that possession is not an innocuous act but a preparatory step towards more significant criminal conduct. This is because, ***first,*** it allows intervention at an early stage, before the contraband can be used to cause harm. ***Secondly***, it acts as a deterrent by penalizing individuals who engage in activities that are likely to lead to more serious offenses. ***Thirdly***, it reflects the societal interest in preventing the accumulation and availability of dangerous items that have no legitimate purpose except for the further perpetuation of a more severe offence and harm to society at large.

86. The POCSO as outlined in its Statement of Object and Reasons was specifically designed to provide commensurate penalties to serve as a deterrent against the sexual abuse and exploitation of children. Additionally, the Statement of Objects and Reasons accompanying the 2019 Amendment Act which *inter-alia* amended Section 15 of the Act to provide for three distinct offences punishable under it, explicitly emphasizes that the said amendments had been introduced in order to implement stringent measures aimed at addressing and deterring the alarming increase in child sexual abuse. The plain reading of sub-section(s) (1), (2) and (3) respectively of Section 15 of the POCSO along with the marginal note appended to it which reads "*Punishment for storage of pornographic material involving child*" indicates, that the said provision punishes only the storage of

pornographic material involving a child when done with a specific intent prescribed thereunder and that there is no requirement for any actual transmission. It is trite to say that, in the absence of any inherent conflict or contradiction between the marginal note and the substantive parts of a particular provision, the marginal note may be used to aid in the interpretation of the provision. Thus, the aforesaid leaves no manner of doubt in the mind of this Court, that the provision of Section 15 of the POCSO is in the nature and form of an inchoate offence which penalizes the mere storage or possession of any pornographic material involving a child when stored with a specific intent prescribed thereunder, without requiring any actual transmission, dissemination etc.

87. Under Section 15 sub-section (1), where a person either stores or possesses any child pornography and does not delete or report the same, in order to share or transmit the same, he will be liable under the said provision. The use of the words "*with an intention to share or transmit child pornography*" in the said provision makes it clear that no actual sharing or transmission is required to occur, rather what is required is only the intention to share or transmit because of which the said material was neither deleted, destroyed, or reported. In other words, the *actus reus* that is penalized under Section 15 sub-section (1) is the failure to delete, destroy or report any child pornography that was stored or in possession of any person with an intention to share or transmit the same. Had the intent of the legislature been otherwise, it would have clearly used the words "*transmits*" or "*shares*" instead.

88. Similarly, Section 15 sub-section (2) penalizes the storage or possession of any child pornographic material when done for the purpose of either transmitting, propagating, displaying or distributing the same in any manner. The use of the words "*for transmitting or propagating or displaying or distributing in any manner at any time"* clearly suggests that again no actual act of transmission, propagation, display or distribution is required to take place. Had the intent of the legislature been otherwise, it would have explicitly stated "*any person, who stores or possesses pornographic material in any form involving a child and transmits or propagates or displays or distributes in any manner at any time"*. The use of the words "*for transmitting or propagating or displaying or distributing* ***in any manner***" in Section 15 sub-section (2) makes it crystal clear that the said provision

deals with two kinds of *actus reus* being **(I)** ***first,*** the storage or possession of a pornographic material involving a child when done with an intention to either transmit it or to propagate it or to display or distribute it though no actual transmission, propagation, display or distribution might have occurred **OR (II)** ***secondly,*** the storage or possession of a pornographic material involving a child which was actually transmitted, propagated, displayed or distributed in any form or manner. In other words, the *actus reus* that is required under Section 15 sub-section (2) is that a pornographic material involving a child must be found to have been stored or in possession with an intention to either transmit it or to propagate it or to display or distribute it or the same must have been transmitted, propagated, displayed or distributed in any form or manner.

89. The underlying difference in the *actus reus* under Section 15 sub-section(s) (1) and (2) is that in the former the storage or possession of any such material is due to the omission to delete, destroy or report the same whereas in the latter, the storage or possession of any such material is in order to facilitate the transmission, propagation, display or distribution of the same. To further put the distinction into perspective, the *actus reus* under sub-section (1) must be such that indicates that the child pornographic material found in storage or possession was only due to an omission to delete or destroy. Whereas under sub-section (2) it must be shown that such material had been stored or in possession for a reason more than just mere omission i.e., for the reason of transmitting, propagating, displaying or distributing the same. The use of the words "*any manner*" in sub-section (2) makes it clear that apart from the storage or possession of such pornographic material, there must be something more to show either **(I)** the actual transmission, propagation, display or distribution of such material **OR (II)** the facilitation of any transmission, propagation, display or distribution of such material, such as any form of preparation or setup done that would enable that person to transmit it or to display it. Thus, Section 15 sub-section (2) of the POCSO would cover both the actual transmission, propagation, display or distribution of any child pornography as-well as the facilitation of any of the abovementioned acts.

90. On the other hand, the *mens rea* which is required to constitute an offence under Section 15(1) is the intent to share or transmit a pornographic material involving a child, and the said intention is

to be gathered or gauged from the *actus reus* itself i.e., by culling out the manner in which there was an omission to delete, destroy or report such a material or the reason behind the same. This is evinced from the construction of the expression "*but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography*" which makes it clear that the scope of discerning the intent to share or transmit has been both limited **AND** tied to only the omission to delete, destroy or report i.e., the *actus reus*. The expression "*with an intention to share or transmit*" cannot be singled out and construed devoid of its context. Thus, it is the manner in which along with the attending circumstances attributable to the failure to delete, destroy or report that must sufficiently be indicative of the intent to share or transmit any material.

91. In Section 15 sub-section (1) of the POCSO the legislature by qualifying and linking the expression "*intent to share or transmit*" to the omission to delete, destroy or report, has in its wisdom made the intention or *mens rea* under the said provision a matter of inference, to be ascertained from the *actus reus* itself. The degree of probability for inferring such intention would largely depend upon the manner in which the *actus reus* i.e., how the omission took place. It is for the courts to ascertain whether the manner in which the material was found in storage or possession, the attending circumstances to the omission and the conduct of the person accused sufficiently refutes or displaces the inference of an intention to share or transmit or not.

92. The underlying reason behind tying the inference of intention to the omission alone is because the legislature was alive to the practical difficulty that exists in establishing an intention to share or transmit any child pornographic material from just the mere possession of such material. In offences pertaining to or involving the possession of any contraband, it is too uphill a task for the courts to peer through and look into the mind of the person accused and then cull out the intention of that person behind possessing or storing such material. Thus, in such cases instead of directly establishing the intention from the mental state of the person accused, it is established indirectly by inferring it from the manner in which the contraband was found to have been stored or in possession. Here again due to the infeasibility or difficulty in cogently establishing an inference of intention often due to the lack of any material and the very private and clandestine nature

of the offence, the courts instead try to look for some material or circumstances that might displace the inference of such an intention, and wherever there is nothing to show the same, the courts may without hesitation proceed to infer the existence of such an intention.

93. Whereas, under Section 15 sub-section (2) the *mens rea* is to be gathered from the manner in which the pornographic material was found to be stored or in possession and any other material apart from such possession or storage that would be indicative of any facilitation or actual transmission, propagation, display or distribution of such material. Thus, wherever in addition to the storage or possession of any child pornographic material, there exists any material or attending circumstances that would either show or indicate the facilitation or actual commission of any of the acts enumerated in Section 15 sub-section (2) of the POCSO, the said provision would get attracted in place of Section 15 sub-section (1). We say so because, the presence of such additional material may demonstrate that the intention of the person accused has gone beyond the contours of Section 15 sub-section (1). It evinces a more significant manifestation of the intention of the person accused, which moved from what is required in sub-section (1) to a much higher degree of intention that is required under sub-section (2). In other words, the existence of such additional material strengthens the inference of that intention which is required and made punishable under Section 15 sub-section (2).

94. Section 15 sub-section (3) penalizes the storage or possession of any child pornographic material when done for any commercial purpose. The term 'commercial purpose' refers to and encompasses any activity or transaction that is carried out or undertaken as a means of any commercial enterprise i.e., with the object or intention of any gain, irrespective of whether it was in monetary terms or not. Thus, to constitute an offence under this provision, the requirement is that the storage or possession of any child pornography must be in lieu of any monetary gain or for receiving any other valuable consideration. Again, the words "*any commercial purpose*" indicate that the storage or possession must be with an intention to generate or acquire any monetary gain or any other form of valuable consideration, irrespective and regardless of whether such monetary gain or valuable consideration is actually generated or acquired. Thus, it is immaterial whether any monetary gain or any other benefit was actually realized or not. To establish an offence under Section 15 sub-

section (3), besides the storage or possession of the pornographic material involving a child, there must be some additional material or attending circumstances that may sufficiently indicate that the said storage or possession was done with the intent of any form of gain or benefit. As soon as there is any material to indicate that the storage or possession of any child pornographic material was done in lieu or in expectation of some form of gain or benefit, it would constitute an offence under Section 15 sub-section (3) of the POCSO notwithstanding whether such gain was actually realized.

95. Thus, while Section 15 sub-section (1) requires the existence of the requisite *mens rea* or intention due to which the child pornographic material was not deleted, destroyed or reported, Section 15 sub-section (2) requires the existence of the requisite *mens rea* or intention which propelled or led the person accused to not only store or possess the said material but also to take some additional steps towards either the actual transmission, propagation, display or distribution or the facilitation of the same. In contrast, Section 15 sub-section (3) requires the existence of the requisite *mens rea* or intention due to which the person accused not only stored or possessed the child pornographic material but also compelled him to take some additional steps either for any gain or benefit or in lieu or expectation of some form of gain or benefit.

96. For the sake of clarity, it would be apposite to give few illustrations as a guiding example to further demonstrate the fine but pertinent distinction that exists between sub-section (1), (2) and (3) of Section 15 of the POCSO.

97. For illustration; say certain child pornographic material was found stored in the personal mobile phone of 'A' and the same was neither deleted, destroyed nor reported. Here though there is possession or storage of child pornographic material but since there is nothing to show any facilitation of transmission, propagation, display or distribution of the said material, this would attract the provision of Section 15(1). At the same time, since the material in question was found in the personal mobile of 'A' the same is indicative that the omission to either delete, destroy or report in all likelihood was due to the intent to share or transmit. Here the manner in which the omission has occurred is sufficiently indicative of the intent to share or transmit, as there is nothing apart to show that the omission was

attributable to any other reason but the intent to share or transmit, and thus it would constitute an offence under Section 15(1) of the POCSO.

98. Conversely, say for example certain child pornographic material was found stored in a broken mobile phone of 'A' and the said material had never been deleted, destroyed or reported. Now again, there is nothing to show that there was either any actual transmission, propagation, display or distribution nor anything to show that something apart from and in addition to the storage or possession had been done by 'A' for facilitation of the transmission, propagation, display or distribution of such material. This would again attract the provision of Section 15(1) instead of 15(2) of the POCSO. However, since the material was found in a broken phone, it is likely that the failure to delete, destroy or report the same was attributable to the inability of 'A' to operate the broken mobile rather than the intent to share or transmit, thus, no offence would be made out under Section 15(1) of the POCSO. This is because, the manner in which the omission has occurred is not sufficiently indicative of the intent to share or transmit. Thus, no offence could be said to have been constituted under Section 15 sub-section (1) of the POCSO.

99. Take for instance, certain child pornographic material was found stored in the mobile phone of 'A' but this time, the said material had found its way in the device due to an automatic download of media of which 'A' had no knowledge whatsoever. Here although there is possession or storage of such material, yet the omission to delete, destroy or report is clearly shown and established by 'A' that it was due to lack of knowledge about the existence of such material on his parts. Here the manner in which the omission has occurred is not sufficiently indicative of the intent to share or transmit, thus no offence could be said to have been made out under Section 15(1) of the POCSO.

100. Take a case where certain child pornographic material was found stored in the mobile phone of 'A' but this time in addition to the aforesaid material few chats were also recovered wherein 'A' told his friend 'B' that he had some child pornographic material which he could share with him. Here, since there is additional material to show that 'A' had taken some overt steps in order to propagate the said material, he would be liable under Section 15(2) of the POCSO.

101. For another illustration, say for example, again certain child pornographic material was found stored in the mobile phone of 'A' but this time 'A' creates a chat group consisting of several of his friends, and sends a message therein stating that he has some child pornographic material which he would forward on the group. Here, since there is additional material to show that 'A' had taken some overt steps in order to distribute the said material, he would be liable under Section 15(2) of the POCSO.

102. Conversely, say 'A' who has certain child pornographic material in his phone, again creates a group consisting of several of his friends, but this time he sends a message stating that he has some child pornographic material which he would send in exchange of some amount of money. Here, since there is additional material to show that 'A' had taken some overt steps in respect of the said material for some monetary gain, he would now be liable under Section 15(3) of the POCSO instead.

103. We may at the cost of repetition clarify that there may be situations where the possession or storage of the pornographic material is found to be in a such a manner that the same by itself would be indicative of an intention to either transmit, display, propagate or distribute such material or that it was done in lieu or expectation of any gain. In such cases the storage or possession of child pornographic material itself would sufficiently be indicative of the requisite intention either under Section 15 sub-section(s) (2) or (3) as the case may be, and there would be no requirement to adduce any additional material as long as the manner of storage or possession of such material or the attending circumstances itself is sufficiently indicative of such intention.

104. For illustration; say certain child pornographic material was found stored in five to six television devices in a hotel run by 'A'. Here, because the pornographic material has been found to be stored in multiple devices that too at a place which has easy access for the public, the same would be indicative that the 'A' was using the hotel and the television devices therein as a means for facilitating display of such pornographic material, and thus, would be punishable under Section 15 sub-section (2) of the POCSO.

105. For another illustration say again certain child pornographic material were found stored in five to six television devices in a hotel run by

'A', but this time some price was mentioned onto the pornographic material itself. Here, because some amount of money was found to be mentioned on the material itself and the said material was stored in a place with easy public access, the same would be indicative that the 'A' was using the hotel and the television devices therein as a means for facilitating display of such pornographic material in lieu of monetary gain, thus, would be punishable under Section 15 sub-section (3) of the POCSO.

106. The aforesaid illustrations have been provided only as a guiding example to highlight the distinction between sub-section(s) (1), (2) and (3) of Section 15 of the POCSO. These illustrations should not be mechanically applied or construed by any court in any proceeding while dealing with any matter involving Section 15 of the POCSO devoid of the context in which these illustrations have been given and without applying its mind as to whether the necessary ingredients have been established or not in the individual facts and circumstances of the matter. Any matter involving Section 15 sub-section (1), (2) or (3) of the POCSO, must be dealt with independent of the illustrations narrated above and *stricto-sensu* in accordance with only the ratio of this decision.

107. Lastly, we must also caution the police and the courts to be mindful of the fact that wherever in a given case a particular sub-section of Section 15 is found to be applicable, the other two remaining sub-sections of the said provision will cease to be applicable. Section 15 sub-section(s) (1), (2) and (3) respectively of the POCSO are independent and distinct offences. The three offences cannot coexist simultaneously in the same set of facts. They are distinct from each other and are not intertwined that they cannot survive without each other. This is because, the underlying distinction between Section 15 sub-section(s) (1), (2) and (3) respectively lies in the different degree of culpable *mens rea* that is required under each of the three provisions. The inception of the requisite culpable *mens rea* begins and takes shape from the intention specified under sub-section (1), then gradually continues to transform into the intention stipulated under sub-section (2) and finally culminates into the intention prescribed under sub-section (3). Under Section 15 sub-section (1) of the POCSO, the requisite intention therein is still *in fieri* i.e., in process of developing and culminating into either the intention under sub-section(s) (2) or

(3). Whenever, the said intention ultimately crystalizes into the intention either under sub-section(s) (2) or (3), the other provisions would automatically become inapplicable.

108. Yet one another important aspect, that the police and the courts should be mindful of is that while examining any matter involving the storage or possession of any child pornography, it finds that particular sub-section of Section 15 is not attracted, it must not jump to the conclusion that no offence at all is made out under Section 15 of the POCSO. The police at the time of investigation and the courts at the time of taking cognizance, should keep this aforesaid aspect in mind. In other words, both should try to ascertain that if offence is not made out in one particular sub-section, whether the same is made out in the other two sub-sections or not.

II. Concept of 'Possession', 'Constructive Possession' and 'Immediate Control' under Section 15 of the POCSO.

109. During the course of hearing, our attention was also drawn to a recent news article that reported how on social media, links to view child pornography were being circulated and sold for anywhere between Rs. 40 to Rs. 5,000. The news report indicates, how social media platforms are rife with child sexual abuse, and gave certain insight about the *modus operandi* of the distribution of such material on these platforms. It explained how the sellers and distributors of child pornographic material rather than sharing any downloads to such material, would ingeniously only share links to such material instead in lieu of money, so as to circumvent the penal provisions of the POCSO and IT Act, which criminalized only the storage of such material. By indefinitely forwarding links, they completely bypass the requirement of first storing such material onto any device, and similarly those who view such material also only use the links, without ever downloading such material onto their device.

110. As earlier mentioned, prior to the 2019 Amendment Act, Section 15 of the POCSO only criminalized the storage of any child pornographic material for any commercial purpose. Thereafter, the legislature in view of the increasing number of child sexual abuse cases, amended Section 15 of the POCSO, to recognize and criminalize three distinct forms or manner of storage of child pornographic material, as has been discussed in the preceding parts of this judgment.

111. One another subtle but significant change that was made to all three sub-sections of Section 15 was the inclusion of the word "possession" in addition to storage, which was earlier not there in the erstwhile provision of Section 15 of the POCSO.

112. Thus, while the word "*possession*" was originally absent in the unamended Section 15 of the POCSO, the legislature in its wisdom, specifically added the said word in the amended Section 15, whereby now both the storage or the possession of any child pornographic material would be liable to be punished when done with any of the specified intention thereunder.

113. We believe that the change referred to above was not made inadvertently or lightly, but rather was done specifically with the intention of making the provisions of Section 15 of the POCSO more stringent to effectively deter the dissemination and use of child pornography.

114. An important aspect of the jurisprudence on possession as an inchoate crime is the doctrine of constructive possession. Constructive possession extends the concept of possession beyond physical control to situations where an individual has the power and intention to control the contraband, even if it is not in their immediate physical possession. This doctrine is particularly relevant in cases where contraband is found in a location that is not directly under the physical control of the accused, but where the accused has access to and control over the area where the contraband is found.

115. In ***U.S. v. Tucker*** reported in **150 F. Supp. 2d 1263 (D. Utah. 2001)**, the U.S. District Court, Utah, explained and elaborated on the doctrine of constructive possession. In the said case, the defendant therein used to routinely view child pornography, but he never used to keep it stored in his computer, and would often delete any such material and its traces from its computer after he was finished viewing them. When charged with the offence of possession of child pornographic material, he challenged the same, contending that since no material had been stored in his disk, he cannot be said to be in possession of any child pornography. The court held that wherever a person exercises some form or manner of immediate control over any particular material, both tangible or intangible, such material would be said to be in his constructive possession. It observed that the control of a person over such material can be ascertained by seeing whether

he could manipulate, alter, modify or destroy such material or not, if the answer to any of the above is in an affirmative, such material would be deemed to be in his conscious or constructive possession.

116. Similarly in ***U.S. v. Romm*** reported in **455 F. 3d. 990 (9th Cir., 2006)**, the defendant therein admitted to viewing images of child pornography on the Internet. He would save them to disk, view them for about 5 minutes, then delete them. The Court held that a person can be said to possess child pornography even without downloading or storing it, if he or she seeks it out and exercises dominion or control over it. It observed that this dominion or control may be evident by factors such as when viewing the images on the screen, did the person have the ability to print them, save them, forward them or delete them. If he did, then he can be said to have knowingly exercised custody or control over those images and thus, consequently in possession of the same.

117. Thus, for establishing constructive possession both the power to control the material in question and the knowledge of exercise of such control are required. The doctrine of constructive possession, is a crucial development in the criminal jurisprudence, especially pertaining to inchoate crimes where possession is sought to be punished, as it ensures that no person can evade liability by simply distancing themselves from the physical possession of contraband while retaining the ability to control it.

118. We are of the considered view, that wherever a person indulges in any activity such as viewing, distributing or displaying etc. pertaining to any child pornographic material without actually possessing or storing it in any device or in any form or manner, such act would still tantamount to 'possession' in terms of Section 15 of the POCSO, if he exercised an invariable degree of control over such material, applying the aforesaid doctrine of constructive possession.

119. Say for instance, 'A' routinely watches child pornography over the internet, but never downloads or stores the same in his mobile. Here 'A' would still be said to be in possession of such material, as while watching he exercises a considerable degree of control over such material including but not limited to sharing, deleting, enlarging such material, changing the volume etc. Furthermore, since he himself on his own volition is viewing such material, he is said to have knowledge of having control over such material.

120. Conversely, say 'A' is sent an unknown link by 'B', which upon clicking opened a child pornographic video on the phone of 'A'. Here although 'A' at the time of opening the link had control over the said link, yet he cannot be said to have a knowledge of that control over such material as he at that relevant point of time was unaware as to what would open from the said link; thus 'A' cannot be said to be in possession. We say so, because, 'A' had no information as to what the link pertained to, in order to have knowledge of control over such material, a person requires reasonable information such as what is involved in the material in question, what is the purpose of such material, etc. Without such information no person can decide whether he wants to view it, or delete it or further forward it i.e., he cannot effectively exercise the control that he has, without a certain degree of knowledge.

121. However, in the aforementioned illustration, if 'A' rather than closing the link in a reasonable time, continues to view such material he would be deemed to be in possession of such material. This is because, after a reasonable window of time, he would be said to have sufficient information about such material to have knowledge for the effective exercise of his control over such material.

122. Thus, we are of the considered view that any form of intangible or constructive possession of any child pornographic material will also amount to "possession" under Section 15 of the POCSO in terms of the Doctrine of Constructive Possession. There is no requirement of a physical or tangible "storage" or "possession" of such material in Section 15 of the POCSO. We may clarify with a view to obviate any confusion that, where any child pornographic material is in the constructive possession of an accused, there the failure or omission to report the same would constitute the requisite *actus-reus* for the purposes of Section 15 sub-section (1) of POCSO.

123. For instance, say, 'A' is sent an unknown link by 'B', which upon clicking opened a child pornographic video on the phone of 'A'. Now if 'A' immediately closes the link, although once the link is closed 'A' is no longer in constructive possession of the child pornography, this by itself does not mean that 'A' has destroyed or deleted the said material by merely closing the link. 'A' will only be absolved of

any liability if he after closing the link further reports the same to the specified authorities. Thus, when it comes to constructive possession of an accused, it is the failure or omission to report that constitutes the requisite *actus-reus* for the purposes of Section 15 sub-section (1) of POCSO.

124. At this juncture we may also address ourselves on another pertinent aspect for constituting an offence under Section 15 of the POCSO. The term 'storage' and 'possession' that has been used in the said provision does not require that such 'storage' or 'possession' must continue to be there at the time of registration of an FIR or any criminal proceeding. The provision of Section 15 is not fixated any particularly time-frame. What is *simpliciter* required to constitute an offence under Section 15 of the POCSO is the establishment of 'storage' or 'possession' of any child pornographic material with the specified intention under sub-section(s) (1), (2) or (3), at any relevant point of time. Even, if the said 'storage' or 'possession' no longer exists at the time of registration of the FIR, nonetheless an offence can be made out under Section 15 if it is established that the person accused had 'stored' or 'possessed' of any child pornographic material with the specified intention at any particular point of time even if it is anterior in time. We say so because, any other view aside from the above, in our opinion would lead to a chilling effect with drastic consequences, whereby the provisions of the POCSO may be defeated by a devious person. If for instance, a person immediately after storing and watching child pornography in his mobile phone deletes the same before an FIR could be registered, could it be said that the said person is not liable under Section 15, because at the time of registration of the FIR, such material no longer existed on the device of the person accused? The answer to the aforesaid, must be an emphatic "no". Thus, we clarify that there is no requirement under Section 15 of the POCSO that 'storage' or 'possession' must continue to exist at the time of initiation of the criminal proceeding, and no such requirement can be read into the said provision. An offence can be made out under Section 15 if it is established that the person accused had 'stored' or 'possessed' of any child pornographic material with the specified intention at any particular point of time even if it was before such initiation or registration of criminal proceedings.

c. Pornographic Material must *prima facie* appear to involve a Child.

125. At this stage, we may explain one another crucial aspect concerning Section 15 of the POCSO, more particularly the criteria for determining whether the material in question involves or depicts a 'child', or in other words whether such material can be considered a 'child pornography' or not. The determination of whether the individual involved is a 'child' or not, in terms of the POCSO is a crucial foundational element for constituting various offences under the Act.

126. Section 2(1)(d) of the POCSO stipulates that the term 'child' means and refers to any person who is below the age of eighteen years. Thus, under the POCSO more particularly Section 2(1)(d) an objective criterion has been prescribed by the legislature for determining whether a person is a 'child' or not for the purposes of any offence under the Act. The said criteria is based on the age of the individual in question, and involves ascertaining and establishing whether he or she is under eighteen years of age, if so, such person would be considered a 'child' for the purposes of any offence in respect of such child that is punishable under the POCSO.

127. Earlier under the POCSO, there was no specific definition of 'child pornography'. Thus, under the erstwhile Section 15 of the POCSO, there was only one criteria for ascertaining whether the material in question can be regarded as 'child pornography' or not, which was by establishing that the material depicts or involves a person who is under the age of eighteen years.

128. It was only with the enactment of the aforesaid 2019 Amendment Act, whereby the term "child pornography" was specifically defined under the POCSO by way of insertion of Section 2(1)(da) in the Act. At the cost of repetition, Section 2(1)(da) of the POCSO is reproduced below: -

> ***"2. Definitions.*** *–*
>
> *(1) In this Act, unless the context otherwise requires, –*
>
> *(da) "child pornography" means any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer generated image indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child;"*

129. A plain reading of the above would indicate that the term "child pornography" means any visual depiction of a child involved in any sexually explicit conduct. It further explains that the expression 'visual depiction' means and includes the following: -

i. A photograph or video, which may be either in actual or any electronic form.

ii. An image generated digitally or by a computer which is indistinguishable from an actual child i.e., any self-generated image which appears to depict a lifelike child indistinguishable from an actual child, and will not include any artistic or cartoon based depiction.

iii. Any other image (including any video-based imagery) that has been created, adapted or modified.

The above list of material mentioned is inclusive in nature i.e., the different types, form and manner of visual depiction that has been enumerated therein is not exhaustive in any manner. In the last, the said provision, more particularly the words "*but appear to depict a child*" lays down the test or criteria for ascertaining, whether any of the above mentioned visual depiction is a 'child pornography' or not, by prescribing a *prima facie* subjective satisfaction that the material appears to depict a child.

130. The use of the comma before the words "*but appear to depict a child*" is significant. The legislature has used the aforesaid comma both as a disjunctive and a conjunctive to the words preceding it. It has been used as a disjunctive to stress, that the subjective criteria that the material in question appears to depict a child is not inextricably linked or limited to just one category of visual depictions i.e., the last category being "*image created, adapted, or modified*". At the same time, it has been used as a conjunctive in relation to all types of visual depictions that have been illustrated in the said provision, to clearly indicate, that this subjective criterion applies to the entire provision i.e., to all types of visual depictions mentioned therein or in other words to 'child pornography'.

131. Thus, any visual depiction of a sexually explicit act which any ordinary person of a prudent mind would reasonably believe to *prima facie* depict a child or appear to involve a child, would be deemed as 'child pornography' for the purposes of the POCSO.

Therefore, for any offence under the POCSO that relates to child pornographic material, such as Section 15, the courts would only be required to form a *prima facie* subjective satisfaction that the material appears to depict a child from the perspective of any ordinary prudent person. Such satisfaction may be arrived at from any authoritative and definitive opinion such as through a forensic science laboratory (FSL) report of such material or from any expert opinion on the material in question, or by the assessment of such material by the courts themselves, depending on the peculiar facts and circumstances of each case.

132. This aforesaid test or criteria of 'subjective satisfaction' is not a superfluous or imaginary creation of the legislature, but a well-founded test, that exists in various other countries. In this regard, reference may be made to the decision of the Court of Appeal of England & Wales in ***Regina v. Michael Land*** reported in **[1997] EWCA Crim J1010-15** wherein the court was dealing with an offence of possession of indecent photographs of children for the purpose of distribution under Section 1(1)(c) of the Protection of Children Act 1978. There the question arose whether the individual in the aforesaid photographs was under sixteen years of age or not. The court observed that often there lies an inherent difficulty in making any positive identification of the person in question, so as to establish their age conclusively. It held that, thus in such situations, the question whether such person is a child or not would have to be ascertained as a matter of inference from the facts and the material in question, without any need for a formal proof of the same. The court further rejected the contention that in the absence of any paediatric or other expert evidence, no such inference can be drawn. It observed that such fact-based questions of age can be assessed by the judge or the jury as the case may be by use of their critical faculties and senses such as their eyes, supplemented with their own judgement and experience.

133. In ***John Leadbetter v. Her Majesty's Advocate*** reported in **[2020] HCJAC 51**, the High Court of Justiciary, Scottland held that no expert witness is required for proof of age of any person depicted in an obscene material in question. It further held that, such proof of age may be established by any witness or a person who demonstrates a certain extent of skill or knowledge in determination of the age on the basis of a wide range of evidence that may be available.

134. In ***United States v. Katz*** reported in **178 F.3rd 368 (5th Cir. 1999)**, it was held by the U.S. Court of Appeals, Fifth Circuit, Louisiana, that the threshold question whether the age of any person in a child pornography may be determined by a 'lay' jury without the assistance of expert testimony where there is no conflict of opinion as to the age. However, it observed that where the individual in question appears to have reached puberty, there expert testimony or opinion as to proof of age would be necessary.

135. In ***Commonwealth v. Robert*** reported in **(829 A.2d. 127)**, the Superior Court of Pennsylvania observed that proof of age, like proof of any material fact, can be accomplished by the use of either direct or circumstantial evidence, or both. It held that the proof necessary to satisfy the element of age in a dissemination or possession of child pornography case is not limited to expert opinion testimony.

136. What is discernible from the aforesaid is that, although, in the few decisions referred to by us, there is a difference of opinion as to whether an expert's testimony or determination is necessary or not for the proof of age of an individual depicted in any pornographic material, yet in all of the aforementioned decisions it has been consistently held that the criteria for such determination is only the subjective satisfaction.

137. The test or criteria of 'subjective satisfaction' is in view of the practical difficulty that exists in conclusively establishing the age of an individual in any pornographic material through any objective means or criteria. This is owed to the fact that often, it is next to impossible to establish the identity of the victim, then to trace the whereabouts of such person, and then objectively determine their age. If such a criterion is adopted, then most of the cases pertaining to the possession of any child pornographic material would fail at the threshold, due to want of any means or information for conclusively proving the age of the victim.

138. The aforesaid aspect may be looked at from one another angle. Any mandate of an objective determination of the age by conclusive means, could possibly result in absurd consequences. For instance, say a pornographic material involves an under-teen child who by virtue of his built on the face of it appears to be a child, yet such material will not be considered child pornographic material in the eyes of law, unless an objective determination of the exact age of such

child is carried out in a conclusive manner. In the absence of any such determination, the prosecution of possession of such material would have to fail, merely due to technicalities and the inflexible character of the criteria or test for determining the age.

139. The aforesaid provision of Section 2(1)(da) of the POCSO holds significant importance, as the legislature whilst giving teeth to the existing provision of Section 15 of the Act, and making three distinct offences punishable under it through the 2019 Amendment Act, also consciously defined the term 'child pornography' under the POCSO through the very same amendment. It indicates the legislature's intention of construing both these provisions together as a whole; neither Section 15 of the POCSO nor Section 2(1)(da) can be interpreted or invoked in isolation from the other.

140. The legislature through Section 2(1)(da) of the POCSO, made a conscious departure from the already existing objective criterion of determination of age in terms of Section 2(1)(d) which is generally applicable to the POCSO, as it was alive to aforementioned inherent difficulty that is posed by such criteria. The legislature was well aware, that if the proof of age in offences pertaining to child pornography such as under Section 15 of the POCSO would also have to be assessed by the existing objective test, it would lead to a very chilling effect, whereby the entire Section 15 of the POCSO could be rendered unworkable merely on account of a hyper-technical approach as to determination of age, thereby defeating the very object of the POCSO.

141. The aforesaid aspect may also be looked at from one more angle. Section 2(1)(da) of the POCSO was inserted by the legislature with two-fold purpose in mind. While one of the purpose of Section 2(1)(da) of the POCSO, was to explicitly define and delineate what type of visual depictions would be considered 'child pornography' to remove any ambiguity that existed earlier, the real purpose behind insertion of the said provision was to mitigate the tendency of the courts to refer and apply the objective criteria of age determination prescribed under Section 2(1)(d) of the POCSO, even when dealing with matters involving child pornography. Which is why the legislature in addition to explaining the contour of visual depiction in Section 2(1)(da) of the POCSO, also specifically added the words "*but appear to depict a child*" in the end.

142. If the courts while dealing with any matter involving child pornography, continue to refer and rely on Section 2(1)(d) of the POCSO, then the same will frustrate the intention behind Section 2(1)(da) more particularly the words "*but appear to depict a child*" in the statute book, thereby render that portion of the aforesaid provision *otiose* and nugatory.

143. The true purport of Section 2(1)(da) of the POCSO, is to ensure that for offences pertaining to child pornography, it is Section 2(1)(da) that is given due regard and not Section 2(1)(d). Thus, in any offence pertaining to child pornography the definition of 'child' in Section 2(1)(d) would pale in comparison to the definition of 'child pornography' under Section 2(1)(da) of the POCSO. As such, the court while dealing with an offence under Section 15 of the POCSO, must be mindful of the fact, that it is Section 2(1)(da) of the POCSO, which has to be referred to and relied upon and not Section 2(1)(d). In other words, it is the definition of 'child pornography' which is of relevance while considering whether Section 15 of the POCSO can be invoked or not.

d. Scope of Section 67B of the IT Act.

144. The IT Act was originally enacted with the object of providing a legal framework for *inter-alia* recognizing electronic records & digital signatures, facilitating electronic commerce, and providing a legal sanctity to e-contracts. While the IT Act did include certain provisions to penalize cybercrimes, they were rudimentary and did not comprehensively address issues like creation and facilitation of sexual abuse of children, the online publication, transmission and distribution of child pornography or the sexual inducement, enticement and exploitation of children over the internet.

145. The aforesaid was due to the fact that, the IT Act prior to the Information Technology (Amendment) Act, 2008 (for short, the '**2008 Amendment Act**'), criminalized only one act being the publication or transmission of obscene material, under Section 67. The IT Act made no distinction between the publication or transmission of an 'obscene material' from the publication or transmission of an obscene material involving any sexually explicit act or conduct i.e., pornographic material or for that matter child pornographic material. More glaringly, there was no difference in either publication or transmission of such material from the distribution, facilitation and consumption of such

material over the internet. The IT Act also did not recognize other forms of sexual abuse and exploitation of children over the internet as a punishable offence such as enticement of children into any sexual act.

146. Over a period of time, as the age of internet evolved, the inadequacies of the IT Act became apparent, primarily due to more and more children using the internet and a corresponding increase in number of cyber-crimes being committed against them. Thus, there was a need for a more robust legal framework particularly for the protection of vulnerable population like children over the internet.

147. The 50th Report of the Standing Committee on Information Technology on the 'Information Technology (Amendment) Bill, 2007' noted that although a new provision in the form of Section 67A had been proposed for specifically criminalizing publication or transmission of pornographic material with enhanced punishment, yet there was no specific provision pertaining to child pornography. The Standing Committee, rejected the response of the Department of Information Technology that the provision of Section 67A in general would also include child pornography, and instead recommended that a specific provision for child pornography be incorporated, in order to not just criminalize the publication and transmission of child pornography with an enhanced punishment but also to tackle and criminalize other related forms of child sexual abuse such as, online enticement of children into sexual acts, distribution of child pornography and the facilitation or creation of such material. The relevant recommendations read as under: -

> *"6. The Information Technology Act, 2000 was enacted keeping in view technology directions and scenario as it existed at that point of time. As the technology has a habit of reinventing itself into cheaper and more cost-effective options, it becomes imperative to give a fresh look to any technology driven law from time to time. Moreover, due to overall increase in e-commerce, growth in outsourcing business, new forms of transactions, new means of identification, consumers concern, promotion of e-governance and other information technology applications, technology neutrality from its present 'technology specific' form in consonance with development*

all over the world, security practices and procedures for protection of Critical Information infrastructure, emergence of new forms of computer misuse like child pornography, video voyeurism, identity theft and e-commerce frauds like phishing and online theft, rationalization of punishment in respect of offences with reference to the Indian Penal code, a need was felt to review the Indian Information Technology Act, 2000"

xxx xxx xxx

(iii) Child Pornography

118. Clause 31 proposes to insert Section 67 A whereby punishment has been provided for publishing or transmitting of material containing sexually explicit act in electronic form.

119. In the above context, a non-official witness as well as the CBI have been of the view that the proposed Section should be recast to include 'child pornography' also and specific provisions should be incorporated in this Section to criminalize child pornography in tune with the laws prevailing in advanced democracies of the world as well as Article 9 of the Council of Europe Convention on Cyber Crimes which states as under: -

> *"Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: (a) producing child pornography for the purpose of its distribution through a computer system; (b) offering or making available child pornography through a computer system; (c) distributing or transmitting child pornography through a computer system; (d) procuring child pornography through a computer system for oneself or for another person; (e) possessing child pornography in a computer system or on a computer-data storage medium.*

2. For the purpose of paragraph 1 above, the term "child pornography" shall include pornographic material that visually depicts:

(a) a minor engaged in sexually explicit conduct;

(b) a person appearing to be a minor engaged in sexually explicit conduct;

(c) realistic images representing a minor engaged in sexually explicit conduct.

3. For the purpose of paragraph 2 above, the term "minor" shall include all persons under 18 years of age. A Party may, however, require a lower age-limit, which shall be not less than 16 years.

4. Each Party may reserve the right not to apply, in whole or in part, paragraphs 1, sub-paragraphs d. and e, and 2, sub-paragraphs b. and c

120. When the Committee desired to hear the views of the Department of Information Technology in incorporating an express provision on defining child pornography as suggested by the Expert Committee, it was replied that a new Section 67A related to punishment for publishing or transmitting of material containing sexually explicit acts has been proposed as per which stringent provision has been made relating to pornography in general and would also automatically cover child pornography.

121. On the issue of criminalising child pornography and making penal provision towards that, the Department stated that, the advice/ assistance in the Commission of Crime (Pornography) through offering advice on information regarding the websites for facilitating any possession or downloading illegal content might be considered an offence.

122. The Department of Information Technology also agreed to a suggestion that the pre-offence grooming i.e. the initial actions taken by the offender to prepare the

child for sexual relationships through online enticement and distributing or showing pornography to a child should also be made a criminal offence.

RECOMMENDATIONS / OBSERVATIONS

xxx xxx xxx

Child Pornography

24. The Committee note that Clause 31 of the Bill intends to insert a new Section 67A which provides for stringent punishment for publishing or transmitting of material containing sexually explicit acts in electronic form. But the Committee are concerned to find that the term 'child pornography' has nowhere been mentioned in the proposed Section. The Department's argument that the Section while covering 'pornography' will automatically cover child pornography does not convince the Committee as there should be no scope for assumption or presumption when fresh amendments are being proposed. The Committee, therefore, impress upon the Department to include the term 'child pornography' in the proposed Section 67A in view of its growing menace. They also desire that specific provisions should be incorporated in this Section to criminalise child pornography in tune with the laws prevailing in the advanced Countries and Article 9 of the Council of Europe Convention on Cyber Crimes. In view of the several manifestations of sexual abuse of the children and its loathsome ramifications, the Committee desire that the act of grooming the child for sexual relationship through online enticement or distributing/showing pornography or through any other online means should also be made a criminal offence and a suitable provision be made in this regard in the proposed Section 67A."

(Emphasis supplied)

148. From the aforesaid, it can be seen that the Standing Committee whilst making its recommendation, underscored that no useful purpose would be served if the publication or transmission of any child pornography is punished all the same as any other pornographic material. It highlighted, that while the IT Act had originally been

enacted keeping in mind the requirements that existed then, yet now with the march of the age of internet, it has become imperative to undertake a fresh approach to the provisions of the IT Act particularly those relating to cyber-crime in light of the new emerging forms of misuse of the internet. It opined that, merely criminalizing the publication or transmission of child pornography will not be sufficient, and that other various forms of online sexual abuse and exploitation also need to be recognized and adequately punished, on par with the laws prevailing in various other countries.

149. It was in the aforesaid backdrop that the legislature by virtue of the Information Technology (Amendment) Act, 2008 *inter-alia* amended Section 67 of the IT Act and introduced Section 67A along with Section 67B. This was for the first time, that a specific provision had been made, to recognize and protect the vulnerable and tender age of children by criminalizing various forms of online sexual degradation, abuse and exploitation with enhanced punishment. At the cost of repetition, Section 67B of the IT Act is being reproduced below: -

> *"**67-B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form**. — Whoever —*
>
> *(a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct; or*
>
> *(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or*
>
> *(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resources; or*
>
> *(d) facilitates abusing children online; or*
>
> *(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children,*
>
> *shall be punished on first conviction with imprisonment of either description for a term which may extend to five*

years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

Provided that provisions of Section 67, Section 67-A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form—

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

(ii) which is kept or used for bona fide heritage or religious purposes.

Explanation. — For the purpose of this section, "children" means a person who has not completed the age of 18 years."

150. A conjoint reading of Section(s) 67 and 67A *viz-a-viz* 67B would reveal that unlike the former which penalizes only the publication or transmission of any obscene material or pornographic material, the scope and ambit of Section 67B is much wider inasmuch as it recognizes and penalizes five different forms / categories of *actus reus*, being: -

(i) Section 67B sub-section (a): -

a. Section 67B sub-section (a) of the IT Act pertains to the dissemination of child pornography and penalizes the publication or transmission of any material involving a child in any sexually explicit act or conduct, and the direct or indirect involvement in aiding or facilitating the dissemination of such material.

b. In order, to constitute an offence under this provision, there must be an actual publication or transmission of any child pornographic material, though the said publication or transmission may be done either by the accused himself or

be caused through someone else at the instance or behest of the accused. In other, words Section 67B sub-section (a) punishes any person who is involved in a process, in any manner that leads to the publication or transmission of any child pornographic material.

c. Thus, twin-conditions as prescribed under Section 67B(a) of the IT Act, need to be satisfied in order to constitute an offence: - **(I)** the actual publication or transmission of any child pornographic material **AND (II)** the involvement of the accused in such publication or transmission process in any manner.

(ii) Section 67B sub-section (b): -

a. It penalizes the creation of any text or image-based content in any electronic form, that depict children in any obscene or indecent or sexually explicit manner. It further penalizes the collection, solicitation, browsing i.e., online viewing, or downloading of such material. Thus, even the mere viewing of any child pornographic material that is stored in a mobile phone would tantamount to 'browsing' of such material in electronic form. Lastly, it also penalizes the advertising, promotion, exchange or distribution of any such material. Here again, what is punishable is only the actual commission of any of the above-mentioned acts.

b. The scope of Section 67B sub-section (b), is more expansive than the preceding sub-section because, **(i) *first,*** the term 'material' here includes any electronic content depicting children in sexually explicit acts as well as in obscene or indecent contexts, and **(ii) *secondly,*** the *actus reus* encompasses not just the act of disseminating but also the acts of creating, propagating, or engaging with or using such material.

c. In other words, Section 67B sub-section (b) penalizes the actual commission of any of the following: -

i. the act of producing or creating any text or digital image based electronic material (incl. videos) that depict children in any obscene, indecent or sexually explicit manner;

ii. the act of engaging or using such material by way of collecting, browsing, accessing, downloading, saving, seeking, actively searching such material from any computer resource, and;

iii. the act of facilitating or propagating the circulation or dissemination of such material by advertising, promoting, exchanging or sharing, distributing or offering for sale such material from any computer resource on the internet.

(iii) Section 67B sub-section (c): -

a. Section 67B sub-section (c) of the IT Act penalizes the act of any person to induce or entice a child to participate or indulge in any sexually explicit act or any other act that would offend any adult of reasonable mind, using any computer resource.

b. In order to constitute an offence under the said provision, what is required is only the actual commission of an act of inducement or enticement in any manner by the accused alone, and there is no requirement that such enticement or inducement must have resulted in the child indulging in any sexually explicit or any other offensive act.

c. Thus, even where the accused merely attempts to entice a child to indulge in any such act, through a computer resource, he would be liable under this provision, irrespective of whether the child also indulges in such act or not. Furthermore, such enticement or inducement may be for having the child either indulge in any sexually or offensive act with the accused himself or with any other person at the instance or persuasion of the accused.

d. In other words, what is penalized under Section 67B sub-section (c) is the act of enticing or inducing a child to indulge in any sexually explicit offensive act or behaviour.

(iv) Section 67B sub-section (d): -

a. Section 67B sub-section (d) penalizes any form or manner of facilitation of abuse of children, online i.e., it penalizes any form of degradation, exploitation, or abuse of children

on any online platform. The *actus reus* punishable under the said provision is the doing, aiding or abetting of any act, either directly or indirectly that would facilitate or enable the abuse of children online in any indecent, lascivious or prurient manner.

b. It is pertinent to note, that under Section 67B sub-section (d) there is no requirement that the act in question must have been done only with an intention to facilitate the abuse of children online. What is rather required to constitute an offence under the said provision is that the act must be such which likely would facilitate the abuse of children online.

c. In other words, what is penalized is any act that has the propensity or likelihood to aid, enable or support the online abuse of children in any obscene, indecent, or lewd fashion.

(v) Section 67B sub-section (e): -

a. Section 67B sub-section (e) of the IT Act penalizes the act of recording through video or any other electronic means, the participation of any sexually explicit act with or in the presence of any child. The *actus reus* required is the use of any video or any other electronic means to record any sexually explicit act being done either by the accused himself or by anyone else in the presence of a child.

b. It must be borne in mind, that the sexually explicit act itself need not be done in the actual presence of the child, rather what is required is that the child was made privy to such sexually explicit act, and the same was recorded by the accused in any electronic form. Say for instance, that in the presence of a child, a pornographic video is played, and the same is then recorded by the accused. Here since, the recording includes a child being subjected to a sexually explicit act in the form a pornographic video, an offence would be constituted under the said provision, even though no such act was done in the actual presence of the child.

c. In other words, what is penalized under Section 67B sub-section (e) is the act of exposing or subjecting a child to any sexually explicit act by anyone, and recording the same in any electronic form.

151. From the aforesaid, it is clear that Section 67B of the IT Act is a comprehensive provision designed to address and penalize the various electronic forms of exploitation and abuse of children online. It not only punishes the electronic dissemination of child pornographic material, but also the creation, possession, propagation and consumption of such material as-well as the different types of direct and indirect acts of online sexual denigration and exploitation of the vulnerable age of children.

152. This Court in ***Sharat Babu Digumarti v. Govt. of NCT of Delhi*** reported in **(2017) 2 SCC 18** held that Chapter XI of the IT Act, more particularly Section(s) 67 through 67B are a complete code in itself when it comes to offences relating to electronic forms of obscene and pornographic material. The relevant observations read as under: -

> *"31. Having noted the provisions, it has to be recapitulated that Section 67 clearly stipulates punishment for publishing, transmitting obscene materials in electronic form. The said provision read with Sections 67-A and 67-B is a complete code relating to the offences that are covered under the IT Act. [...]"*
>
> (Emphasis supplied)

153. Thus, Section(s) 67, 67A and 67B of the IT Act being a complete code, ought to be interpreted in a purposive manner that suppresses the mischief and advances the remedy and ensures that the legislative intent of penalizing the various forms of cyber-offences relating to children and the use of obscene / pornographic material through electronic means is not defeated by a narrow construction of these provisions.

iii. The Presumption of Culpable Mental State under Section 30 of the POCSO.

154. As discussed earlier, the POCSO is a special legislation that was specifically enacted to punish aggravated forms of offences related to sexual abuse and exploitation of children as well as including the well-being of the children. Its nuanced provisions have been deliberately designed to provide stringent measures in order to secure the dignity protection and interest of children. It was in this backdrop, that the legislature in its wisdom specifically provided for certain statutory presumptions as regards commission of certain

specified offences as-well as presumption of the existence of a culpable mental state on the part of the person accused so as to ensure that the legislation is effective in addressing the increasing number of child sexual abuse cases.

155. The provisions pertaining to statutory presumptions under the POCSO are contained in Section(s) 29 and 30 which provide for presumption as to certain offences and presumption of culpable mental state respectively. In the case at hand we are concerned with Section 30 of the POCSO which at the cost of repetition is being reproduced hereunder: -

> ***"30. Presumption of culpable mental state.*** *–*
>
> *(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*
>
> *(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.*
>
> *Explanation. – In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."*

156. Section 30, sub-section (1) provides that where any offence under the POCSO requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state. It further provides that the accused may as a defence prove that he had no such mental state with respect to any act being sought to be punished under the Act. Thus, Section 30(1), makes it clear that the presumption of culpable mental state applies to any offence under the said Act that requires such mental state, and the use of the word "*shall"* makes it mandatory for the Special Court to presume the existence of such mental state. However, the said provision also clarifies that, although the said presumption is mandatory yet it is rebuttable inasmuch as the person accused is permitted to prove any fact to establish the contrary i.e., to show that no such mental state

existed on his part. Section 30 sub-section (2) further explains the manner and the circumstances under which the said presumption can be rebutted, insofar as it stipulates that in order to prove any fact to show that no such mental state existed, the person accused has to prove the same beyond a reasonable doubt and not on a mere preponderance of probability. Thus, the standard prescribed for rebutting the said statutory presumption of culpable mental state is beyond a reasonable doubt. Lastly, the Explanation appended to the said provision provides that 'culpable mental state' shall include intention, motive, knowledge of a fact and the belief in, or the reason to believe a fact.

a. Concept of Statutory Presumption and Principle of Foundational Facts.

157. In ***Attorney General*** (supra) this Court while considering the aforesaid Section(s) 29 and 30 of the POCSO observed that the same had been specifically incorporated by the legislature in view of the serious nature of the offences punishable under the POCSO and the object behind the enactment of the said legislation. Furthermore, this Court in view of the importance of the aforesaid provisions, held that any offence under the Act pertaining to sexual, assault, harassment etc., ought to be construed *viz-a-viz* the other provision (sic Section(s) 29 and 30) of the POCSO. The relevant observations read as under: -

> *"36. It may also be pertinent to note that having regard to the seriousness of the offences under the POCSO Act, the Legislature has incorporated certain statutory presumptions. Section 29 permits the Special Court to presume, when a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3, 5, 7 and Section 9 of the Act, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. Similarly, Section 30 thereof permits the Special Court to presume for any offence under the Act which requires a culpable mental state on the part of the accused, the existence of such mental state. Of course, the accused can take a defence and prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. It may further be noted that though as per sub section (2)*

of Section 30, for the purposes of the said section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability, the Explanation to Section 30 clarifies that "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact. Thus, on the conjoint reading of Section 7, 11, 29 and 30, there remains no shadow of doubt that though as per the Explanation to Section 11, "sexual intent" would be a question of fact, the Special Court, when it believes the existence of a fact beyond reasonable doubt, can raise a presumption under Section 30 as regards the existence of "culpable mental state" on the part of the accused.

37. This takes the Court to the next argument of Mr. Luthra that there being an ambiguity, due to lack of definition of the expressions - "sexual intent", "any other act", "touching" and "physical contact", used in Section 7, coupled with the presumptions under Sections 29 and 30 of the Act, the reverse burden of proof on the accused would make it difficult for him to prove his innocence and, therefore, the POCSO Act must be strictly interpreted. In the opinion of the Court, there cannot be any disagreement with the said submission of Mr. Luthra. In fact it has been laid down by this Court in catena of decisions that the Penal Statute enacting an offence or imposing a penalty has to be strictly construed. A beneficial reference of the decisions in the case of Sakshi v. Union of India reported in (2004) 5 SCC 518, in the case of R. Kalyani v. Janak C. Mehta reported in (2009) 1 SCC 516 and in the case of State of Punjab v. Gurmeet Singh, (2014) 9 SCC 632 be made in this regard. However, it is equally settled legal position that the clauses of a statute should be construed with reference to the context vis-a-vis the other provisions so as to make a consistent enactment of the whole Statute relating to the subject matter. The Court can not be oblivious to the fact that the impact of traumatic sexual assault committed on children of tender age could endure during their whole life, and may also have an adverse effect on their mental

state. The suffering of the victims in certain cases may be immeasurable. Therefore, considering the objects of the POCSO Act, its provisions, more particularly pertaining to the sexual assault, sexual harassment etc. have to be construed vis-a-vis the other provisions, so as to make the objects of the Act more meaningful and effective."

(Emphasis supplied)

158. The statutory presumption of culpable mental state is neither a concept which is alien to the law nor is it something which is exclusive to the POCSO alone. In fact, there are several legislations which also contain similar provisions relating to the statutory presumption of culpable mental state, such as Section 35 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, the "**NDPS Act**"), Section 138A of the Customs Act, 1962 (for short, the "**Customs Act**"), Section 278E of the Income Tax Act, 1961 (for short, the "**Act, 1961**") to name a few. Since all of the aforesaid provisions are *pari materia* with Section 30 of the POCSO, it would be apposite to refer to the various decisions of this Court interpreting these analogous provisions.

159. In ***Bhanabhai Khalpabhai v. Collector of Customs*** reported in **1994 Supp. (2) SCC 143**, this Court whilst examining the scope of Section 138A of the Customs Act which relates to presumption of culpable mental state observed that the said statutory presumption had been incorporated by the legislature in view of the difficulty that the prosecution often faces in proving every link in respect of commission of certain offences by way of direct evidence. It further observed that such statutory presumption is an exception to the general criminal jurisprudence that the onus never shifts on the accused and he has only to raise a doubt in the mind of the court, in respect of the correctness of the prosecution version. The relevant observation reads as under: -

"9. In the facts and circumstances of the case, it can also be held that the appellant was concerned with the specified goods in connection with 'fraudulent evasion or attempt at evasion' of duty chargeable on the specified goods. It is well known, that it is very difficult for the prosecution, to prove every link, in respect of the commission of the offence under the Act by direct evidence. The whole process of smuggling, for evading payment of custom duty

> *consists of different links. The links aid and abate each other, sometimes through a remote control. That is why, Parliament has introduced Section 138-A in the Act. [...] The provision relates only to burden and nature of proof at the trial, as such it was applicable in the present case. In view of the aforesaid section, a presumption has to be drawn, in respect of existence of the alleged mental state. An option has been given to the accused to prove by way of defence the fact, that he did not have any such mental state with respect to the act charged which is an offence. It can be said that the provision aforesaid is an exception to the general criminal jurisprudence that onus never shifts on the accused and he has only to raise a doubt in the mind of the court, in respect of the correctness of the prosecution version. It is different from Sections 106 and 114 of the Evidence Act. In view of Section 138-A, once a presumption is raised about a culpable mental state on the part of the accused, that he had stored the silver ingots, to export them outside the country evading payment of custom duties, the accused has to prove as a defence that no such mental state with respect to the act charged, did exist. [...]"*
>
> (Emphasis supplied)

160. In another decision of this Court in ***Devchand Kalyan Tandel v. State of Gujarat*** reported in **(1996) 6 SCC 255,** it was reiterated that the statutory presumption engrafted in Section 138A of the Customs Act was out of necessity in view of the growing number of cases pertaining to evasion of duty or prohibitions or other alike economic offences and the inherent difficulty of the prosecution in establishing ingredients of such offences. It held that, once the recovery of prohibited goods from the accused person has been duly established by the prosecution, the statutory presumption would arise. It further held, that the question in such cases would be whether in the proved facts and circumstances, could the recourse of the statutory presumption be taken. The relevant observations read as under: -

> *"10. [...] It is no doubt true that in a charge for violation of the provisions of Section 135(1)(a) it is required for the prosecution to establish that the accused have fraudulently evaded or attempted to evade any duty chargeable on*

the goods or have violated the prohibition imposed under the Act in respect of the goods. But if the prosecution establishes the aforesaid facts then there is no necessity of attracting the statutory presumption under Section 138-A and without such presumption an accused can be convicted under Section 135(1)(a). But the legislature having found it difficult to establish the necessary ingredients of such evasion of duty or prohibitions and the economic offences having grown in proportion beyond the control, came forward with the presumption available under Section 138-A of the Act. The main object of Section 138 A is to raise a presumption as to the culpable mental state on the part of the accused when he is prosecuted in a court of law. In other words, if a recovery is made from the accused of any prohibited goods within the notified area then the statutory presumption would arise that he was knowingly concerned in the fraudulent evasion or attempted evasion of any duty chargeable on the goods in question. In the case of Bhanabhai Khalpabhai v. Collector of Customs [1994 Supp (2) SCC 143 : 1994 SCC (Cri) 882] this Court has held that in view of Section 138-A a presumption has to be drawn in respect of the existence of the alleged mental state. An option has been given to the accused to prove by way of defence the fact, that he did not have any such mental state with respect to the act charged which is an offence. The question, therefore, arises as to whether in the proved facts and circumstances the courts below were justified in taking recourse to the statutory presumption under Section 138-A of the Act. [...]

(Emphasis supplied)

161. In ***State of Punjab v. Baldev Singh*** reported in **(1999) 6 SCC 172** a Constitution Bench of this Court held that a presumption is an inference of fact drawn from the facts which are known as proved and as such the statutory presumption under Section 54 of NPDS Act that an accused has committed an offence under the Act will only get attracted once the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the procedure laid down in the Act. The relevant observations read as under: -

> *"54. Thus, even if it be assumed for the sake of argument that all the material seized during an illegal search may be admissible as relevant evidence in other proceedings, the illicit drug or psychotropic substance seized in an illegal search cannot by itself be used as proof of unlawful conscious possession of the contraband by the accused. An illegal search cannot also entitle the prosecution to raise a presumption under Section 54 of the Act because presumption is an inference of fact drawn from the facts which are known as proved. A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50."*
>
> (Emphasis supplied)

162. In ***Seema Silk Sarees v. Directorate of Enforcement*** reported in **(2008) 5 SCC 580**, although the provision involved therein is not *pari materia* with Section 30 of the POCSO, yet the observations made by this Court are relevant to the issue involved in the case at hand. Therein this Court whilst upholding the constitutional validity of Section 18 of the Foreign Exchange Regulation Act, 1973 which *inter-alia* provided for a statutory presumption of contravening the provisions of the said Act, held that such a statutory presumption would stand attracted once certain foundational facts are established by the prosecution. The relevant observation read as under: -

> *"19. A legal provision does not become unconstitutional only because it provides for a reverse burden. The question as regards burden of proof is procedural in nature. [...]*
>
> *20. The presumption raised against the trader is a rebuttable one. Reverse burden as also statutory presumptions can be raised in several statutes as, for example, the Negotiable Instruments Act, Prevention of Corruption Act, TADA, etc. Presumption is raised only when certain foundational facts are established by the prosecution. The accused in such an event would be entitled to show that he has not violated the provisions of the Act. [...]*
>
> (Emphasis supplied)

163. Similarly in ***Noor Aga v. State of Punjab & Anr.*** reported in **(2008) 16 SCC 417,** the constitutional validity of Section 35 of the NDPS Act was challenged which as aforestated provided for the presumption of culpable mental state. This Court speaking through Justice S.B. Sinha (as he then was) whilst upholding the validity of the aforesaid provision observed that although the presumption of innocence being a human right cannot be thrown aside, yet the same would still be subject to exceptions. The court held that where a statute raises a presumption with regard to the culpable mental state on the part of the accused and also places the burden of proof on the accused to prove the contrary, the said presumption would be constitutionally valid and can be raised provided that the foundational facts pertaining to the establishing the *actus reus* of the requisite offence has been proved. It further held that despite such statutory presumption, the initial burden would always lie upon the prosecution to prove certain foundational facts clearly establishing the *actus reus* in respect of the offence that is sought to be punished. It is only after the prosecution has proved the foundational facts, that the statutory presumption gets attracted, whereafter the burden would shift onto the accused to prove otherwise. In the last it also held that the extent of burden to prove the foundational facts pertaining to the *actus reus* by the prosecution would depend upon the seriousness of the offence. The relevant observations read as under: -

> *"35. A right to be presumed innocent, subject to the establishment of certain foundational facts and burden of proof, to a certain extent, can be placed on an accused. It must be construed having regard to the other international conventions and having regard to the fact that it has been held to be constitutional. Thus, a statute may be constitutional but a prosecution thereunder may not be held to be one. Indisputably, civil liberties and rights of citizens must be upheld.*
>
> *xxx xxx xxx*
>
> *51. The Act specifically provides for the exceptions. It is a trite law that presumption of innocence being a human right cannot be thrown aside, but it has to be applied subject to exceptions.*
>
> *xxx xxx xxx*

56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the court to impose fine of more than maximum punishment of Rs 2,00,000 as also the presumption of guilt emerging from possession of narcotic drugs and psychotropic substances, the extent of burden to prove the foundational facts on the prosecution i.e. "proof beyond all reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance with the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of "wider civilisation". The court must always remind itself that it is a well-settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. [...]

xxx xxx xxx

58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable

doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

(Emphasis supplied)

164. In ***Bhola Singh v. State of Punjab*** reported in **(2011) 11 SCC 653** this Court while placing reliance on the decision in ***Noor Aga*** (supra) reiterated that the statutory presumption envisaged in Section 35 of the NDPS Act will only come into play after the prosecution had discharged its initial burden to prove certain foundational facts. It observed that the applicability of such statutory presumption is dependent upon the facts as spelt out by the prosecution, after which the burden would shift onto the accused to establish otherwise. It held that in the absence of any foundational facts pertaining to the alleged offence, no presumption can be drawn. The relevant observations read as under: -

"10. While dealing with the question of possession in terms of Section 54 of the Act and the presumption raised under Section 35, this Court in Noor Aga v. State of Punjab while upholding the constitutional validity of Section 35 observed that as this section imposed a heavy reverse burden on an accused, the condition for the applicability of this and other related sections would have to be spelt out on facts and it was only after the prosecution had discharged the initial burden to prove the foundational facts that Section 35 would come into play.

11. Applying the facts of the present case to the cited one, it is apparent that the initial burden to prove that the appellant had the knowledge that the vehicle he owned was being used for transporting narcotics still lay on the prosecution, as would be clear from the word "knowingly", and it was only after the evidence proved beyond reasonable doubt that he had the knowledge would the presumption under Section 35 arise. Section 35 also presupposes that the culpable mental state of an accused has to be proved as a fact beyond reasonable doubt and not merely when its existence is established by

a preponderance of probabilities. We are of the opinion that in the absence of any evidence with regard to the mental state of the appellant no presumption under Section 35 can be drawn. [...]"

(Emphasis supplied)

165. In ***Baldev Singh v. State of Haryana*** reported in **(2015) 7 SCC 554** this Court held that the presumption of culpable mental state contained in Section 35 of the NDPS Act would come into play once the possession of the contraband in question by the accused has been established by the prosecution, whereafter, the onus would be on the accused to rebut the said presumption. It further held, that such presumption may be rebutted by the accused by either raising doubts in the prosecution's case and the material relied upon it for establishing the possession or that it may adduce any other evidence to rebut the same. In the last, it also held that where the prosecution is unable to establish the possession or where the court has doubts over the prosecution's case, the said presumption would automatically be discharged. The relevant observations read as under: -

"12. [...] Once the physical possession of the contraband by the accused has been proved, Section 35 of the NDPS Act comes into play and the burden shifts on the appellant-accused to prove that he was not in conscious possession of the contraband. [...]The Explanation to sub-section (1) of Section 35 expanding the meaning of "culpable mental state" provides that "culpable mental state" includes intention, knowledge of a fact and believing or reason to believe a fact. Sub-section (2) of Section 35 provides that for the purpose of Section 35, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of the probability. Once the possession of the contraband by the accused has been established, it is for the accused to discharge the onus of proof that he was not in conscious possession. Burden of proof cast on the accused under Section 35 of the NDPS Act can be discharged through different modes. One of such modes is that the accused can rely on the materials available in the prosecution case raising doubts about the

prosecution case. The accused may also adduce other evidence when he is called upon to enter on his defence. If the circumstances appearing in the prosecution case give reasonable assurance to the court that the accused could not have had the knowledge of the required intention, the burden cast on him under Section 35 of the NDPS Act would stand discharged even if the accused had not adduced any other evidence of his own when he is called upon to enter on his defence."

(Emphasis supplied)

166. What can be discerned from the above is that the idea behind providing for a statutory presumption of culpable mental state is in view of the exigency posed by the difficulty that often exists in establishing certain types of offences such as inchoate offences due to its clandestine nature. Such presumptions are in essence an exception to the cardinal principle of criminal jurisprudence that the act does not make a person guilty unless the mind is also guilty.

167. Traditionally, it is the prosecution who bears the burden of proving every element in a particular offence, including the accused's mental state, beyond a reasonable doubt. In order to establish the commission of any offence, the prosecution must stand on its own legs i.e., the onus lies on the prosecution to prove beyond reasonable doubt not just the wrongful act but also the wrongful intention of the person in doing such an act. However, in certain offences particularly economic offences or inchoate offences like possession of child pornography where apart from the *actus reus* there exists no other material to depict or demonstrate the *mens rea*, it is too difficult for the prosecution to look into the mind of the accused to cull out with certainty what his intention was or could have been for doing a particular act let alone cogently establish the same beyond a reasonable doubt. Due to the elusive and concealed nature of such offences there is often little to no direct evidence available to establish what was in fact in the mind of the accused at the time when the particular act in question occurred or that the said act was done only with a particular intention.

168. It is in such scenarios, the legislature consciously provides for a statutory presumption of a culpable mental state to overcome the aforesaid hurdles and assist the prosecution to prove its case. This presumption of a culpable mental state is neither a conclusive proof

of guilt for any particular offence nor does it completely replace or absolve the prosecution of its burden of proof and should not be understood as such, but rather it is a potent tool to assist the prosecution in discharging its initial burden and establishing its case. It seeks to bridge the evidentiary gap that exists between the *actus reus* and the *mens rea* in complex clandestine offences which otherwise cannot be proved through conventional means.

169. One good reason for providing such statutory presumptions in different legislations is owed to the fact that at times having regard to the peculiar case the prosecution may find it extremely difficult to know the mind of the accused so as to establish his intention and mental state. In contrast, the accused may not have to face the same degree of difficulty because he is fully aware of his mental state and can explain his intentions on the basis of his conduct or actions.

170. However, since the courts were in *seisin* of the harshness of such presumptions and the inherent danger they pose – particularly in blurring the line between the presumption of a culpable mental state and the presumption of the guilt itself and thereby undoing or compromising the fairness of such criminal proceeding, this Court for the first time in ***Baldev Singh*** (supra) sowed the seeds for a test to ascertain as to when such presumption can be safely attracted which was later more fully evolved in ***Noor Aga*** (supra) wherein a brightline test was laid down in the form of the 'Rule or Principle of Foundational Facts'.

171. This 'Rule or Principle of Foundational Facts' *simpliciter* lays down that before the statutory presumption of culpable mental state could be validly invoked, the prosecution must first establish certain foundational facts. These foundational facts typically involve or correspond to proving those facts or elements that cogently establish the *actus reus* required for the offence alleged by the prosecution. It is only after such foundational facts have been proved beyond a reasonable doubt that the prosecution may take recourse of the statutory presumption provided by the legislature. The rationale behind the same is two-fold. ***First,*** in the absence of any *actus reus* there is no possible way to ascertain the corresponding *mens rea* that is required to be established. This is because it is the *actus reus* which demarcates or delineates the *mens rea* which is to be looked for and established. Without an *actus reus* of any form there arises no question of establishing and

consequently presuming the *mens rea,* in view of the fundamental principle of criminal jurisprudence, that no one should be punished for their thoughts or intention alone unless accompanied by some form of act. ***Secondly,*** and more importantly it ensures that the statutory presumption does not overreach or take the place of proof of guilt under the guise of 'presumption of culpable mental state'.

172. It would be too much to shift the entire onus onto the accused and to then ask him to prove a negative fact. Thus, any statutory presumption would operate only after the prosecution first lays the foundational facts necessary for the offences that have been alleged beyond a reasonable doubt. This is because a negative cannot be proved in the initial threshold, in order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. Thus, in law it is trite that the initial burden always lies on the prosecution. This why, the establishment of foundational facts by the prosecution is a prerequisite for triggering the statutory presumption for shifting the onus on the accused to prove the contrary. It is a delicate balance struck between the practical need for such presumption in law and the cardinal principles of criminal jurisprudence to ensure that the presumption does not cross or transgress the fine line that demarcates presumption of 'culpable mental state' from the 'presumption of guilt' itself.

173. Since a negative cannot be proved, an accused cannot be asked to disprove his guilt even before the foundational allegations with supporting material thereof are placed and duly established by the prosecution before the court. Unless the prosecution is able to prove foundational facts in the context of the allegations made against the accused under any specific provision of the POCSO as the case may be, the statutory presumption of culpable mental state under Section 30 of the POCSO will not come into the picture.

174. Even if the prosecution establishes such foundational facts and the presumption is raised against the accused, he can rebut the same either by discrediting prosecution's case as improbable or absurd or the accused could lead evidence to prove his defence, in order to rebut the presumption, however the said presumption under Section 30 of the POCSO will be said to have been rebutted only where the accused by way of his defence establishes a fact contrary to the presumption and proves the same beyond a reasonable doubt.

b. Foundational Facts required under Section 15 of the POCSO.

175. Now coming to Section 15 of the POCSO, as discussed earlier, the foundational facts ordinarily pertain to the *actus reus* required under a particular offence. However, given the fact that Section 15 penalizes three distinct and varying degrees of intention and having regard to the mutually exclusive nature of each of the three offences provided thereunder, the mere storage or possession of a child pornographic material cannot become the foundational facts or basis for attracting all three of the said offences all the same.

176. As discussed by us in the foregoing parts of this judgment, while on a plain reading Section 15 sub-section(s) (1), (2) and (3) it might appear that all require the same *actus reus* i.e., the storage or possession of the child pornographic material, however, such an interpretation is flawed as a closer examination of each of the sub-section would reveal that there exists a very fine but pertinent distinction in the *actus reus* which is required to constitute an offence under Section 15 sub-section(s) (1), (2) or (3) of the POCSO.

177. Thus, for the purpose of Section 15 sub-section (1), the necessary foundational facts which the prosecution would first have to establish before it can be allowed to validly raise the statutory presumption of culpable mental state would *simpliciter* be the storage or possession of any child pornographic material and that the person accused had failed to delete, destroy or report the same. Once, the aforesaid is clearly established by the prosecution, a presumption would be raised in terms of Section 30 of the POCSO that the person accused had the knowledge of the child pornographic material that was found to be stored or possessed by him and that he had the intent to share or transmit the same due to which he failed to delete, destroy or report it.

178. Whereas when it comes to Section 15 sub-section (2), since the *actus reus* required to constitute an offence thereunder requires the storage or possession of any pornographic material involving a child along with any additional mater to show either the actual transmission, propagation, display or distribution of any such material or the facilitation of any of the abovementioned acts. Thus, in order to invoke the statutory presumption of culpable mental state as contained in Section 30 of the POCSO, the prosecution would be required to first establish not just the storage or possession of any

child pornographic material, but also any other material to indicate any actual transmission, propagation, display or distribution of any such material or any form of an overt act such as preparation or setup done for the facilitation of the transmission, propagation, display or distribution of such material, whereafter, the statutory presumption would stand attracted, and it shall be presumed by the courts that the said act was done with the intent of transmitting, displaying, propagating or distributing such material and that the said act(s) had not been done for the purpose of either reporting or for use as evidence. We clarify that, though wherever any actual transmission, propagation, display or distribution of such material takes place, the offence under Section 15 sub-section (2) would be constituted, thereby seemingly not requiring any further to be proved. However, due to the two exceptions carved out in sub-section (2) namely that transmission, propagation, display or distribution of child pornographic material when done for either reporting the same or for use as evidence, the statutory presumption in such scenario will still continue to serve a useful purpose by aiding the prosecution in reinforcing that any of the abovementioned acts had not been done with the intention of either reporting the same or for using it as evidence, unless the contrary is proven.

179. Lastly, for the purpose of Section 15 sub-section (3) of the POCSO, the *actus reus* required therein is the storage or possession of any child pornographic material and any other material to indicate that such storage or possession was done in lieu or in expectation of some form of gain or benefit. Thus, where the prosecution established the storage or possession of such material and further shows anything else that might indicate that the same had been done for some form of gain or benefit or the expectation of some gain or benefit, the foundational facts would be said to have been proved, and the statutory presumption envisaged under Section 30 of the POCSO can be validly raised. Then the onus would lie on the accused to prove that the storage or possession of such material had not been done with intention of any commercial purpose.

c. Whether the Presumption under Section 30 of the POCSO can be resorted to in a Quashing Proceeding?

180. The last aspect which remains to be examined is whether the said statutory presumption of culpable mental state provided in Section

30 of the POCSO can be resorted to in a quashing proceeding by the High Courts in exercise of their inherent powers under Section 482 of the Cr.P.C. (corresponding Section 530 of the Bhartiya Nagrik Suraksha Sanhita, 2023, for short, the "**BNSS**"). In other words, at what stage can the aforesaid said statutory presumption be invoked at. Before proceeding with the analysis of the said aspect, it would be appropriate to refer to a few decisions of this Court on this issue.

181. In ***State of M.P. v. Harsh Gupta*** reported in **(1998) 8 SCC 630**, this Court held that the statutory presumption contained in Section 69 of the Indian Forest Act, 1927 could not have been ignored by the High Court in deciding the quashing petition under Section 482 of the Cr.P.C. The relevant observations read as under: -

> *"3. It is rather surprising that at a stage when the only question to be considered was whether the complaint and its accompaniments disclosed any or all of the offences alleged against the respondent, the learned Judge not only went into a detailed discussion about his defence but recorded a conclusive finding that he was not guilty of the offences alleged against him. More surprising is that the learned Judge ignored the provisions of Section 69 of the Act which expressly raises a statutory presumption against a person arraigned that the forest produce recovered from him was a property of the Government, until the contrary is proved; and needless to say, the question of proof of the contrary can be answered after evidence is led.*
>
> *4. For the foregoing discussion, we allow this appeal, set aside the impugned judgment and direct the Magistrate to proceed with the case in accordance with law, without in any way being influenced by any of the observations made by the High Court in the impugned order."*
>
> (Emphasis supplied)

182. This Court in ***Prakash Nath Khanna v. CIT*** reported in **(2004) 9 SCC 686** examined the scope of Section 278E of the Act, 1961. It held that where there is a statutory presumption as regards the existence of a culpable mental state on the part of the accused in respect of any offence alleged, any defence in respect of the absence of such mental state can only be pleaded in the trial. It further held

that in such scenario, it will not be open for the High Court to delve into the aspect of the absence of such mental state in a quashing proceeding. The relevant observations read as under: -

> *"23. There is a statutory presumption prescribed in Section 278-E. The court has to presume the existence of culpable mental state, and absence of such mental state can be pleaded by an accused as a defence in respect to the act charged as an offence in the prosecution. Therefore, the factual aspects highlighted by the appellants were rightly not dealt with by the High Court. This is a matter for trial. It is certainly open to the appellants to plead absence of culpable mental state when the matter is taken up for trial."*
>
> (Emphasis supplied)

183. In another decision of this Court in ***R. Kalyani v. Janak C. Mehta & Ors.*** reported in **(2009) 1 SCC 516** although the issue therein did not pertain to the applicability of any statutory presumption, yet the observations made therein are significant. This Court held that the High Court in a quashing petition in exercise of its inherent jurisdiction cannot go into the aspect of either the existence or absence of any *mens rea* or *actus reus* for a particular offence to pass an order in favour of the accused. The relevant observations read as under: -

> *"15. Propositions of law which emerge from the said decisions are:*
>
> *(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first information report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.*
>
> *(2) For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.*
>
> *(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the Court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.*

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."

(Emphasis supplied)

184. In a recent decision of this Court in ***Rathis Babu Unnikrishnan v. The State (Govt. of NCT of Delhi) & Anr.*** reported in **2022 INSC 480** it was held that when there is a statutory presumption, it would not be judicious of the quashing court to carry out a detailed enquiry on the facts alleged before first permitting the trial court to evaluate the evidence. It further observed that where a accused moves the court for quashing even before the commencement of trial, the High Courts in such cases should be slow and circumspect in prematurely extinguishing by discarding the legal presumption all together. The relevant observation reads as under: -

"11. The legal presumption of the cheque having been issued in the discharge of liability must also receive due weightage. In a situation where the accused moves Court for quashing even before trial has commenced, the Court's approach should be careful enough to not to prematurely extinguish the case by disregarding the legal presumption which supports the complaint.

xxx xxx xxx

13. Bearing in mind the principles for exercise of jurisdiction in a proceeding for quashing, let us now turn to the materials in this case. On careful reading of the complaint and the order passed by the Magistrate, what is discernible is that a possible view is taken that the cheques drawn were, in discharge of a debt for purchase of shares. In any case, when there is legal presumption, it would not be judicious for the quashing Court to carry out a detailed enquiry on the facts alleged, without first permitting the trial Court to evaluate the evidence of the parties. The quashing Court should not take upon itself, the burden of separating the wheat from the chaff where facts are contested. To say it differently, the quashing proceedings must not become an expedition into the merits of factual dispute, so as to conclusively vindicate either the complainant or the defence.

xxx xxx xxx

16. The proposition of law as set out above makes it abundantly clear that the Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal presumption, as in this matter. What is also of note is that the factual defence without having to adduce any evidence need to be of an unimpeachable quality, so as to altogether disprove the allegations made in the complaint.

17. The consequences of scuttling the criminal process at a pre-trial stage can be grave and irreparable. Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process. Also because of the legal presumption, when the cheque and the signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce defence evidence during the trial, to rebut the presumption."

(Emphasis supplied)

185. From the above exposition of law, it is clear that there is no bar for the High Court to invoke the statutory presumption at the stage of deciding the quashing petition in respect to any offence to which such a presumption is applicable. Rather, any failure to give due weightage to the same, may result in dire consequences such as premature quashing of the criminal proceeding or allowing the accused to completely bypass the statutory presumption which otherwise would have been applicable in the trial. In light of our earlier discussion and without again referring to a plethora of decisions in this regard, it is clear how the statutory presumption plays a vital role when it comes to offences such as those under the POCSO.

186. This Court in ***Attorney General*** (supra) specifically held that considering the objects of POCSO, its provisions, more particularly, pertaining to sexual assault etc should be construed *viz-a-viz* the other

provisions of the Act more meaningful and effective. Any selective reference to a particular provision in complete ignorance of the other provision would result in a mutilation of the entire scheme and purport of the legislation and thereby defeat the purpose with which it was enacted. The High Courts as a matter of choice should not shy away from referring to the statutory presumption that has been incorporated in the Act, whilst deciding a quashing petition. The High Courts must not deal with a particular offence under any enactment devoid or in disregard of the rest of the statutory framework, it must recognize and refer to the legislation *in toto*.

187. Otherwise, it would give an undue advantage to an accused by allowing him to mischievously prefer a quashing petition before the trial commences and completely bypass the statutory presumption provided by the legislature and walk right away from the criminal proceedings, thereby setting the entire legislation at naught. It is imperative for the courts to discourage any such attempts on part of the accused to short circuit the statutory provisions and procedure laid in a particular Act and evade trial entirely. In such situations, the statutory presumption becomes all the more important to effectively ensure that criminal process is not manipulated by any devious accused.

188. As has been held in ***Prakash Nath Khanna*** (supra) and ***Rathis Babu Unnikrishnan*** (supra), any defence of the accused for the purpose of rebutting the said statutory presumption should ordinarily be left to the trial court to be looked into at-least when it comes to quashing petitions. Though, in certain exceptional circumstances, the High Court may entertain such defence to quash the criminal proceedings where it appears from the facts itself that the allegations themselves are completely false and bogus and by no stretch of imagination said to be established. But in doing so, the High Court must be slow and circumspect & must exercise some restraint. The statutory presumption may be ignored only where no foundational facts have been established from the material on record.

189. Once the foundational facts are *prima facie* established from the materials on record, it would be improper for the High Court in a quashing petition to conduct an intricate evidentiary inquiry into the facts and ascertain whether the requisite mental elements are present or not. All these aspects should be left to be decided by the trial

court which is the appropriate forum for the evaluation of the same, especially where the statutory presumption has been attracted *prima facie* from the material on record.

190. When the High Court quashes any criminal proceedings without considering the legal effect of the statutory presumption, it effectively scuttles the process of trial and thereby denies the parties the opportunity to adduce appropriate evidence and the right to a fair trial. This would not only defeat the very case of the prosecution but would also thwart the very object of a particular legislation and thereby undermine the public confidence in the criminal justice system.

191. We are conscious of the fact that in ***Noor Aga*** (supra) this Court had held that the statutory presumption under Section 35 of the NDPS Act would only operate in the trial of the accused. However, a close reading of the said decision would reveal that this Court in ***Noor Aga*** (supra) only went so far as to say that before a statutory presumption could be invoked, the foundational facts must have been established by the prosecution. We may at the cost of repetition again reproduce the relevant observations of ***Noor Aga*** (supra) in this regard: -

> *"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.*
>
> (Emphasis supplied)

192. What has been conveyed by this Court in so many words in the aforesaid paragraph of ***Noor Aga*** (supra) is that despite the statutory presumption of culpable mental state, the initial burden to establish the foundational facts will still lie on the prosecution. This Court by no stretch of imagination could be said to have held that the statutory presumption of culpable mental state would only be applicable in trial. Even otherwise, since the decision of ***Noor Aga*** (supra) arose from a criminal appeal against conviction, this Court by no extent had the occasion to examine the applicability of the statutory presumption to proceedings other than the trial and appeal thereof.

193. We are also in *seisin* of the fact that Section 30 sub-section (1) specifically provides that "*the Special Court shall presume the existence of such mental state*". Similarly, Section 30 sub-section (2) also uses the words "Special Court". However, this in no manner can be construed to hold that it is the Special Court alone which has been vested with the power to raise the presumption under Section 30 of the POCSO. We say so, because: -

(i) ***First,*** the use of the words "*the Special Court shall presume the existence of such mental state*" in sub-section (1) and other mention of Special Courts in the provision is only explanatory in nature inasmuch as the legislature has used the said word to only explain how such presumption would ordinarily operate in a trial. It by no stretch can be understood as a bar on the applicability of such presumption to other proceedings, as the said provision does not in any manner delineate or lay down the scope of such presumption and rather only elucidates the nature of the presumption (i.e., presumption of culpable mental state), the manner in which it would operate (i.e., applicable to any offence under the POCSO which requires any culpable mental state) and the standard of proof required to prove anything contrary (i.e., beyond a reasonable doubt). By no means it could be said that the legislature by the use of the words "*Special Court*" in Section 30 of the POCSO intended to curtail the application of the said statutory provision only in trial. Any such interpretation would completely render the other penal provisions meaningless, wherever the accused at the earlier stages moves for a quashing petition.

(ii) ***Secondly,*** the statutory presumption under Section 30 of the POCSO operates or gets attracted not by virtue of the court before which the matter happens to be at, but by the offence itself, for which the legislature specifically provides such presumption in the first place. Since, the presumption in essence is in respect of *mens rea* required for any offence under the POCSO, this presumption is inextricably linked to the offence alone and not the power conferred upon a particular court. This is evinced by Section 30 sub-section (1), more particularly the expression "*In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused*". Furthermore, the aforesaid expression is of wide import and the words "*prosecution for any offence under this Act*" occurring therein would subsume and include any proceeding in respect of an offence under the POCSO would.

(iii) ***Thirdly,*** even otherwise, the mere usage of words "*Special Court*" in the said provision can by no extent defeat or override the inherent powers that have been vested in the High Court by virtue of Section(s) 482 and 530 of the Cr.P.C. and BNSS, respectively.

As such, the statutory presumption envisaged under Section 30 of the POCSO is applicable and can be invoked in any proceeding which involves an offence under the said Act that requires a culpable mental state, irrespective of the court where such proceeding is taking place.

194. It is a settled position of law that a statute is an edict of the legislature, the elementary principle of interpreting or construing a statute is to gather the *mens* or *sententia legis* i.e., the true intention of the legislature. It is trite saying that while interpreting a statute, the courts should strive to ascertain the intention of the Legislature enacting it, and it is the duty of the Courts to accept an interpretation or construction which promotes the object of the legislation and prevents its possible abuse. Thus, we are of the considered view that any other interpretation of the provisions of the POCSO and of the various issues that have been discussed by us in the foregoing paragraphs, would frustrate the very avowed and salutary object of the POCSO and its provisions.

iv. Whether the case at hand was one fit for the High Court to quash?

195. The undisputed facts are that, during investigation two videos depicting children involved in a sexual activity were recovered from the mobile phone of the respondent no. 1. As per the FSL Report, the aforesaid two videos were last modified in the memory of the accused person's phone on 05.09.2016 and 14.06.2019 respectively. The respondent no. 1 himself admitted before the High Court as recorded in the impugned order that he was addicted to watching pornography. In what circumstances such statement come to be recorded by the High court is a mystery. Although, the FIR dated 29.01.2020 alleged offences under Section(s) 14(1) of the POCSO and 67B of the IT Act, yet in the chargesheet, the aforesaid offence under Section 14(1) of the POCSO was substituted and instead offence under Section 15(1) of the POCSO was alleged to have been committed.

196. The High Court in its Impugned Order whilst quashing the criminal proceedings arising out of the aforesaid chargesheet dated 19.09.2023 completely failed to advert to the actual charge that was alleged therein more particularly Section 15 sub-section (1) of the POCSO. Instead, the High Court appears to have just relied upon the FIR and premised its findings on Section 14 of the POCSO, even though the said offence had been dropped in the chargesheet. Thus, there appears to be a serious lapse on part of the High Court in failing to advert to Section 15 of the POCSO especially when the chargesheet had already been filed at the time of passing of the Impugned Order. It is no longer *res-integra* that once the investigation is over and chargesheet is filed, the FIR pales into insignificance. The court, thereafter, owes a duty to look into all the materials collected by the investigating agency in the form of chargesheet.

197. It is no longer *res-integra,* that the High Court in exercise of its inherent powers under Section(s) 482 of the Cr.P.C. or 530 of the BNSS as the case must not conduct a mini trial or go into the truthfulness of the allegations while dealing with a quashing petition. The High Court may be justified in quashing the chargesheet if it appears to it that continuance of criminal proceedings would be nothing but gross abuse of the process of law.

198. In ***R.P. Kapur v. State of Punjab*** reported in **AIR 1960 SC 866**, this Court summarised some categories of cases where inherent power can, and should be exercised to quash the proceedings: -

> *(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;*
>
> *(ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;*
>
> *(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.*

199. This Court in ***State of Haryana v. Bhajan Lal*** reported in **1992 AIR SC 604** held that the power of quashing must be used very sparingly and with circumspection. It must only be used in the rarest of the rare cases. While laying down the principles relating to quashing of criminal proceedings, this Court held that while examining a complaint or FIR, the quashing of which is sought, the Court cannot embark upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or in the complaint. The relevant observations read as under: -

> *"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*
>
> *(1) Where the allegations made in the first information report or the complaint, even if they are taken at their*

face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

200. In ***S.M. Datta v. State of Gujarat*** reported in **(2001) 7 SCC 659** this Court again cautioned that criminal proceedings ought not to be

scuttled at the initial stage. Quashing of a complaint or FIR should rather be an exception and a rarity than an ordinary rule. This Court also held that if a perusal of the first information report leads to disclosure of an offence even broadly, law courts are barred from usurping the jurisdiction of the police, since the two organs of the State operate in two specific spheres of activities and one ought not to tread over the other sphere.

201. In view of the aforesaid consistent line of decisions of this Court, the High Court in our considered view could be said to have committed an egregious error by quashing the criminal proceedings without even properly perusing the chargesheet and the other material on record.

202. The High Court should neither be picky nor remain oblivious in deciding which provision to advert to while considering a quashing petition. When dealing with a quashing petition, there lies a duty on the High Court to properly apply its mind to all the material on record. The least which is expected of High Court in such situation is to carefully go through the allegations contained in the FIR and the charge-sheet, and to ascertain (i) whether, the offences alleged therein could be said to have been *prima facie* established from the material on record? or (ii) whether, apart from the offences alleged in the FIR or the charge-sheet, there is possibility of any other offence *prima facie* being made out? The High Court in exercise of its inherent powers, may be justified in quashing the criminal proceedings only where, neither any offence as alleged in the FIR or charge-sheet is disclosed nor any other offence is *prima facie* made out, and the continuance of the proceedings may be found to amount to abuse of process of law.

203. In the case at hand, there is no dispute by either side that, the two videos infact depicted children in a sexual activity. It is also not the case of the respondent no. 1 that the said videos were not recovered from his mobile phone. In such circumstances, the child pornographic material that was recovered from the personal mobile phone of the accused which was regularly in use by him, *prima facie* establishes the storage or possession of child pornographic material at his hand. Further, since the aforesaid child pornographic material was found to have been stored in the said personal mobile phone since 2016 and 2019, *prima facie* it could be said there was a failure on the part of the respondent no.1 to delete, destroy or report such material.

204. It was also sought to be contended on behalf of the respondent no. 1 that the 2019 Amendment Act whereby and whereunder, the three distinct offences pertaining to the storage or possession of child pornography were made punishable under Section 15 of the POCSO came into force with effect from 16.09.2019. Whereas the both the videos in question had been allegedly stored in the device before the 2019 Amendment Act came into force. Since, the present Section 15(1) of the POCSO was not in operation at the relevant time when the videos were allegedly stored, the respondent no. 1 cannot be punished under the said provision which did not exist at the time of storage of such video.

205. However, we are not impressed with the aforesaid submission. What is sought to be punished under Section 15 is not the time when such material was stored or came to be possessed but rather the storage or possession itself, which may be continuous, wherein the relevant point of time of such storage or possession for constituting any offence under the POCSO more particularly Section 15 would be reckoned from the date of registration of the FIR. In the present case, it is not in dispute that when 2019 Amendment came into force and later when the FIR was registered, the aforesaid two videos were still stored in the mobile phone of the respondent no. 1. In such circumstances, Section 15 sub-section (1) could be said to be *prima facie* attracted.

a. Plea of Ignorance of Law: Ignorance of Law viz-a-viz Incognizance of Law.

206. At this juncture, we may address yet another submission that was canvassed on behalf of the accused as regards the plea of *bona-fide* ignorance of law. It was contended that the accused was not aware of the fact that storing of child-pornography was a punishable offence under Section 15 of POCSO and that the child pornographic material which was found stored in his mobile phone was due to his unawareness of the law accompanied by a *bona-fide* belief that such storage was not an offence, and as such he ought not to be held liable. In this regard, reliance has been placed on two decisions of this Court in ***Chandi Kumar Das Karmarkar*** (supra) and ***Motilal Padampat Sugar Mills*** (supra).

207. In ***Chandi Kumar Das Karmarkar*** (supra), the facts of the case are as follows; there was a civil dispute *inter-alia* between the accused persons therein and the complainant as regards the ownership of a

water tank where fishes had been reared. The complainant therein had acquired possession of the said tank on the strength of an *ex-parte* decree against the accused persons. Eventually, that *ex-parte* decree was set-aside, however the final decision on the title was still pending. Although no application for restitution was preferred yet the accused, due to a *bona-fide* ignorance of law, was under the impression that he had regained possession of the said tank and again started catching fishes in the tank. The complainant lodged an FIR against the accused persons *inter-alia* alleging theft of fish from his tank. The accused therein in his defence pleaded ignorance of law stating that he was unaware that, the said tank and the fishes in that expanse of water under the law continued to be deemed to be the property of the complainant in the absence of any restitution or that the possession of the water reservoir had not reverted back to him. He further pleaded that; he was under a *bona-fide* belief that he had a right of possession of the said tank by virtue of the *ex-parte* decree being set-aside. This Court held that any claim of right due to a *bona-fide* ignorance of law, if reasonable will not constitute an act of theft. It further explained that a claim to such right means one which is not a false pretence but a fair pretence, and not a complete absence of claim but a *bona-fide* claim, however weak. The relevant observations read as under: -

> *"6. The offence of theft consists in the dishonest taking of any moveable property out of the possession of another with his consent. Dishonest intention exists when the person so taking the property intends to cause wrongful gain to himself or wrongful loss to the other. This intention is known as animus furandi and without it the offence of theft is not complete. Fish in their free state are regarded as ferae naturae but they are said to be in the possession of a person who has possession of any expanse of water such as a tank, where they live but from where they cannot escape. Fishes are also regarded as being in the possession of a person who owns an exclusive right to catch them in a particular spot known as a fishery but only within that spot. There can thus be theft of fish from a tank which belongs to another and is in his possession, if the offender catches them without the consent of the owner and without any bona fide claim of right.*

7. Now the ordinary rule that mens rea may exist even with an honest ignorance of law is sometimes not sufficient for theft. A claim of right in good faith, if reasonable saves the act of taking from being theft and where such a plea is raised by the accused it is mainly a question of fact whether such belief exists or not. This court in Criminal Appeal No. 31 of 1961 (Suvvari Sanyasi Apparao v. Boddepalli Lakhminarayana decided on October 5, 1961 observed as follows:

> *"It is settled law that where a bona fide claim of right exists, it can be a good defence to a prosecution for theft. An act does not amount to theft, unless there be not only no legal right but no appearance or colour of a legal right."*

8. By the expression "colour of a legal right" is meant not a false pretence but a fair pretence, not a complete absence of claim put a bona-fide claim, however weak. This Court observed in the same case that the law was stated in 2 East P.C. 659 to be:

> *"If there be in the prisoner any fair pretence of property or right, or if it be brought into doubt at all, the court will direct an acquittal."*

and reffered to 1 Hale P.C. 509 that "the best evidence is that the goods were taken quite openly". The law stated by East and Hale has always been the law on the subject of theft in India and numerous cases decided by Indian Courts are to be found in which these principles have been applied.

Niyogi, J. in his judgment also referred to some of the decisions of the Calcutta High Court and we find ourselves in particular agreement with the following statement of the law in Hamid Ali Bepari v. Emperor :

> *"It is not theft if a person, acting under a mistaken notion of law and; believing that certain property is his and that he has the right to take the same … removes such property from the possession of another."*

(Emphasis supplied)

208. In ***Motilal Padampat Sugar Mills*** (supra) the State Government therein had framed a policy for grant of sales tax exemption to new industrial units in the State. On the basis of the said policy, the appellant therein set-up an industrial unit and approached the State Government for claiming the exemption. The State Government informed him that he would be granted only partial concession in sales tax, to which the appellant was agreeable. However, subsequently, the State having second thoughts, rescinded the concession which was being granted to the appellant. Aggrieved by which the appellant preferred a writ petition claiming exemption from sale tax as per the policy. However, the State Government in response submitted that the appellant therein by accepting a partial concession on sales tax had waived its right to claim full exemption. This Court rejecting the said plea of waiver and estoppel held that, the appellant therein was unaware about the policy and the extent of the exemption in sales tax under the law. Thus, the appellant due to the ignorance of law had a *bona-fide* belief that the policy only provided for a partial concession rather than a complete exemption. This Court observed that it cannot be presumed that the appellant was fully informed about the policy and that he had waived or abandoned his right with full knowledge of the said policy. It further observed that often the maxim "*ignorantia juris non excusat*" i.e., "ignorance of the law is no excuse" is often misconstrued to mean that everyone is presumed to know the law. Accordingly, this Court rejecting the plea of promissory estoppel held that due to the ignorance of law on the part of the appellant, it cannot be said that he had full knowledge of its right to exemption so as to waive or abandon the same. The relevant observations read as under: -

> *"6. [...] The claim of the appellant to exemption could be sustained only on the doctrine of promissory estoppel and this doctrine could not be said to be so well defined in its scope and ambit and so free from uncertainty in its application that we should be compelled to hold that the appellant must have had knowledge of its right to exemption on the basis of promissory estoppel at the time when it addressed the letter dated June 25, 1970. In fact, in the petition as originally filed, the right to claim total exemption from Sales Tax was not based on the plea of promissory estoppel which was introduced only by way of*

amendment. Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that everyone is presumed to know the law, but that is not a correct statement : there is no such maxim known to the law. Over a hundred and thirty years ago, Maule, J., pointed out in Martindale v. Falkner:

> *"There is no presumption in this country that every person knows the law : it would be contrary to common sense and reason if it were so."*

Scrutton, L.J., also once said:

> *"It is impossible to know all the statutory law, and not very possible to know all the common law."*

But it was Lord Atkin who, as in so many other spheres, put the point in its proper context when he said in Evans v. Bartlam

> *"… the fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application."*

It is, therefore, not possible to presume, in the absence of any material placed before the Court, that the. appellant had full knowledge of its right to exemption so as to warrant an inference that the appellant waived such right by addressing the letter dated June 25, 1970. We accordingly reject the plea of waiver raised on behalf of the State Government.

(Emphasis supplied)

209. Thus, from the aforesaid, we are of the considered view that the reliance on the part of the accused on the two decisions of this Court in ***Chandi Kumar Das Karmarkar*** (supra) and ***Motilal Padampat Sugar Mills*** (supra) is completely misplaced. In ***Chandi Kumar Das Karmarkar*** (supra) the question before this Court was whether the accused therein due to the ignorance of law could be said to have a *bona-fide* belief of a right or claim to possession of the fish tank or in other words whether a plea of ignorance is a valid defence to any acts done pursuant to a *bona-fide* belief of existence of a right

under the mistaken notion of law. Whereas in ***Motilal Padampat Sugar Mills*** (supra) the issue for consideration before this Court was whether the appellant therein due to the ignorance of law could be said to have wilfully waived his right, or in other words whether a plea of ignorance is a valid defence to any promissory estoppel to a right.

210. Thus, both the aforesaid decisions in ***Chandi Kumar Das Karmarkar*** (supra) ***Motilal Padampat Sugar Mills*** (supra) are not applicable. We say so, because this Court in the aforesaid decisions has only gone so far as to say that a plea of ignorance of law can be used as a valid defence for either showing that the purported act was done or not done (as the case may be) due to a consequent *bona-fide* belief as to the existence of such a right or claim. In other words, a plea of ignorance of law can be a valid defence if it consequently gives rise to a legitimate and *bona-fide* mistake of fact as to the existence (or non-existence) of a particular right or claim.

211. This may be better understood through a four-prong test wherein for a valid defence, there must exist **(1)** an ignorance or unawareness of any law and **(2)** such ignorance or unawareness must give rise to a corresponding reasonable and legitimate right or claim **(3)** the existence of such right or claim must be believed *bonafide* and **(4)** the purported act sought to be punished must take place on the strength of such right or claim. It is only when all the four of the above conditions are fulfilled, that the person would be entitled to take a plea of ignorance of law as a defence from incurring any liability.

212. As held in ***Chandi Kumar Das Karmarkar*** (supra) a plea of ignorance of law is a valid defence only to the acts said to have been done on the basis of a right or a claim, the existence of which was *bona-fidely* believed or entertained on the basis of ignorance of law or mistaken notion of law. Thus, for a plea of ignorance of law, the ignorance or mistake of law must be such which legitimately gives rise to a *bona-fide* belief of the existence of a right or a claim, and the said person commits any act on the strength of such right or claim. This is fortified from the following observation "*A claim of right in good faith, if reasonable saves the act [...] where such a plea is raised*" in paragraph 7 of ***Chandi Kumar Das Karmarkar*** (supra). Thus, a plea of ignorance of law is only valid for the defence of a *bona-fide* claim of right and any acts done thereunder. As such, where a person

commits any act on the assertion of a right, the existence of which was *bona-fidely* believed due to a mistaken notion of law, such person will not be liable due to the honest but mistaken factum of such right or claim stemming from or accompanied by ignorance of law.

213. Similarly, in ***Motilal Padampat Sugar Mills*** (supra) this Court only held that a plea of ignorance of law may be a valid defence for *bona-fidely* believing the existence of a wrong or incorrect right i.e., the right to only a partial concession of sale tax exemption. Accordingly, this Court held that where a person due to ignorance of law was not fully informed about a particular right, there can be no waiver of such right unless it is shown that such person was indeed aware of the said right.

214. Thus, the aforesaid decisions of this Court in ***Chandi Kumar Das Karmarkar*** (supra) ***Motilal Padampat Sugar Mills*** (supra) are distinguishable for the simple reason that storage or possession of child pornographic material cannot be equated or traced to any right or assertion even if it was a mistaken one. Even if a person is unaware that the possession or storage of such material is punishable, it by no stretch can be considered to give rise to any right or assertion as there exists no such right to either store or possess such material, and thus it is not a valid defence. We say so because, no person of an ordinary prudent mind with the same degree of oblivion or unawareness as to the law, more particularly Section 15 of POCSO could as a natural corollary be led to a belief of existence of a right to store or possess any child pornographic material. The ignorance or unawareness must have a reasonable nexus with the right or assertion claimed i.e., the ignorance or unawareness must be such which could legitimately and reasonably give rise to a corresponding right or claim the and the existence of which must be *bona-fidely* believed. Otherwise, anyone could make a bald or blanket claim of having a *bonafide* belief of any right to wriggle out of any liability arising out of its actions on the touchstone of unawareness of any particular law. Thus, even if the accused was unaware about Section 15 of POCSO, this by itself does not give rise to a corresponding legitimate or reasonable ground to believe that there was any right to store or possess child pornographic material. As such the four-prong test is not fulfilled and the defence of ignorance of law by the accused must fail.

215. Even otherwise, one must be mindful to the fact that such a plea is not a statutory defence with any legal backing, but rather a by-product of the doctrine of equity. Whether such a defence is to be accepted or not, largely depends upon the extant of equity in the peculiar facts and circumstances of each individual cases. It is an equally settled cannon of law that equity cannot supplant the law, equity has to follow the law if the law is clear and unambiguous.

216. This Court in ***National Spot Exchange Ltd. v. Anil Kohli, Resolution Professional for Dunar Foods Ltd.*** reported in **(2022) 11 SCC 761** after referring to a catena of its other judgments, had held that where the law is clear the consequence thereof must follow. The High Court has no option but to implement the law. The relevant observations made in it are being reproduced below: -

> *"15.1. In Mishri Lal [BSNL v. Mishri Lal, (2011) 14 SCC 739 : (2014) 1 SCC (L&S) 387], it is observed that the law prevails over equity if there is a conflict. It is observed further that equity can only supplement the law and not supplant it.*
>
> *15.2. In Raghunath Rai Bareja [Raghunath Rai Bareja v. Punjab National Bank, (2007) 2 SCC 230] , in paras 30 to 37, this Court observed and held as under : (SCC pp. 242-43)*
>
> > *"30. Thus, in Madamanchi Ramappa v. Muthaluru Bojjappa [AIR 1963 SC 1633] (vide para 12) this Court observed: (AIR p. 1637)*
> >
> > > *'12. … [W]hat is administered in Courts is justice according to law, and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law.'*
> >
> > *31. In Council for Indian School Certificate Examination v. Isha Mittal [(2000) 7 SCC 521] (vide para 4) this Court observed: (SCC p. 522)*
> >
> > > *'4. … Considerations of equity cannot prevail and do not permit a High Court to pass an order contrary to the law.'*

32. Similarly, in P.M. Latha v. State of Kerala [(2003) 3 SCC 541 : 2003 SCC (L&S) 339] (vide para 13) this Court observed: (SCC p. 546)

> *'13. Equity and law are twin brothers and law should be applied and interpreted equitably but equity cannot override written or settled law.'*

33. In Laxminarayan R. Bhattad v. State of Maharashtra [(2003) 5 SCC 413] (vide para 73) this Court observed: (SCC p. 436)

> *'73. It is now well settled that when there is a conflict between law and equity the former shall prevail.'*

34. Similarly, in Nasiruddin v. Sita Ram Agarwal [(2003) 2 SCC 577] (vide para 35) this Court observed: (SCC p. 588)

> *'35. In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom.'*

35. Similarly, in E. Palanisamy v. Palanisamy [(2003) 1 SCC 123] (vide para 5) this Court observed: (SCC p. 127)

> *'5. Equitable considerations have no place where the statute contained express provisions.'*

36. In India House v. Kishan N. Lalwani [(2003) 9 SCC 393] (vide para 7) this Court held that: (SCC p. 398)

> *'7. ... The period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from for equitable considerations.'..."*

(Emphasis supplied)

217. Unawareness or incognizance of law should not be conflated with ignorance of law. This Court in ***Motilal Padampat Sugar Mills*** (supra) duly acknowledged that a plea of unawareness of law is

fundamentally different in scope and application from the rule that ignorance of the law does not excuse anyone. The former as explained above, is a byproduct of the doctrine of equity whereas the latter is a cardinal rule of criminal jurisprudence and no person can claim to be absolved of any criminal offence or liability on a plea of ignorance of law. Thus, where something is specifically made punishable under the law, then in such cases the law would prevail over equity, and no plea of ignorance of law can be taken as a defence to absolve or dilute any liability arising out of such punishable offences. Thus, even if all four preconditions are satisfied, the courts are not bound to accept such a plea, if it is in negation or derogation of any law or the idea of justice.

218. Equity modifies the applicable law or ensures its suitability to address the particular circumstances before a court to produce justice. The modification of general rules to the circumstances of the case is guided by equity, not in derogation or negation of positive law, but in addition to it. It supplements positive law but does not supplant it. In a second sense however, where positive law is silent as to the applicable legal principles, equity assumes a primary role as the source of law itself. Equity steps in to fill the gaps that exist in positive law. Thus, where no positive law is discernible, courts turn to equity as a source of the applicable law. However, where positive law exists, equity will always yield to it. [See ***M. Siddiq v. Mahant Suresh Das***, reported in **2020 1 SCC 1**]

219. It was further contended by the respondent no. 1 that although the said child pornographic material was found stored in his mobile phone, yet he had no knowledge of the same. He would submit that, the aforesaid videos that were found stored in his mobile as revealed by the FSL Report had been automatically downloaded into his mobile phone without his knowledge or volition.

220. Even, assuming that the respondent no. 1 did not actually store the aforesaid two videos in his mobile phone, and that he had no knowledge of the existence of those videos, nonetheless, the aforesaid aspect cannot be looked into by us at the stage of quashing, more particularly while deciding whether a *prima-facie* case is said to be made out. Even otherwise, since the material on record adduced by the prosecution clearly establishes the possession or storage of child pornographic material and the failure on the part of the respondent

no. 1 in deleting, destroying or reporting the same, the foundational facts necessary to invoke the statutory presumption of culpable mental state could be said to have been *prima facie* established.

221. In view of the statutory presumption of culpable mental state being attracted, any defence of the respondent no. 1 such as the absence of knowledge or intention would be a matter of trial. Absence of culpable mental state has to be established before the trial court by leading cogent evidence in that regard. Such defences should not be looked into by us at this stage. All that should be ascertained is whether a *prima facie* case is said to have been made out.

v. Summary of our conclusion

222. We summarize our final conclusion as under: -

(I) Section 15 of the POCSO provides for three distinct offences that penalize either the storage or the possession of any child pornographic material when done with any particular intention specified under sub-section(s) (1), (2) or (3) respectively. It is in the nature and form of an inchoate offence which penalizes the mere storage or possession of any pornographic material involving a child when done with a specific intent prescribed thereunder, without requiring any actual transmission, dissemination etc.

(II) Sub-section (1) of Section 15 penalizes the failure to delete, destroy or report any child pornographic material that has been found to be stored or in possession of any person with an intention to share or transmit the same. The *mens-rea* or the intention required under this provision is to be gathered from the *actus reus* itself i.e., it must be determined from the manner in which such material is stored or possessed and the circumstances in which the same was not deleted, destroyed or reported. To constitute an offence under this provision the circumstances must sufficiently indicate the intention on the part of the accused to share or transmit such material.

(III) Section 15 sub-section (2) penalizes both the actual transmission, propagation, display or distribution of any child pornography as-well as the facilitation of any of the abovementioned acts. To constitute an offence under Section 15 sub-section (2) apart from the storage or possession of

such pornographic material, there must be something more to show i.e., either **(I)** the actual transmission, propagation, display or distribution of such material **OR (II)** the facilitation of any transmission, propagation, display or distribution of such material, such as any form of preparation or setup done that would enable that person to transmit it or to display it. The *mens rea* is to be gathered from the manner in which the pornographic material was found to be stored or in possession and any other material apart from such possession or storage that is indicative of any facilitation or actual transmission, propagation, display or distribution of such material.

(IV) Section 15 sub-section (3) penalizes the storage or possession of any child pornographic material when done for any commercial purpose. To establish an offence under Section 15 sub-section (3), besides the storage or possession of the pornographic material involving a child, there must be some additional material or attending circumstances that may sufficiently indicate that the said storage or possession was done with the intent to derive any gain or benefit. To constitute an offence under sub-section (3) there is no requirement to establish that such gain or benefit had been actually realized.

(V) Sub-section(s) (1), (2) and (3) respectively of Section 15 constitute independent and distinct offences. The three offences cannot coexist simultaneously in the same set of facts. They are distinct from each other and are not intertwined. This is because, the underlying distinction between the three sub-sections of Section 15 lies in the varying degree of culpable *mens rea* that is required under each of the three provisions.

(VI) The police as well as the courts while examining any matter involving the storage or possession of any child pornography, finds that a particular sub-section of Section 15 is not attracted, then it must not jump to the conclusion that no offence at all is made out under Section 15 of the POCSO. If the offence does not fall within one particular sub-section of Section 15, then it must try to ascertain whether the same falls within the other sub-sections or not.

(VII) Any act of viewing, distributing or displaying etc., of any child pornographic material by a person over the internet without

any actual or physical possession or storage of such material in any device or in any form or manner would also amount to 'possession' in terms of Section 15 of the POCSO, provided the said person exercised an invariable degree of control over such material, by virtue of the doctrine of constructive possession.

(VIII) Any visual depiction of a sexually explicit act which any ordinary person of a prudent mind would reasonably believe to *prima facie* depict a child or appear to involve a child, would be deemed as 'child pornography' and the courts are only required to form a *prima facie* opinion to arrive at the subjective satisfaction that the material appears to depict a child from the perspective of any ordinary prudent person for any offence under the POCSO that relates to child pornographic material, such as Section 15. Such satisfaction may be arrived at from any authoritative opinion like a forensic science laboratory (FSL) report of such material or opinion of any expert on the material in question, or by the assessment of such material by the courts themselves.

(IX) Section 67B of the IT Act is a comprehensive provision designed to address and penalize the various electronic forms of exploitation and abuse of children online. It not only punishes the electronic dissemination of child pornographic material, but also the creation, possession, propagation and consumption of such material as-well as the different types of direct and indirect acts of online sexual denigration and exploitation of the vulnerable age of children. Section(s) 67, 67A and 67B respectively of the IT Act being a complete code, ought to be interpreted in a purposive manner that suppresses the mischief and advances the remedy and ensures that the legislative intent of penalizing the various forms of cyber-offences relating to children and the use of obscene / pornographic material through electronic means is not defeated by a narrow construction of these provisions.

(X) The statutory presumption of culpable mental state on the part of the accused as envisaged under Section 30 of the POCSO can be made applicable provided the prosecution is able to establish the foundational facts necessary to constitute a particular offence under the POCSO that may have been alleged against the accused. Such presumption can be

rebutted by the accused either by discrediting the prosecution's case or by leading evidence to prove the contrary, beyond a reasonable doubt.

(XI) The foundational facts necessary for the purpose of invoking the statutory presumption of culpable mental state for an offence under Section 15 of POCSO are as follows: -

(a) For the purpose of sub-section (1), the necessary foundational facts that the prosecution may have to first establish is the storage or possession of any child pornographic material and that the person accused had failed to delete, destroy or report the same.

(b) In order to invoke the statutory presumption of culpable mental state for an offence under sub-section (2) the prosecution would be required to first establish the storage or possession of any child pornographic material, and also any other fact to indicate either the actual transmission, propagation, display or distribution of any such material or any form of an overt act such as preparation or setup done for the facilitation of the transmission, propagation, display or distribution of such material, whereafter it shall be presumed by the court that the said act was done with the intent of transmitting, displaying, propagating or distributing such material and that the said act(s) had not been done for the purpose of either reporting or for use as evidence.

(c) For the purpose of sub-section (3) the prosecution must establish the storage or possession of such material and further prove any fact that might indicate that the same had been done to derive some form of gain or benefit or the expectation of some gain or benefit.

(XII) The statutory presumption of culpable mental under Section 30 of POCSO can be made applicable in a quashing proceeding pertaining to any offence under the POCSO.

F. FEW MEANINGFUL SUGGESTIONS.

223. Before, we close this matter, we must address ourselves on a very important aspect, as regards the need to effectively address the growing number of dissemination and use of child pornography.

i. The Lingering Impact of Child Pornography on the Victimization & Abuse of Children.

224. A child's victimization begins with the sexual act, continues through its recording, and perpetuates as photographs and videos that float through cyberspace, freely accessible to anyone who has the ability to surf the internet.[1] Child sexual exploitation is one of the most heinous crimes imaginable, and the offence of Child Pornography is equally as heinous, if not more, as in the latter the victimization and exploitation of the child does not end with the initial act of abuse.[2] The creation or dissemination of such pornographic material further extends and compounds the harm infinitely and at a far larger scale.[3] It in essence turns the singular incident of an abuse into a ripple of trauma inducing acts where the rights and dignity of the child is continuously violated each time such material is viewed or shared. This is why it is imperative that we collectively as a society address this issue with the utmost seriousness.

225. The impact of such continuous victimization is profound. Any act of sexual abuse inherently inflicts lasting physical and emotional trauma on the child. However, the dissemination of this act of abuse through pornographic material further accentuates and deepens the trauma into a psychological scar. The knowledge that their abuse is being watched by countless strangers, sometimes years after the actual event, exacerbates the psychological wounds on top of the trauma that was already induced by the act in the first place.[4] This perpetuating violation deprives the victim of any remaining hope or chance to heal, recover from the abuse and find closure. [5]

226. One must also be mindful of the fact that the term "child pornography" is a misnomer that fails to capture the full extent of the crime. It is important to recognize that each case of what is traditionally termed

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1 Eva J. Klain, Heather J Davies, Molly A. Hicks Et. Al., Child Pornography: The Criminal Justice-System Response, 8 (Penn State University Press, 2001).

2 Philip Jenkins, Beyond Tolerance: Child Pornography on the Internet (New York University Press, 2003)

3 Burgess, Ann W. & C.R. Hartman, *Child Abuse Aspects of Child Pornography*, 7 Psychiatric Annals, 248 (1987).

4 Audrey Rogers, *The Dignity Harm of Child Pornography – From Producers to Possessors,* in Carissa Byrne Hessick (Eds.), Refining Child Pornography Law – Crime, Language and Social Consequences (University of Michigan Press, 2016).

5 Tali Gal, Child Victims and Restorative Justice – A Needs Rights Model, 17 (Oxford University Press, 2011)

"child pornography" involves the actual abuse of a child. The use of the term "child pornography" can lead to a trivialization of the crime, as pornography is often seen as a consensual act between adults. It undermines the victimization because the term suggests a correlation to pornography — conduct that may be legal, whose subject is voluntarily participating in, and whose subject is capable of consenting to the conduct.[6]

227. The term "child sexual exploitation and abuse material" or "CSEAM" more accurately reflects the reality that these images and videos are not merely pornographic but are records of incidents, where a child has either been sexually exploited and abused or where any abuse of children has been portrayed through any self-generated visual depiction.[7]

228. The term "child sexual exploitation and abuse material" (CSEAM) rightly places the emphasis on the exploitation and abuse of the child, highlighting the criminal nature of the act and the need for a serious and robust response. We are conscious that in the preceding parts of this judgment, we have used the term "child pornography", however the same has been done only for the purposes of giving a better understanding of the nuances involved in the present matter. We further forbid the courts from using the term "child pornography" and instead the term "child sexual exploitation and abuse material" (CSEAM) should be used in judicial orders and judgements of all courts across the country.

229. Although, there exists a tangible difference between the act of viewing CSEAM and the act of engaging in sexual abuse of children, yet the latter desire is always inherent in the former.[8] Both the use of CSEAM and the act of child sexual abuse share a common, malevolent intent:

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6 Jonah R. Rimmer, Child Sexual Exploitation, (Oxford Research Encyclopaedia Criminology, 2024).

7 Mary Graw Leary, *The Language of Child Sexual Abuse and Exploitation,* in Carissa Byrne Hessick (Eds.), Refining Child Pornography Law – Crime, Language and Social Consequences (University of Michigan Press, 2016); *see also,* Danijela Frangež, Anton Toni Klančnik, Mojca Žagar Karer Et. Al., The Importance of Terminology Related to Child Sexual Exploitation, 66(4) Rev. za. Krim. Kriminol. 291 (2015); *see also,* Kathryn C. Seigfried Spellar & Virginia Soldino, *Child Sexual Exploitation: Introduction to a Global Problem,* in Thomas J. Holt & Adam M. Bossler (Eds.), The Palgrave Handbook of International Cybercrime and Cyberdeviance, (Palgrave Macmillian, Cham, 2020)

8 Vaughn I. Rickert & Owen Ryan, *Is the Internet the Source?,* 40 J. Adolesc. Health 104 (2007); s*ee also,* Dr. Ethel Quayle, *Assessment issues with young people who engage in problematic sexual behaviour through the Internet,* in M.C. Calder (Ed.), New Developments with young people who sexually abuse (Russel House Publishing, Lyme Regis, UK, 2007).

the exploitation and degradation of a child for the sexual gratification of the abuser. The production of child sexual exploitative material is inherently linked to the act of sexual abuse. In both cases, the intent is clear: to sexually exploit and harm a child. The creation of such material is not a passive act but a deliberate one, where the abuser intentionally engages in the exploitation of a child, knowing full well the harm it causes.[9]

230. This intent is what makes these crimes particularly heinous. The abuser is not only violating the child's body but is also reducing them to an object for their own gratification, with little regard for the child's dignity or well-being. This dehumanization is evident in the production and distribution of CSEAM, where the child is treated not as a person but as a commodity to be consumed. Those who consume such material may develop an increased desire to engage in further acts of child exploitation. The viewing of CSEAM can desensitize individuals to the horrors of child abuse, leading them to seek out more extreme forms of exploitation or even to commit acts of abuse themselves.[10]

231. Moreover, the demand for such material will always incubate a corresponding production and distribution of CSEAM.[11] Abusers may be motivated to create and distribute these materials to satisfy the demand, leading to the abuse of more children.[12] This cycle of abuse and exploitation underscores the need for stringent measures to not only punish those who create and distribute CSEAM but also to deter potential consumers and reduce the demand for such material.

232. Child sexual exploitative material is deeply degrading to the dignity of children. It reduces them to objects of sexual gratification, stripping them of their humanity and violating their fundamental rights. Children are entitled to grow up in an environment that respects their dignity and protects them from harm. However, CSEAM violates this right in the most egregious manner possible.

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9 Matthew L Long, Laurence A. Alison & Michelle A McManus, *Child pornography and likelihood of contact abuse: a comparison between contact child sexual offenders and noncontact offenders,* 25(4) Sex Abuse, 370 (2013).

10 Dr. Ethel Quayle Et. Al., *The role of sexual images in online and offline sexual behaviour with minors,* 17(6) Curr. Psychiatry Rep. 1 (2019).

11 Melissa Hamilton, *The Child Pornography Crusade and Its Net- Widening Effect*, 33 Cardozo L. Rev. 1694 (2012).

12 Esposito & Lesli C., *Regulating the Internet: The Battle Against Child Pornography,* 30 Casew. Res. J. Int'l. L. 5 (1998).

233. The existence and circulation of CSEAM are affronts to the dignity of all children, not just the victims depicted in the material. It perpetuates a culture in which children are seen as objects to be exploited, rather than as individuals with their own rights and agency. This dehumanization is particularly dangerous because it can lead to a broader societal acceptance of child exploitation, further endangering the safety and well-being of children.[13]

234. Given the severity and far-reaching consequences of child sexual exploitation, there is a clear legal and moral imperative to take strong action against those who produce, distribute, and consume CSEAM. This includes not only criminal penalties for those involved in CSEAM but also preventative measures, such as education and awareness campaigns. Laws must be robust and strictly enforced to ensure that perpetrators are brought to justice and that children are protected from further harm. The courts ought to be loathe in showing any form of leniency in such matters.[14]

235. The impact of CSEAM on its victims is devastating and far-reaching, affecting their mental, emotional, and social well-being. Victims of such heinous exploitation often endure profound psychological trauma that can manifest as depression, anxiety, and post-traumatic stress disorder (PTSD).[15] The relentless reminder that images and videos of their abuse are circulating online can lead to a persistent sense of victimization and helplessness, further exacerbating feelings of shame, guilt, and worthlessness. This awareness can make it highly challenging for victims to move forward, as the fear of being recognized and judged by others remains ever-present.[16]

236. In our society, where social stigma and notions of honour and shame are deeply entrenched, the social repercussions for victims are particularly severe. Many victims face intense social stigmatization and isolation, finding it difficult to form and maintain healthy

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13 Jason S. Carrol Et Al., *Generation XXX, Pornography Acceptance and Use Among Emerging Adults,* 23 J. Adolescent Res. 6 (2008).

14 Clare McGlynn & Dr. Hannah Bows, *Possessing Extreme Pornography: policing, prosecutions and the need for reform,* 83(6) J. Crim. Law., 473 (2019).

15 Dr. Ethel Quayle, Lars Loof and Tink Palmer, Child Pornography and Sexual Exploitation of Children Online, 64 (ECPAT International, 2008).

16 *See,* Michael C. Seto, Kailey Roche, Nicole C Rodrigues Et. Al., *Evaluating Child Sexual Abuse Perpetration Prevention Efforts: A Systematic Review,* 33 J. Child Sex. Abus. 22 (2024).

relationships due to trust issues and trauma-related challenges. The stigma attached to being a victim of CSEAM can create significant barriers in social interactions, causing victims to withdraw and feel alienated from their communities. The continuous re-victimization through the sharing and viewing of these materials perpetuates the victims' suffering. Each instance of someone viewing or distributing the material represents a new violation, making it harder for victims to heal. This ongoing trauma can severely impact their self-esteem and self-worth, leading to long-term emotional and psychological damage. Furthermore, the impact extends to their education and employment opportunities. Many victims struggle to concentrate on their studies or work due to the overwhelming emotional burden they carry. This can lead to academic underachievement, difficulty in securing employment, and economic hardships, compounding their sense of insecurity and instability.[17]

237. Providing compassionate and comprehensive support is crucial to help victims heal and reclaim their lives. Therapeutic interventions, including trauma-informed counselling and support groups, can offer a safe space for victims to process their experiences and begin to heal. Legal and social support services are also essential to help victims navigate the complexities of their situation and rebuild their lives.

238. In India, the misconceptions about sex education are widespread and contribute to its limited implementation and effectiveness. Many people, including parents and educators, hold conservative views that discussing sex is inappropriate, immoral, or embarrassing. This societal stigma creates a reluctance to talk openly about sexual health, leading to a significant knowledge gap among adolescents.

239. One prevalent misconception is that sex education encourages promiscuity and irresponsible behaviour among youth. Critics often argue that providing information about sexual health and contraception will lead to increased sexual activity among teenagers. However, research has shown that comprehensive sex education actually delays the onset of sexual activity and promotes safer practices among those who are sexually active.[18]

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17 Paul G. Cassel, James Marsh & Jeremy M. Christiansen, *The Case for Full Restitution for Child Pornography Victims,* 82 Geo. Wash. L. Rev. 61 (2013).

18 Padminin Iyer & Peter Aggleton, *Seventy years of sex education – A Critical Review,* 74(1) Health Educ.

240. Another common belief is that sex education is a Western concept that does not align with traditional Indian values. This view has led to resistance from various state governments, resulting in bans on sex education in schools in some states. This type of opposition hinders the implementation of comprehensive and effective sexual health programs, leaving many adolescents without accurate information. This is what causes teenagers and young adults to turn to the internet, where they have access to unmonitored and unfiltered information, which is often misleading and can plant the seed for unhealthy sexual behaviours.

241. Additionally, there is a misconception that sex education only covers biological aspects of reproduction. Effective sex education encompasses a wide range of topics, including consent, healthy relationships, gender equality, and respect for diversity. Addressing these topics is crucial for reducing sexual violence and promoting gender equity.

242. Despite some of these challenges, there are successful sex education programs in India, such as the Udaan program in Jharkhand. This program's success highlights the importance of community involvement, transparency, and government support in overcoming resistance and creating a supportive environment for sex education.[19]

243. Positive age-appropriate sex education plays a critical role in preventing youth from engaging in harmful sexual behaviours, including the distribution, and viewing of CSEAM.[20] Positive sex education focuses on providing accurate, age-appropriate information about sexuality, consent, and respectful relationships. Research indicates that comprehensive sex education can significantly reduce risky sexual behaviours, increase knowledge, enable healthy decision-making, reduce misinformation, delay sexual debut, decrease the number of sexual partners, and increase contraceptive use. The research done in India has shown the need for comprehensive sex education programs. A study of over 900 adolescents in Maharashtra

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J. 3 (2015).

19 *See,* the Udaan Adolescent Education Program by the Centre for Catalyzing Change in Jharkhand in India.

20 Cortney Lollar, Child Pornography and the Restitution Revolution, 103 J. Crim. L. & Criminology 343 (2013).

found that students not exposed to scientific literature on reproductive and sexual health were more likely to initiate sex early.[21]

244. Furthermore, positive sex education promotes healthy attitudes towards sexuality and relationships, which can counteract the distorted perceptions often associated with the consumption of child pornography. It can also help foster greater empathy and respect for others, reducing the likelihood of engaging in exploitative behaviours. Comprehensive sex education programs also teach youth about the importance of consent and the legal implications of sexual activities, helping them understand the severe consequences of viewing and distributing child pornography.

245. It is of paramount importance that we begin to address misconceptions around sexual health, and promoting a comprehensive understanding of sex education's benefits is essential for improving sexual health outcomes and reducing the incidence of sexual crimes in India. This is especially crucial given India's growing population.

246. Section 43 of the POCSO obligates the Central Government and the State Government to undertake measures and ensure that the provisions of the said Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the legislation. It further requires the appropriate government to also impart proper training at tegular intervals to all government offices such as police on the implementation of the provisions of this Act. The relevant provision reads as under: -

> *"**43. Public awareness about Act.—***
>
> *The Central Government and every State Government, shall take all measures to ensure that—*
>
> *(a) the provisions of this Act are given wide publicity through media including the television, radio and the print media at regular intervals to make the general public, children as well as their parents and guardians aware of the provisions of this Act;*

21 Jagdish Khubchandani, Jeffrey Clark & Raman Kumar, *Beyond Controversies: Sexuality Education for Adolescents in India*, 3(3) J. Family Med. Prim. Care. 175 (2014).

(b) the officers of the Central Government and the State Governments and other concerned persons (including the police officers) are imparted periodic training on the matters relating to the implementation of the provisions of the Act."

247. Section 44 of the POCSO on the other hand obligates the National Commission for Protection of Child Rights and the State Commission for Protection of Child Rights constituted under the Act to regularly monitor and assist in the implementation of the provisions of this Act. The relevant provision reads as under: -

"44. Monitoring of implementation of Act.—

(1) The National Commission for Protection of Child Rights constituted under section 3, or as the case may be, the State Commission for Protection of Child Rights constituted under section 17, of the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) shall, in addition to the functions assigned to them under that Act, also monitor the implementation of the provisions of this Act in such manner as may be prescribed.

(2) The National Commission or, as the case may be, the State Commission, referred to in sub-section (1), shall, while inquiring into any matter relating to any offence under this Act, have the same powers as are vested in it under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006).

(3) The National Commission or, as the case may be, the State Commission, referred to in sub-section (1), shall, also include, its activities under this section, in the annual report referred to in section 16 of the Commissions for Protection of Child Rights Act, 2005 (4 of 2006)."

248. We are of the considered view that the obligation of the appropriate government and the commission under Section(s) 43 and 44 of the POCSO respectively, does not end at just spreading awareness about the provisions of the POCSO. Since, one of the salutary and avowed object of the POCSO was the deterrence of offences of child sexual abuse and exploitation, thus, as a natural corollary, the obligation of the appropriate government and the commission under

the aforesaid provisions will also entail imparting of sex education and awareness amongst the general public, children as well as their parents and guardians, particularly in schools and places of education. The steps and efforts of the appropriate government and the commission towards the compliance of Section(s) 43 and 44 must go beyond just the textual wording of the said provisions and ought to earnestly take into account the pragmatic necessities for curtailing the issue of child abuse, exploitation and addiction to pornography.

249. Ultimately, it is our collective responsibility to ensure that victims of child pornography receive the care, support, and justice they deserve. By fostering a compassionate and understanding society, we can help them find their path to recovery and regain a sense of safety, dignity, and hope. This includes changing societal attitudes towards victims, improving legal frameworks to protect them, and ensuring that perpetrators are held accountable.

a. Obligation to report under Section(s) 19 & 20 respectively of the POCSO and Role of the Society and all Stakeholders.

250. Section 19 read with 20 & 21 of the POCSO is one such step towards recognizing this collective responsibility of the society in curtailing the issue of abuse and exploitation of children. Section 19 places an obligation on any person who has an apprehension that an offence under POCSO is likely to be committed or has knowledge that such an offence has been committed, to report and provide information about the same to the Special Juvenile Police Unit or the local police. Section 19 further delineates the process and procedure in which such information or report has to be recorded by the authorities, and the course of action to be adopted. Section 20 extends such obligation to any and all personnel of media, hotels, hospitals, clubs or studios etc., to mandatorily report and provide information about any material or object which is sexually exploitative of a child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium to the authorities mentioned above. Any failure to do so, either in terms of Section 19 or 21 of POCSO shall be liable to be punished with imprisonment upto 6-months or fine or both. Further, any failure on the part of any employer or supervisor in reporting the commission of any offence or its apprehension in respect of a subordinate under his control, will also be liable to be punished with imprisonment which may extend to 1-year and also fine. The relevant provisions read as under: -

*"**19. Reporting of offences.—***

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of1974) any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,—

(a) the Special Juvenile Police Unit; or

(b) the local police.

(2) Every report given under sub-section (1) shall be —

(a) ascribed an entry number and recorded in writing;

(b) be read over to the informant;

(c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection including admitting the child into shelter home or to the nearest hospital within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been

designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

20. Obligation of media, studio and photographic facilities to report cases.—

Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.

21. Punishment for failure to report or record a case.— *(1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.*

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions of sub-section (1) shall not apply to a child under this Act."

251. Thus, it is evident that, to achieve the avowed purpose, a legal obligation has been imposed under the POCSO Act on any person to report an offence to the relevant authorities specified therein if they have knowledge that an offence under the Act has been committed. This obligation also extends to individuals who have reason to believe that an offence under the Act is likely to be committed. In addition

to imposing this legal duty under Section 19, the legislature being in *seisin* of the paramount importance in collectively addressing the problems of child abuse and exploitation, deemed it expedient to make the failure to discharge this obligation punishable under Section 21 of the Act. Such provisions have been inserted with a view to ensure strict compliance of the provisions under the POCSO and thereby to ensure that the tender age of children is not being abused and their childhood and youth is protected against exploitation.

252. In ***Shankar Kisanrao Khade v. State of Maharashtra,*** reported in **(2013) 5 SCC 546**, this Court expressing its anguish over the large number of cases of abuse and exploitation of children, held that such issues must be collectively dealt by all stakeholders in a child-centric manner by applying the *best interest of child standard*, since best interest of the child is paramount and not the interest of perpetrator of the crime. It further *inter-alia* laid down the manner in which all persons in charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails, etc. or wherever children are housed have to comply with the obligation(s) envisaged under Section(s) 19 & 21 of the POCSO. The relevant observations read as under: -

> *"72. I may also point out that, in large numbers of cases, children are abused by persons known to them or who have influence over them. Criminal courts in this country are galore with cases where children are abused by adults addicted to alcohol, drugs, depression, marital discord, etc. Preventive aspects have seldom been given importance or taken care of. Penal laws focus more on situations after commission of offences like violence, abuse, exploitation of the children. Witnesses of many such heinous crimes often keep mum taking shelter on factors like social stigma, community pressure, and difficulties of navigating the criminal justice system, total dependency on the perpetrator emotionally and economically and so on. Some adult members of family including parents choose not to report such crimes to the police on the plea that it was for the sake of protecting the child from social stigma and it would also do more harm to the victim. Further, they also take shelter pointing out that in such situations*

some of the close family members having known such incidents would not extend medical help to the child to keep the same confidential and so on, least bothered about the emotional, psychological and physical harm done to the child. Sexual abuse can be in any form like sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted or encouraging, inducing or forcing the child to be used for the sexual gratification of another person, using a child or deliberately exposing a child to sexual activities or pornography or procuring or allowing a child to be procured for commercial exploitation and so on.

73. In my view, whenever we deal with an issue of child abuse, we must apply the best interest of child standard, since best interest of the child is paramount and not the interest of perpetrator of the crime. Our approach must be child-centric. Complaints received from any quarter, of course, have to be kept confidential without casting any stigma on the child and the family members. But, if the tormentor is the family member himself, he shall not go scot-free. Proper and sufficient safeguards also have to be given to the persons who come forward to report such incidents to the police or to the Juvenile Justice Board.

74. The conduct of the police for not registering a case under Section 377 IPC against the accused, the agony undergone by a child of 11 years with moderate intellectual disability, non-reporting of offence of rape committed on her, after having witnessed the incident either to the local police or to the Juvenile Justice Board compel us to give certain directions for compliance in future which, in my view, are necessary to protect our children from such sexual abuses. This Court as parens patriae has a duty to do so because the Court has guardianship over minor children, especially with regard to the children having intellectual disability, since they are suffering from legal disability. Prompt reporting of the crime in this case could have perhaps, saved the life of a minor child of moderate intellectual disability.

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76. Considering the entire facts and circumstances of the case, I am inclined to convert death sentence awarded to the accused to rigorous imprisonment for life and that all the sentences awarded will run consecutively.

77. In my opinion, the case in hand calls for issuing the following directions to various stakeholders for due compliance:

77.1. The persons in charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails, etc. or wherever children are housed, if they come across instances of sexual abuse or assault on a minor child which they believe to have been committed or come to know that they are being sexually molested or assaulted are directed to report those facts keeping upmost secrecy to the nearest Special Juvenile Police Unit (SJPU) or local police, and they, depending upon the gravity of the complaint and its genuineness, take appropriate follow-up action casting no stigma to the child or to the family members.

77.2. Media personnel, persons in charge of hotels, lodges, hospitals, clubs, studios and photograph facilities have to duly comply with the provision of Section 20 of Act 32 of 2012 and provide information to the SJPU, or local police. Media has to strictly comply with Section 23 of the Act as well.

77.3. Children with intellectual disability are more vulnerable to physical, sexual and emotional abuse. Institutions which house them or persons in care and protection, if come across any act of sexual abuse, have a duty to bring to the notice of the Juvenile Justice Board/SJPU or local police and they in turn be in touch with the competent authority and take appropriate action.

77.4. Further, it is made clear that if the perpetrator of the crime is a family member himself, then utmost care be taken and further action be taken in consultation with the mother or other female members of the family of the child, bearing in mind the fact that best interest of the child is of paramount consideration.

77.5. If hospitals, whether government or privately-owned or medical institutions where children are being treated come to know that children admitted are subjected to sexual abuse, the same will immediately be reported to the nearest Juvenile Justice Board/SJPU and the Juvenile Justice Board, in consultation with SJPU, should take appropriate steps in accordance with the law safeguarding the interest of the child.

77.6. The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening the offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.

77.7. Complaints, if any, received by Ncpcr, Scpcr, Child Welfare Committee (CWC) and Child Helpline, NGOs or women's organisations, etc., they may take further follow-up action in consultation with the nearest Juvenile Justice Board, SJPU or local police in accordance with law.

77.8. The Central Government and the State Governments are directed to constitute SJPUs in all the districts, if not already constituted and they have to take prompt and effective action in consultation with the Juvenile Justice Board to take care of the child and protect the child and also take appropriate steps against the perpetrator of the crime.

77.9. The Central Government and every State Government should take all measures as provided under Section 43 of Act 32 of 2012 to give wide publicity to the provisions of the Act through media including television, radio and print media, at regular intervals, to make the general public, children as well as their parents and guardians, aware of the provisions of the Act."

253. This Court in its decision in ***State of Maharashtra & Anr. v. Maroti*** reported in **(2023) 4 SCC 298** examined and explained the true purport of the obligations envisaged under Section(s) 19 & 21 of

the POCSO. It held that prompt and proper reporting of offences under the POCSO is the bedrock of the obligations that have been cast under the said provisions, and any other view would defeat the very purpose and object of the Act. It further observed that merely because the failure to discharge the obligation under Section(s) 19 & 21 is punishable with imprisonment for a short duration, does not mean that such an offence is not to be taken seriously. Accordingly, it held that strict compliance of such provisions must be ensured to protect the tender age and youth of children against exploitation. The relevant observations read as under: -

> *"11. To achieve the avowed purpose, a legal obligation for reporting of offence under the POCSO Act is cast upon on a person to inform the relevant authorities specified thereunder when he/she has knowledge that an offence under the Act had been committed. Such obligation is also bestowed on person who has apprehension that an offence under this Act is likely to be committed. Besides casting such a legal obligation under Section 19, the Legislature thought it expedient to make failure to discharge the obligation thereunder as punishable, under Section 21 thereof. True that under Section 21 (1), failure to report the commission of an offence under Sub Section 1 of Section 19 or Section 20 or failure to report such offence under Sub Section 2 of Section 19 has been made punishable with imprisonment of either description which may extend to six months or with fine or with both. Sub section 2 of Section 21 provides that any person who being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under Sub-Section 1 of Section 19 in respect of a subordinate under his control, shall be punishable with imprisonment with a term which may extend to one year or with fine. Certainly, such provisions are included in with a view to ensure strict compliance of the provisions under the POCSO Act and thereby to ensure that the tender age of children is not being abused and their childhood and youth is protected against exploitation.*
>
> *12. Looking at the penal provisions referred above, making failure to discharge the obligation under Section 19 (1)*

punishable only with imprisonment for a short duration viz., six months, one may think that it is not an offence to be taken seriously. However, according to us that by itself is not the test of seriousness or otherwise of an offence of failure to discharge the legal obligation under Section 19, punishable under Section 21 of POCSO Act. We are fortified in our view, by the decisions of a three Judge Bench of this Court in Vijay Madanlal Choudhary & Ors. v. Union of India & Ors. and a two Judge-Bench in Shankar Kisanrao Khade v. State of Maharashtra.

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14. [...] the length of punishment is not only the indicator of the gravity of offence and it is to be judged by a totality of factors, especially keeping in mind the background in which the offence came to be recognized by the Legislature in the specific international context. In this context, it is also relevant to note that the United Nations Convention on Rights of Children, which was ratified by India on 11.12.1992, requires the State parties to undertake all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices etc. Articles 3 (2) and 34 of the Convention have placed a specific duty on the State to protect the child from all forms of sexual exploitation and abuse.

15. Prompt and proper reporting of the commission of offence under the POCSO Act is of utmost importance and we have no hesitation to state that its failure on coming to know about the commission of any offence thereunder would defeat the very purpose and object of the Act. We say so taking into account the various provisions thereunder. Medical examination of the victim as also the accused would give many important clues in a case that falls under the POCSO Act. [...] We refer to the aforesaid provisions only to stress upon the fact that a prompt reporting of the commission of an offence under POCSO Act would enable immediate examination of the victim concerned and at the

same time, if it was committed by an unknown person, it would also enable the investigating agency to commence investigation without wasting time and ultimately to secure the arrest and medical examination of the culprit. There can be no two views that in relation to sexual offences medical evidence has much corroborative value."

(Emphasis supplied)

254. The role of "intermediaries" as defined under Section 2(w) of the IT Act in checking the proliferation of child pornography is significant. Section 79 of the IT Act, 2000 which relates to due diligence that is to be observed by an intermediary, provides an exemption from liability to such intermediaries in certain cases if they are in compliance with the due-diligence requirements prescribed under the said provision, more particularly sub-section (3)(b), this is known as the "safe harbour" protection or provision. "Safe Harbour" protection means that an intermediary will not be held liable for any third-party information, data, or communication link made available or hosted by him. As per sub-section (2), in order to avail such protection, the intermediary foremost must not in any manner be involved in either initiating the transmission, or the receipt or the modification of the third-party data or information in question, and further is required to observe due diligence while discharging his duties under the IT Act and to also observe such other guidelines as the Central Government may prescribe in his behalf. Sub-section (3) (b) of the above-mentioned provision stipulates that if an intermediary receives actual knowledge or is notified by the appropriate government or its agency that any information, data, or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit an unlawful act, the intermediary must expeditiously remove or disable access to that material on that resource without compromising the evidence in any manner. It further states that the protection under Section 79 lapses and does not apply if the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act, or if upon receiving "actual knowledge", or if the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner on being notified by the appropriate Government or its agency that any

information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act. The relevant provision reads as under: -

> ***"79. Exemption from liability of intermediary in certain cases.—***
>
> *(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by him.*
>
> *(2) The provisions of sub-section (1) shall apply if—*
>
> (a) *the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or*
>
> (b) *the intermediary does not—*
>
> (i) *initiate the transmission;*
>
> (ii) *select the receiver of the transmission; and*
>
> (iii) *select or modify the information contained in the transmission;*
>
> (c) *the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.*
>
> *(3) The provisions of sub-section (1) shall not apply if—*
>
> (a) *the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;*
>
> (b) *upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary*

fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation.—For the purposes of this section, the expression 'third-party information' means any information dealt with by an intermediary in his capacity as an intermediary."

255. Rule 11 of the Protection of Children from Sexual Offences Rules, 2020 (for short, the "**POCSO Rules**"), places an obligation on the intermediaries to not only report offences under POCSO but also to hand over the necessary material including the source from which such material may have originated to the Special Juvenile Police Unit or the local police, or the cyber-crime portal. As per a MOU between the National Crime Records Bureau (NCRB) under the Ministry of Home Affairs (MHA) and the National Centre for Missing & Exploited Children (NCMEC), a US based NGO, all social media intermediaries are required to report cases of child abuse and exploitation to the NCMEC, which in turn reports these cases to the NCRB and the NCRB forwards this to the concerned State authorities in India through the national cybercrime reporting portal.

256. It has been brought to the notice of this Court that social media intermediaries do not report such cases of child abuse and exploitation to the local authorities specified under POCSO and rather only comply with the requirements stipulated in the MOU. In view of the salutary object and the mandatory character of the provisions of Sections 19 and 20 of the POCSO read with Rule 11 of the POCSO Rules, we are of the considered view, that an intermediary cannot claim exemption from the liability under Section 79 of the IT Act for any third-party information, data, or communication link made available or hosted by it, unless due diligence is conducted by it and compliance is made of these provisions of the POCSO. We are also of the view that such due diligence includes not only removal of child pornographic content but also making an immediate report of such content to the concerned police units in the manner specified under the POCSO Act and the Rules thereunder.

257. Section 42A of the POCSO provides that the Act shall be in addition to and not in derogation of the provisions of any other law and further provides that it shall have overriding effect on the provisions of any

such law to the extent of the inconsistency. The relevant provision reads as under: -

> ***"42A. Act not in derogation of any other law.—***
>
> *The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."*

258. In view of the overriding effect of the POCSO Act and the rules thereunder, merely because an intermediary is in compliance of the requirements specified under Section 79 of the IT Act, will not absolve it of any liability under the POCSO, unless it duly complies with the requirements and procedure set out under it, particularly Section 20 of POCSO Act and Rule 11 of the POCSO Rules. It is a settled position of law, that when a statute describes or requires a thing to be done in a particular manner; it should be done in that manner or not at all. Thus, social media intermediaries in addition to reporting the commission or the likely apprehension of commission of any offence under POCSO to the National Centre for Missing & Exploited Children (NCMEC) is also obligated to report the same to authorities specified under Section 19 of POCSO i.e., the Special Juvenile Police Unit (SJPU) or the local police.

259. We endorse the view and the directions issued by this Court in ***Shankar Kisanrao Khade*** (supra) and are of the considered view that a meaningful effect to the provisions of the POCSO can only be given if such directions are complied with to the letter and spirit. We further caution the courts to refrain from showing any form of leniency or leeway in offences under Section 21 of the POCSO, particularly to schools/educational institutions, special homes, children's homes, shelter homes, hostels, remand homes, jails, etc. who failed to discharge their obligation of reporting the commission or the apprehension of commission of any offence or instance of child abuse or exploitation under the POCSO. Section(s) 19, 20 and 21 of the POCSO are mandatory in nature, and there can be no dilution of the salutary object and purport of these provisions. Merely because Section 21 prescribes a lesser threshold of punishment,

the same in no way derogates or detracts from the gravity or severity of the offence which has been sought to be punished as held in ***Maroti*** (supra). It is a settled position of law that the length of punishment is not the only indicator of the gravity of the offence and it is to be judged by a totality of factors, especially keeping in mind the background in which the offence came to be recognized by the legislature in the specific international context i.e., the United Nations Convention on Rights of Children, particularly Article(s) 3(2) and 34 of the said Convention.

ii. Suggestions to the Union of India and to the courts.

260. We propose to suggest the following to the Union of India in its Ministry of Women and Child Development: -

(i) The Parliament should seriously consider to bring about an amendment to the POCSO for the purpose of substituting the term "child pornography" that with "child sexual exploitation and abuse material" (CSEAM) with a view to reflect more accurately on the reality of such offences. The Union of India, in the meantime may consider to bring about the suggested amendment to the POCSO by way of an ordinance.

(ii) We put the courts to notice that the term "child pornography" shall not be used in any judicial order or judgment, and instead the term "child sexual exploitation and abuse material" (CSEAM) should be endorsed.

(iii) Implementing comprehensive sex education programs that include information about the legal and ethical ramifications of child pornography can help deter potential offenders. These programs should address common misconceptions and provide young people with a clear understanding of consent and the impact of exploitation.

(iv) Providing support services to the victims and rehabilitation programs for the offenders is essential. These services should include psychological counselling, therapeutic interventions, and educational support to address the underlying issues and promote healthy development. For those already involved in viewing or distributing child pornography, CBT has proven effective in addressing the cognitive distortions that fuel such behaviour. Therapy programs should focus on developing

empathy, understanding the harm caused to victims, and altering problematic thought patterns.

(v) Raising awareness about the realities of child sexual exploitative material and its consequences through public campaigns can help reduce its prevalence. These campaigns should aim to destigmatize reporting and encourage community vigilance.

(vi) Identifying at-risk individuals early and implementing intervention strategies for youth with problematic sexual behaviours (PSB) involves several steps and requires a coordinated effort among various stakeholders, including educators, healthcare providers, law enforcement, and child welfare services. Educators, healthcare professionals, and law enforcement officers should be imparted training to identify signs of PSB. Awareness programs can help these professionals recognize early warning signs and understand how to respond appropriately.

(vii) Schools can also play a crucial role in early identification and intervention. Implementing school-based programs that educate students about healthy relationships, consent, and appropriate behaviour can help prevent PSB.

(viii) To give meaningful effect to the above suggestions and work out the necessary modalities, the Union of India may consider constituting an Expert Committee tasked with devising a comprehensive program or mechanism for health and sex education, as well as raising awareness about the POCSO among children across the country from an early age, for ensuring a robust and well-informed approach to child protection, education, and sexual well-being.

(ix) We urge the Parliament to consider amending Section 15 sub-section (1) of POCSO so as to make it more convenient for the general public to report by way of an online portal, any instance of storage or possession of CSEAM to the specified authorities for the purpose of the said provision.

G. FINAL ORDER

261. For all the foregoing reasons, we have reached the conclusion that the High Court committed an egregious error in passing the impugned judgment. We are left with no other option but to set aside the impugned judgment and order passed by the High Court, and

restore the criminal proceedings in Spl. S.C. No. 170 of 2023 to the court of Sessions Judge, Mahila Neethi Mandram (Fast Track Court), Tiruvallur District. We accordingly pass such order.

262. We direct the Registry to send one copy each of this judgment to the Principal Secretary, Ministry of Law & Justice, Union of India and to the Principal Secretary, Ministry of Women and Child Development, Union of India, for undertaking appropriate course of action.

263. Pending application(s) if any, also stand disposed of.

Result of the Case: Appeals disposed of.

†*Headnotes prepared by:* Divya Pandey