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**EXAMINING THE LEGISLATIVE INTENT BEHIND §7 OF THE POCSO ACT IN
THE CONTEXT OF THE JUDGEMENT GIVEN IN SATISH RAGDE V. STATE OF
MAHARASHTRA****ABSTRACT**

The case of Satish Ragde has given rise to many pertinent questions regarding the interpretation of statutes as well as their impact on imparting justice. The case was judged by a single-judge bench of the Bombay High Court under the POCSO Act. This paper aims to analyse this case in the light of two rules of interpretation: the literal construction rule and the mischief rule. Examining the theories of Maxwell and Crawford, the paper finds that the Satish Ragde misuses the POCSO Act by preferring the judge's personal views over the intention of the legislature. The paper takes into its consideration legal precedents established in India as well as other countries such as England and Scotland. It is proved that all such legal precedent is violated by the decision. The paper, in the end, realises the violation of principles committed on part of the single-judge bench ruling.

INTRODUCTION

Rape has been noted to be the unsurpassed violation of the self.¹Cases have emphasised this point in various ways. In *State of Maharashtra v. Rajendra Jawanmal Gandhi*, the Supreme Court asserted that rape is a crime 'not only against the victim it is against the whole society'.²The Protection of Children from Sexual Offences (POCSO) Act was enacted in 2012. The purpose of this Act, as stated in the words of the statute, is to protect individuals under the age of 18 from sexual assault, sexual harassment and pornography by providing for the trial of such offences in Special Courts.³Taking into account the overwhelming evidence that shows India's health systems mistreating rape victims, POCSO mandates provision of

¹ Law Commission of India, Rape and Allied Offences (84th Report, 1980)

² (1997) 8 SCC 386.

³ The Protection of Children from Sexual Offences Act 2012.

immediate treatment for survivors of sexual violence and lays down punishments for failure to do so.⁴

The recent case of *Satish Ragde vs. The State of Maharashtra*⁵ has brought to light details of the POCSO Act that need to be rethought. The case specifically deals with s 7 and s 8 of the POCSO Act. These sections criminalise acts done with a sexual intent that do not involve penetration.⁶ It is pertinent to note this case's findings as it has laid down a dangerous precedent concerning the intent behind the provision, as agreed by the Attorney General.⁷ Thereby, the Supreme Court has stayed the judgement.⁸ This paper examines the legislative intent behind these provisions under the POCSO Act to come to a conclusion which determines whether the judgement given in the *Satish Ragde* case is fair. While doing so, the paper employs literal construction as a rule of statutory interpretation to analyse the POCSO Act. Part I of the paper delves into the details of the sections of the Act that are relevant to the case and provides a brief comparative study concerning s 7 of the POCSO Act and §354 of the Indian Penal Code (IPC). Part II provides an insight on the established precedent laid down in cases having a similar factual background as the *Satish Ragde* case. Lastly, Part III takes into account the matters discussed in the previous parts to examine the intent of the legislature behind making the POCSO Act, as this is the grey area that the Bombay High Court leaves open to vulnerability.

I. The Difference between the POCSO Act and the IPC

The *Satish Ragde* case dealt with a 12-year-old girl being allured into going to the accused's home under the false promise of receiving guava. He then proceeded to press her breasts and undo her *salwar*. The Special Court found the accused guilty under ss 354, 363 and 342 of the IPC, in addition to s 8 of the POCSO Act.

⁴Ministry of Women and Child Development, Model Guidelines under Section 39 of The Protection of Children from Sexual Offences (2013). Act, 2012

⁵ Criminal appeal number 161 of 2020.

⁶The Protection of Children from Sexual Offences Act 2012, s 7.

⁷Krishnadas Rajagopal, 'Supreme Court stays Bombay HC order on 'skin-to-skin' contact for sexual assault under POCSO Act' *The Hindu* (New Delhi, 27 January 2021)

<<https://www.thehindu.com/news/national/supreme-court-stays-bombay-hc-order-on-skin-to-skin-contact-for-sexual-assault-under-pocso-act/article33675124.ece#:~:text=Bobde%20on%20Wednesday%20took%20cognisance,POCSO%20to%20punish%20sexual%20offenders>> accessed 21 February 2021.

⁸Gulnar Mistry, 'The Bombay High Court judgment on sexual assault: A serious matter' *Bar and Bench* (28 January 2021) <<https://www.barandbench.com/columns/the-bombay-high-court-judgment-on-sexual-assault-a-serious-matter>> accessed 12 February 2021.

Keeping these details in mind, it becomes important to take a look at what the sections lay down. S 7 of the POCSO Act says:

Whoever, with sexual intent, touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any act with sexual intent which involves physical contact without penetration is said to commit sexual assault.⁹

The act under s 7 is punishable with ‘imprisonment... for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine’.¹⁰ While the POCSO Act applies to all genders, s 354 of the IPC only applies to women as it says,

Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.¹¹

It is distressing to note that the Court alludes to the differences in the term of imprisonment. The accused is sentenced to punishment under s 354 being read with s 8 for a total of one year in addition to two years of imprisonment under s 363 and six months under s 342.¹²

The single-bench of Justice Pushpa Ganediwala observed that: ‘The act of pressing of breast of the child aged 12 years, in the absence of any specific detail as to whether the top was removed or whether he inserted his hand inside top and pressed her breast, would not fall in the definition of “sexual assault”(under the POCSO Act).’¹³ This is what led the court to convict the accused for a mere one year of imprisonment under s 354. It is submitted, however, that reliance being placed on a detail as trivial as whether her top was removed to come to a conclusion as grave as this is completely arbitrary. While imposing a punishment that is inadequate, the court also trivialises the matter by saying that ‘stricter proof and serious allegations are required’.

By accepting that there is a difference between skin-to-skin touch and groping over the clothes, the court uses the IPC which reverses the burden of proof and puts it on the accused.

⁹The Protection of Children from Sexual Offences Act 2012, s 7.

¹⁰The Protection of Children from Sexual Offences Act 2012, s 8.

¹¹ The Indian Penal Code 1860, s 354.

¹²*Satish Ragdev The State of Maharashtra* Criminal Appeal No. 161 of 2020.

¹³Bhadra Sinha, ‘Groping child without skin-to-skin contact & sexual intent not assault under POCSO — Bombay HC’ *The Print* (24 January 2021) <<https://theprint.in/judiciary/groping-child-without-skin-to-skin-contact-sexual-intent-not-assault-under-pocso-bombay-hc/591269/>> accessed 13 February 2021.

Thus, the accused has to now prove beyond a reasonable doubt that the skin-to-skin touch did not take place.¹⁴This would, in turn, go against what the POCSO Act stands for as it enforces a stricter guideline of “guilty until proven innocent” instead of “innocent until proven guilty” as used by the IPC.¹⁵To argue that there has been no skin-to-skin contact then goes against the facts that demonstrate that the accused has groped the child and disrobed her. This would entail venturing on to probability instead of relying on facts which is simply against the workings of the law.¹⁶

Apart from these details, the case also deflects from the gender-neutral aims of the POCSO Act. By laying down a judgement that punishes groping over the clothes only under s 354 of the IPC, the case does not leave any recourse to male children who may be seeking recourse under the POCSO Act for similar offences. The IPC only punishes penetrative sexual assault under s 377 which criminalises ‘unnatural offences.’¹⁷For such offences against children that do not involve penetration, it is pertinent that the POCSO Act be applied so that gender parity is maintained while also giving way to strict and well-deserved punishment.

The above-mentioned problems have arisen by application of the IPC instead of the POCSO Act is leading to grave consequences. This brings into question many doubts regarding the interpretation of the POCSO Act and its basic principles. The case has completely disregarded what the POCSO Act has tried carefully to establish, from gender-neutral laws and terms of imprisonment to presumption of guilt. The judge here is not disputing the facts and is simply neglecting to apply the POCSO Act because, in her opinion, the sentence is too high. This mentality behind delivering a judgement sends a message to society, that their children being groped over their clothes will not be considered sexual assault, and this is extremely detrimental.

II. Legal Precedents and Their Violation

The first part of the paper establishes that *Satish Ragdelays* down a judgement that arbitrarily chooses to enforce IPC over the POCSO Act. This part of the paper will show how diversion

¹⁴John S Ralph, ‘The Distinction Between Section 7 Of The POCSO Act And Section 354 Of IPC’ *Live Law* (26 January 2021) <<https://ezproxy.nujs.ac.in:2138/columns/pocso-section-7-section-354-ipc-sexual-assault-bombay-high-court-skin-to-skin-168924#.YDSehQDTTUc.link>> accessed 15 February 2021.

¹⁵The Protection of Children from Sexual Offences Act 2012, s 30; Apoorva Mandhani, “Absurd interpretation” – experts say HC’s POCSO order in groping case wrong on many levels’ *The Print* (25 January 2021) <<https://theprint.in/judiciary/absurd-interpretation-experts-say-hcs-pocso-order-in-groping-case-wrong-on-many-levels/591873/>> accessed 16 February 2021.

¹⁶*ibid* (n 14).

¹⁷The Indian Penal Code 1860, s 377.

from the judgements that have previously established that such issues must fall under the POCSO Act worsens the quality of the *Satish Ragde* judgement.

Skin-to-skin contact as a requisite

‘If there was clear and unequivocal evidence that suggested that he did press her breast, whether from outside or whether “skin-to-skin”, the offence is complete.’¹⁸

The single-judge bench has deemed skin-to-skin contact to be a requirement for cases to fall under the provisions ss 7, 8 of the POCSO Act. This, in the opinion of Justice Pushpa Ganediwala, is not a requirement that falls under the category of ‘physical contact without penetration’ as laid down by the provision. However, the opposite is proven to be true by previous judgements.

The case of *Jagar Singh v. State of Himachal Pradesh*¹⁹ involved the accused being charged under the same provisions of the POCSO Act as in the case of *Satish Ragde*. The accused had pressed the victim’s breasts and inflicted teeth marks on her cheek. The High Court opined that offences falling under this Act must be dealt with seriously as they are of a grave and heinous nature.²⁰ The counsel for the accused made the argument that ss 7 and 8 of the POCSO Act when referring to touching the ‘vagina, penis, anus or breast of the child’ or making ‘the child touch the vagina, penis, anus or breast of such person or any other person’ calls for touching of the naked vagina, naked penis, naked anus, or naked breast. The High Court rejects this argument and says that no such observation can be made by reading the provisions given under the POCSO Act.²¹ Similarly, the Andhra Pradesh High Court supported the application of ss 7, 8 by prosecuting the accused in a case where he held the victim’s hand and waist with sexual intent.²² This decision of the court overturned the judgement laid by a sessions court which said that these acts were not grave enough to fall under these POCSO Act provisions.

A case under the Karnataka High Court involved the accused being charged under s 354 of the IPC and s 8 of the POCSO Act.²³ The case involved the accused pressing the victim’s breasts. With no questions being asked about whether the victim was disrobed, the court

¹⁸Apoorva Mandhani, “Absurd interpretation” – experts say HC’s POCSO order in groping case wrong on many levels’ *The Print* (25 January 2021) <<https://theprint.in/judiciary/absurd-interpretation-experts-say-hcs-pocso-order-in-groping-case-wrong-on-many-levels/591873/>> accessed 16 February 2021.

¹⁹ Cr.MP(M) No. 1112 of 2014

²⁰ibid para 13.

²¹ibid para 14 (n 19).

²²*Mondi Murali Krishna v State of Andhra Pradesh* Criminal Revision Case No.1970 of 2017.

²³*State of Karnataka v Noor Ahammed Fakeersab* Criminal Appeal No. 100041/2016.

proceeded to prosecute the accused under the charges. This case is similar to a matter that arose in the High Court of Delhi.²⁴The same charges were levied on the accused. The court agrees that 'whether the appellant had touched or pressed her breast, the offence would be complete', again, without the question of whether the victim was wearing clothes. These decisions laid by other courts have not served as an inspiration to the single-bench decision. This fact is aggravated by the Bombay High Court having previously established that disrobement is not essential for the crime to be construed as a sexual assault under the POCSO Act.²⁵

It is proposed by this paper that the precedent established by *Lok Prasad Limboo v. State of Sikkim*²⁶ must be followed. This case involved charges under s 354 of IPC and s 8 of the POCSO Act. The Court convicted the accused under both provisions and sentenced him to imprisonment with the terms running consecutively. Such application of the legal provisions would be most accurate in the case of *Satish Ragde*.

Relevant foreign law

The provisions accounted by the law of the United Kingdom are considered by this paper because Indian law has drawn several of its laws to be based on UK law. The Sexual Offences Act of 2003 under s 79 establishes the meanings and rules that must apply in case of a sexual assault. This provision defines 'touching' to include 'touching – (a) with any part of the body, (b) with anything else, (c) through anything, and in particular includes touching amounting to penetration'.²⁷ The Sexual Offences (Scotland) Act of 2009 under s 20 establishes a clear definition for physical contact by letting its scope include 'bodily contact or contact by means of an implement and whether or not through clothing'.²⁸

In the case of *R v. H*, the argument presented takes the stand that touching someone's tracksuit bottoms cannot on its own amount to touching the person.²⁹ The court holds, however, that the words in s 79 include 'touching includes touching' and in particular 'through anything'. Thus, it is opined that 'it was not Parliament's intention by the use of that language to make it impossible to regard as a sexual assault touching which took place by touching what the victim was wearing at the time'.

²⁴*Jitender v State (Govt. of NCT of Delhi)* CRL.A. 564/2019.

²⁵*Pandurang Narayan Jadhav v State of Maharashtra* Criminal Appeal No. 192 OF 2017.

²⁶CrI. A. No. 19 of 2018.

²⁷ The Sexual Offences Act 2003, s 79.

²⁸The Sexual Offences (Scotland) Act 2009, s 20(2)(c).

²⁹[2005] EWCA Crim 732.

Indian law does not define the scope of what touching or physical contact includes. This has given way to such bizarre interpretation on the part of the Bombay High Court single-judge bench in *Satish Ragde*. The court needs to take into its consideration that a similar matter had arisen in the Kerala High Court. The case included the accused being acquitted by a court which observed that touching her over her clothes is not sexual assault. The Kerala High Court set aside this order of acquittal and noted that such observation made by the court is erroneous 'to say the least'.³⁰ The lack of consideration the judgement has for previous cases and various existing legislation, national and foreign, is disappointing.

III. The High Court's Findings and the Legislative Intent

The paper has established so far, without a shadow of doubt, that the judgement laid down in the case of *Satish Ragde* is in contravention to the legal provisions and precedents of India and the UK. Before the paper can conclude that the case is a dangerous precedent, attention needs to be paid to the interpretation of the statute in question. The intent of the legislature is to be ascertained to truly understand the statute. Crawford says, 'The legislative intention is not found in these rules of construction but is revealed by them'.³¹ He explains that the intent of the legislature is reflected in everything including the subject-matter, purpose or object, effect, consequences, occasion and necessity – these all serve as aids to discover the intent of the legislature. Thus, we can safely imply that the legislative intent is supreme and cannot be neglected or looked over.

Literal construction

Literal construction is the most basic rule of interpretation and it relies on the plain meaning of the statute. Maxwell in his book opines that the sentences of the rules must be understood according to the rules of grammar and that when the language is unambiguous, the task of interpretation cannot be said to have risen.³² This unambiguous language of the law will only ever give rise to one meaning, according to Maxwell. This sole meaning derived from a plain reading of the law will provide the intent of the legislature.³³ The case of *R. v. Banbury* says that the primary rule of interpretation – literal construction – requires deduction of meaning

³⁰*Geetha v State of Kerala* CrI.MC.No.1237 OF 2020

³¹Earl Theodore Crawford, *The Construction of Statutes* (1940).

³²Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (W. Maxwell & Son, 1875).

³³*R v. Hodnett* TR 96.

in a manner that presumes that the legislature has ‘meant what they have actually expressed’.³⁴

It is important to remember that, as per Maxwell, ‘It matters not what the consequences may be’ when it comes to the derivation of such a plain and literal meaning. He says that no matter how arbitrary or inconvenient the intention is met out to be, it must be applied as is.³⁵ When a statute is given its literal meaning and such a meaning is found to be against the intent of the legislature, the effect of the words must nevertheless be taken to mean as it does through literal construction.³⁶ Deviation from these principles of literal construction is only permitted in three cases:

1. Application of the literal construction leads to an absurd meaning;
2. There is some ambiguity;
3. There is injustice met out in some way.³⁷

There are two corollaries to the literal construction rule that must be followed: (1) omissions are not to be inferred, (2) every word in the statute must be given a meaning.³⁸ Concerning the first corollary, Lord Loreburn LC said, ‘It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do’.³⁹ Maxwell emphasises that it is not the court’s job to ‘scan its wisdom or its policy’ when the statute lays a plain meaning. The second corollary requires each word in the statute to be given a meaning as this would help to derive an interpretation that is correct and reflects the intent of the legislature.

The case at hand and the mischief rule

Literary construction, being the primary and basic rule of interpretation, requires application in the case of *Satish Ragde*. Ss 7 and 8 of the POCSO Act, being read without any interpretation on the part of the courts, would give us the intention of the legislation behind curating such a law. This, in turn, would justify all of the details that are part of the provisions. To understand the judgement vis a vis the provision’s literary construction we

³⁴*R. v. Banbury (Inhabitants)* (1834) 1 A. & E. 136.

³⁵*The Ornamental Woodwork Co. v. Brown* H & C. 63.

³⁶*Nolly vs. Buck* 8 B & C. 164.

³⁷Guru Prasanna Singh, *Principles of Statutory Interpretation: Including the General Clauses Act, 1897 with Notes*(2012).

³⁸ *ibid.*

³⁹*Vickers, Sons, & Maxim, Ltd. v. Evans* [1910] A.C. 444.

must examine each detail of the judgement and decipher its meaning in relation to the provision's construction.

1. Sexual intent

S 7 of the POCSO Act includes the words 'with sexual intent' which when considered under their literal construction would include acts done with the accused having the mens rea of committing them.⁴⁰ The single-judge bench does not dispute the fact that the accused had the sexual intent behind carrying the act. Thus, it is laid down that the accused in the case carried the act with the necessary sexual intent.

2. Physical contact

The words 'any act with sexual intent which involves physical contact without penetration' in s 7. These words provide a wide scope for the acts can be included under it. This scope could easily include groping someone over their clothes. The scope and object of the provision aids in understanding legislative intent, as opined by Crawford.⁴¹ Thus, we can say that it was the legislation's intention to include the act that has been committed by the accused in the case in question.

3. Sexual assault

A sexual assault under s 7 is punishable under s 8 of the POCSO Act.⁴² Any act of physical contact without penetration, if done with a sexual intent, qualifies as a sexual assault under this provision. However, it is the contention of Justice Pushpa Ganediwala that the accused's act, that has so far fulfilled the required conditions under the provision, does not fall under the definition of sexual assault.⁴³ This hampers the judgement as it does not give effect to the legislative intent.

As mentioned by Maxwell, it is not the court's job to interpret the words constructed by the legislature; the court must only give effect to these words.⁴⁴ By preventing the act of the accused from falling under the wide scope of the provision, the court is crossing the line of applying the law as it is and venturing onto giving effect to its own personal intent through the law. In this context, the mischief rule of interpretation becomes important. *Heydon's case*

⁴⁰The Protection of Children from Sexual Offences Act 2012, s 7.

⁴¹ *ibid* (n 31).

⁴²The Protection of Children from Sexual Offences Act 2012, s 8.

⁴³*ibid* (n 13).

⁴⁴*ibid* (n 31).

established the mischief rule.⁴⁵The mischief rule if applied when the rule of literal construction is deviated from under the second condition, which says, the literal construction giving rise to ambiguity cannot be relied upon.⁴⁶The case lays down a four-part process that must be considered when the statute's plain reading is resulting in ambiguity:

1. The law in place before the statute in question was made
2. What the mischief or defect that the law before did not provide for was
3. What remedy the statute in question provides
4. The true reason behind this remedy⁴⁷

The Protection of Children from Sexual Offences (Amendment) Bill, 2019 was followed by the implementation of POCSO Act. The 2019 Bill had the object of protecting children from all sexual offences, pornography and to provide for the Special Courts which would allow for the trial of such matters. In addition, the Bill aimed at being gender-neutral.⁴⁸ Before this Bill was passed, only ss 375 and 354 of the IPC was used. The mischief of these provisions of the IPC are that they are not providing for any special protection for children or establishing Special Courts for offences against children and are not gender-neutral. The POCSO Act by way of the Bill aims to remedy the mischief IPC created by making laws that draw the deserving amount of attention towards children's issues. However, by laying a judgement which negates the aims of the statute through misinterpretation, the Bombay High Court advances the mischief and defeats the remedy.⁴⁹

IV. Conclusion

The paper has deconstructed the provisions of the POCSO Act as well as the judgement rendered in the case of *Satish Ragde* to determine if all the elements work, in totality, to administer justice. Passing the judgement through three main tests of examination of the provisions applied, precedent established and considering legislative intent, the paper comes to the unfortunate conclusion that the decision of the High Court fails on all account.

⁴⁵*Heydon's case* (1584) 76 ER 637.

⁴⁶*ibid* (n 37, 45).

⁴⁷*ibid* (n 45).

⁴⁸The Protection Of Children From Sexual Offences (Amendment) Bill 2019.

⁴⁹Ashok Kini, 'Touch Interpretation of Child Sexual Assault by Bombay High Court' *Live Law* (25 January 2021) <<https://ezproxy.nujs.ac.in:2124/columns/touchy-interpretation-of-child-sexual-assault-by-bombay-high-court-groping-skin-to-skin-168907?infinitemscroll=1>> accessed 15 February 2021.

The decision of the court fails to execute the literal construction which requires the most basic reading of the provisions and questioning their object. Even if we consider that the court believes the literal construction to be ambiguous and decides to choose the mischief rule of interpretation, the decision cannot stand. By implementing the IPC provisions, the court goes against precedent in addition to the principles of the mischief rule as given by *Haydon's case*. This deviation from the letter of the law on the basis of not considering the grave crime heinous enough is unfair. The main object of the POCSO Act is completely ignored by the judge and this paper stands with the statement made by the Attorney General regarding the decision being a dangerous precedent.

The reason for the decision, also known as ratio decidendi, binds cases of the future.⁵⁰ This concept of ratio decidendi simplifies the idea of 'not the judges' opinions, but which way they decide cases, will be the dominant subject-matter of any truly scientific study of law'.⁵¹ This subject-matter reflects the intent of the legislature when they devised the statute. As a ratio decidendi includes the facts of the case and the decision put forth by judge, cases in the future which have similar facts would rely on *Satish Ragde* to come to a conclusion. By setting such a precedent, the case opens the door for future cases being decided in a similar and illogical manner that discounts all the principles law should adhere to. This would undo all the efforts and objectives of the POCSO Act and its previous judgements. For now, it can only be hoped that the staying of the case by the Supreme Court can be seen as a ray of hope. If the arbitrary and unjust decision of the Bombay High Court is overturned all of these elements of the case and provisions would fall back into place.

⁵⁰AL Goodhart, 'The Ratio Decidendi of a Case' (1959) 22 The Modern Law Review
<<https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1959.tb02164.x>> accessed 17 February 2021.

⁵¹ Professor Oliphant, 'A Return to Stare Decisis' (1927) 16 American Bar Association.