

The Role of the Indian Judiciary to Combat Sexual Abuse Against Children

***¹Mr. Rajdeep Ghosh**

ABSTRACT

India is reckoned as the home of about 19 percent of children in the world. Many reports of many authorities including the Census of 2011 depict that more than one-third of India's total population are children i.e., below eighteen years of age. As per one assumption, more than forty percent of these children are in need of care and protection which showcases the gravity of the problem at hand. India has taken several steps and measures to address and redress the issues relating to children in India which include child education, child health, and child development. But Child protection has remained an issue before and even after the enactment of special child laws like the Protection of Children from Sexual Offences Act of 2012 and Juvenile Justice (Care and Protection of Children) Act, 2015, and these issues are addressed by the judiciary from time to time. Abuse of children has been shrouded in an environment of secrecy which signifies a conspiracy of silence around the entire subject matter of the same.¹ This article endeavors to highlight the role of the Indian Judiciary to combat sexual abuse against children through judicial activism or through interpretation of the existing provisions of law depending on the ratio decidendi or rationale of a few leading and landmark cases along with providing a few guideposts.

Keywords: Children, rights, sexual abuse, judicial activism, judicial interpretation, ratio decidendi.

1. INTRODUCTION

Child Sexual Abuse is constantly rising at an alarming pace. The poor rate of conviction under the POCSO displays a leggy picture of the criminal justice system administered in India. It is needless to mention that the long-drawn process gives a lot of time to the accused to turn the case in his own

¹ * Mr. Rajdeep Ghosh is a Student of Master of Laws (LL.M.) at Assam University, Silchar, Email: advrajdeeplay@gmail.com, Mobile: 09435268812.

favor by resorting to intimidation of the victim and witnesses. The data revealed by the NCRB in 2016 clarified the sad state of affairs as it brought into light that only 3 percent of cases of child rape went before the courts ended in conviction. This view was further highlighted by a report published by the eminent National Law School, Bangalore it expressed that the victim and her family members turned hostile in 67.5 percent of cases. It is assumed that the severity of punishment will help to reduce the rate of crime but it is not true. It is the certainty of receiving a stern sentence that deters a possible criminal from committing a crime. The role of the judiciary is extremely important and it must be exercised with a great amount of diligence. The guidelines given by the Learned High Courts of different States and the top Court of India is of utmost importance as it helps to deal with the concerned cases with utmost precision.

2. RESEARCH QUESTION

What are the role of the Indian Judiciary through both judicial activism and judicial interpretation in landmark cases in combating child sexual abuse in India?

3. OBJECTIVES OF THIS STUDY

- 1) For checking the role of the Indian Judiciary in combating child sexual abuse in India;
- 2) To check the efficacy of the above said judgments in practice;
- 3) To find out the ratio decidendi of the above said cases protecting the interest of the children encountering sexual abuse;
- 4) To check whether there is still any lacking on the part of the Indian judiciary for the purpose of protecting the interests of children facing sexual abuse?

4. RESEARCH METHODOLOGY

For completing this work, a doctrinal research method was followed. Various sources, information, and materials have been gathered and utilized from many books, articles, journals, landmark judgments, both physical and e-libraries to make this work done. Moreover, the analytical research methodology has also been observed.

5. JUDGEMENTS OF THE SUPREME COURT AND HIGH COURTS

In the case of Santhosa V/s Stateⁱⁱ, Mr. Ravi who was the father of the victim lodged the complaint stating that his daughter Rachana went to school on 10-01-2014 and did not come again. Later on, he discovered that the accused person kidnapped her. On investigation, it was found that the victim girl had also sexual intercourse meanwhile. The Supreme Court observed that the petitioner's contention that the victim girl gave consent for the alleged sex and thus it is not rape could not be made tenable as because at the time of occurrence of the said incident, the girl was only 13 years old so she was unable to give her free volition or consent as per law.

Ashish Kumar and Ors. V/s State of U.P. and Orsⁱⁱⁱ

FACTS: An FIR was lodged by the victim's father under sections 147, 354A, 352,323, and 506 of IPC and sections 7&8 of POCSO, but after conducting an investigation, the investigating officer submitted a charge-sheet under sections 352, 323, and 506 IPC only. The defacto complainant then filed an affidavit alleging that on the date of the incident the age of the victim was about 16 years also she had alleged molestation in her statement, offenses under sections 147, 354A of IPC and sections 7 & 8 of POCSO Act were also made out. Upon receiving the affidavit, the magistrate passed an order that offenses under Sections 323, 353, 354, 506 of IPC and Sections 7 & 8 of POCSO act were prima facie made out, but as the court was not empowered to take cognizance of the offenses punishable under the POCSO Act, 2012, therefore, the charge sheet was returned to be produced before the Special Court.

HELD: The Hon'ble High Court held that in a case which is only tried by a Court of Session through the magistrate is not empowered to add or alter charge he is empowered under section 209 of the Cr.P.C.to commit the case to the Court of Session. Since under Section 31of the POCSO Act a Special Court constituted under the act is deemed to be a Court of Session, the magistrate is empowered to commit the case under Section 209 of the Cr.P.C. but the commitment arises after the magistrate takes cognizance of the offenses laid in the charge sheet.^{iv}

Chandrika Prasad V/s State^v

FACTS: The victim, aged about 10 years, was sexually assaulted by the appellant who worked as a security guard and he outraged the modesty of the child when she went to her father's shop to help him go home and have lunch as her uncle was out of town. Then the matter was brought to the notice of the police who after investigation submitted one charge sheet against the accused and

the trial court subsequently convicted him under Section 354 of I.P.C. and Section of the POCSO Act on which the accused felt aggrieved and thus the present appeal was filed.

On the basis of the evidence put forward in the Court, it was clear that the appellant abused his position of trust and outraged the modesty of the child when her father went home to have lunch. The accused who worked as a security guard took advantage of the situation and abused the child for about 10-15 days. The victim then declined from visiting the shop and revealed the incident.

HELD: The High Court held that the order was based upon proper appreciation of evidence and deserves no interference. The appellant, a security guard had outraged the modesty of a child below 12 years and also betrayed the trust of her father and hence the sentence order needs no modification and it was correct.

Jongi V/s State^{vi}

FACTS: It was the time of winter when the accused called the victim to give her a potli. When she went to Shivaji stadium to play, the accused came to her and asked to accompany him to get the potli back. He took her to a Gali and kissed and also hurt her on the cheek with a knife and also asked her to take off her underwear. The victim then cried and shouted. The accused was then apprehended by the public and he then ran away. Based on the report, the trial court convicted him under Section 354 and Section 9 of the POCSO Act, 2012. Against that order, the appeal is preferred.

HELD: The Hon'ble court held that the act of lifting the shirt of the victim amounted to can be termed as a case of sexual harassment. Thus the offense proved against the appellant is under Section 11 of the POCSO Act which is punishable under section 12 of the said act and provides imprisonment for a term which may extend to three years and shall also be liable to fine.

Avinash V/s State of Karnataka^{vii}

FACT: The appellant committed an act of sexual assault after kidnapping the victim in the night hours and taking her to various places, also having sexual intercourse with her. After the incident complaint was filed. On completion of the investigation, a charge sheet was laid against the appellant/accused for an offense punishable under Section 366 of IPC and Section 4 of the POCSO act. The trial court convicted them under the said offenses. Aggrieved by the sentence the present appeal was filed before the High Court.

DECISION: it was held by the Hon'ble High Court that the age of the victim is an important aspect to be considered before deciding the question as to whether there was either an offense under Section 366 of the IPC and Section 4 of the POCSO Act. To prove the age of the victim merely the Xerox copy of the SSLC marks sheet was given. The High Court set aside the conviction with a direction to the lower court to afford the prosecution an opportunity to produce the original in court.

Subrata Biswas & another V/s The State^{viii}

FACTS: In the present case the appellant had allegedly outraged the modesty of his minor stepdaughter at his residence and then in a roadside jungle near his house. The trial court has convicted the appellant under Sections 5 &6 of the POCSO Act and Sec.356 of IPC and had sentenced him to undergo life imprisonment with a fine of Rs. 50000.

The counsel on behalf of the prosecution submitted that the version of the minor victim should be treated with due sensitivity and care, more particularly when she has leveled a charge of rape against her stepfather and due care should be given to Sec.29 of the POCSO Act. The counsel for the appellant stated that various inconsistencies in the statements of the victim and that of the other witnesses were vital and have shaken the prosecution story and also there was a delay in lodging of FIR.

DECISION: The bench comprising of Justice Gangopadhyay and Justice Bagchi noted glaring inconsistencies in the narrative of the prosecution case which rendered the statement of the victim unreliable. The absence of the fact of forcible rape in the medical report and failure to send the recoveries for forensic examination also poked holes in the prosecution case. The court refuted the claim of the prosecution and said that if the same is accepted the prosecution would be absolved from putting forward and further evidence and again the Court would be required to ask the accused person to disprove the case against him. This interpretation did not only lead to absurdity but also to constitutional suspect. Justice Bagchi said that the evidence on record does not bring home the guilt of the accused /appellant. The appeal was allowed and the conviction was liable to be set aside.

Yogesh Gopal Chavan Vs. The State of Maharashtra^{ix}

Facts: the statement given by the victim in the FIR lodged against the accused dated 20th May 2015 was that she was raped by her brother twice and by her older brother Harsh, once in 2013 and the other time in 2015. The victim further alleged that her brother's friend came to her house to consume liquor and subsequently touched her inappropriately. The two accused were convicted and so filed their appeal against the judgment.

DECISION: the court noted that the victim made several improvements from her original statement recorded in FIR while narrating the incidents to the officers in charge of the Children's home and medical officers at the JJ Hospital.

The court said that "Improvements on these aspects are not immaterial, inconsequential or minor in nature, the same can be attributable to a desire to implicate the appellants/accused persons in a serious offense by including embellishment and exaggeration over the original version.

The court concluded that the evidence of the victim lacks assurance which is required in a criminal trial to bring home the guilt. The victim had modulated her version on each occasion to suit her own convenience, and therefore the same is not safe to be acted upon.

Smt. Reenu Saini V/s State of Uttarakhand*

FACTS: The Court was hearing a petition filed by a woman, whose sixteen-year-old niece had been subjected to sexual assault. The defects complainant had now alleged that that the accused was threatening the victim girl and her family members to drop the proceedings and also the investigating officer was also putting pressure upon the family to withdraw the case and had also visited the school of the victim thereby disclosing the identity of the victim.

DECISION: The Uttarakhand High Court disposed of the petition with the following directions:

1. The Director-General of police to the State of Uttarakhand was directed to take stringent disciplinary action against the investigating officer in the manner in which he conducted the investigation.
2. The Director-General of police was also directed to hand over the further investigation to a woman police officer, not below the rank of sub-inspector within twenty-four hours.
3. It was also directed that no child as defined under the POCSO Act, shall be called to any police station throughout the state of Uttarakhand for the purpose of recording his/her statement.
4. The identity of the child shall not be disclosed to any person, in any form, including social media, print media, electronic media, Whatsapp, Twitter, or in any other mode not even in blurred pictures.
5. The Senior Superintendent of Police, Haridwar is directed to provide sufficient protection to the victim and to her family members forthwith.

6. GUIDELINES BY THE SUPREME COURT IN RECENT CASES

Sakshi V/s Union of India^{xi}

FACTS: It has been found that the offenses such as sexual abuse of minor children have been considered as a less serious offense, and treated as offenses falling under Sec.354 of the IPC as outraging the modesty of the women or under Sec.377 IPC as unnatural offenses.

DECISION: The Apex court gave the following guidelines namely:

In holding the trial of child sex abuse or rape:-

- a) A screen or some such arrangements may be made where the victim or witnesses do not see the face or body of the accused.
- b) The questions put in cross-examination on behalf of the accused, in so far as it relates to the incident directly should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and not embarrassing.
- c) The victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

Ms. Eera Through Dr. Manjula Krippendorf V/s State (Govt. of NCT o Delhi) & Anr.^{xii}

In the instant case the pivotal issue for consideration pertains to the interpretation of Sec. 2 (d) of the Protection of Children from Sexual Offences Act, 2012.

JUDGMENT: The concurring opinion of Justice Dipak Misra and Justice R.F. Nariman refused to extend the application of the Protection of Children from Sexual Offences Act, 2012 to mentally retarded individuals. It was also stated that such interpretation would lead to the transgression of the judiciary in the field of legislative lawmaking.

Justice Misra opined that in the case of a mentally retarded rape victim, the court would take into consideration the element of consent being present or absent. He, therefore, refused to expand the definition under the Act and stated that there is a limitation of the creativity of a Judge. He, however, directed the Delhi State Legal Services Authority to grant maximum compensation to the victim.

Justice Nariman emphasized the necessity of abstinence from judicial overreach. He opined that in the process of interpretation of statute a judge can only iron out the creases he found in a statute in the light of its object and not alter the material of the Act.

Nipun Saxena & Anr. v. Union of India & Ors.^{xiii}

FACTS: The judgment related to the most important aspect of the protection of the identity of the adult victims of rape as well as the child who is subjected to sexual abuse so that they are not subjected to any sort of harassment, ridicule, etc.

The Supreme Court stated that a minor who is subjected to sexual abuse needs to be protected even more than a major victim as the minor victim would find it more difficult to deal with the social stigma or ridicule

The reading of the provision of Sec. 24 (5) and Sec. 33 (7) of the POCSO ACT, 2012 clearly enunciates that the name and identity of the child should never be disclosed neither during the stage of investigation nor during the trial and the identity is to be protected from public and media at all circumstances.

The Supreme Court emphasized the need of setting up one-stop centers to deal with cases relating to women and children. The center should have well-trained sensitive staff. Counselors and psychiatrists should also be available at call in these centers. The center should also be well equipped with medical facilities for treatment as well as a medical examination of the victim.

The Supreme Court issued the following directions:-

1. No person can print or publish in print, electronic, social media, etc. any details such as the name of the victim or even in a remote manner disclose any facts which can lead to the victim being identified.
2. In case the victim is dead or is of unsound mind the name of the victim should never be published even with the authorization of the next of the kin of the victim.
3. The police officials shall keep all the documents, in which the name is disclosed on a sealed cover.
4. All the authorities to which the name of the victim is disclosed by the investigating agency or the court are also required to keep the name and identity of the victim secret.
5. In case the victim is minor, the name can only be disclosed upon order by the special court if it is in the best interest of the child
6. All the states/ union territories are required to set up at least one “One Stop Centre” in every district from one year from the Day of Judgment.

Dr. Sr. Tessy Jose V/s State of Kerela^{xiv}

FACTS: The accused no. 1 had raped the victim when she was a minor as a result of which she became pregnant. Later on, the victim's mother found upon medical examination that the victim was in the advanced stage of pregnancy and soon after reaching the hospital she went into labour. She later delivered a child. In so far as the role of the appellants is concerned they attended upon the victim.

Appellant no. 1 was a 66-year-old gynecologist.

Appellant no. 2 was a pediatrician

Appellant no. 3 was an old administrative staff of the hospital.

The prosecution case is not that the appellants had any knowledge about the rape of the victim but on account of purported commission of an act under Sec 19(1) of the POCSO Act, 2012.

DECISION: As per provision 19 of the POCSO Act, 2012 a person who has apprehension that an offense under this act has been committed must inform the authorities. The apex court held that after going through the record of the case and the submissions of the advocates no case against the appellant has been made out. As the victim's age when brought to the hospital was recorded as 18. Provision 19(1) of the POCSO Act, 2012 deals with knowledge, and no obligation to investigate and gather knowledge has been fastened.

Also appellants no. 2 and 3 had not come in contact with the victim. The knowledge requirement foisted on the appellant cannot be that they ought to have deduced from the circumstances that an offense has been committed. The apex court held that there is no evidence to implicate the appellants and proceedings against the appellants are quashed.

Alakh Alok Srivastava v. Union of India^{xv}

FACTS: The writ petition initially raised two issues:

- (1) The first issue related to the treatment of an eight-month-old female child victim of a crime committed under the POCSO Act, 2012.
- (2) The second issue related to the Speedy trial and monitoring of the trials under the POCSO Act, 2012 in a child-friendly court.

DECISION: The directions issued by the Supreme Court:

1. The High Court shall try to ensure that the cases under the POCSO act were tried and disposed of by the special court as well as the presiding officers are specifically sensitized in the matter of child protection.

2. The Special courts as conceived be established if not already done and the cases relating to POCSO be made over to them.
3. The courts are to be instructed that unnecessary adjournments should not be granted trials to be completed in fast track manner, following the procedure laid down in the POCSO Act.
4. The chief justices of the high courts were requested to set up a three-member committee to look after the progress of the case registered under the POCSO Act, 2012
5. The Director-General of Police shall set up Special Task Force which shall ensure that the investigation is properly conducted.
6. Adequate steps to be taken up by the high court to ensure a child-friendly atmosphere in the courts constituted under the POCSO Act,2012

Kumar Ghimrey V/s The State of Sikkim^{xvi}

FACTS: On 20.02.2014 at 13:30 hours the accused Kumar Ghimrey attempted to sexually assault seven years old child Anjali Rai in a jungle and consequently a complaint was filed in the Temi police station. After investigation, a charge sheet was filed under section 376,511,341,342 of the Indian Penal Code, 1860 along with Section 4 of the POCSO Act, 2012

7. VIEWS EXPRESSED BY THE JUDICIAL OFFICERS ON THE POCSO ACT, 2012

The implementation of the POCSO Act, 2012 is an arduous task and the primary responsibility has been affixed upon the judicial officers to do the needful in implementing the same. The judicial officers are facing a lot of troubles in implementing the same a number of national seminars have been conveyed by the National Judicial Academy, Bhopal to gather from the practical experience of the judges the problems faced by them in implementing the Act.

1. NATIONAL CONFERENCE FOR THE MEMBERS OF JUVENILE JUSTICE BOARDS ORGANISED JOINTLY BY NATIONAL JUDICIAL ACADEMY AND NATIONAL COMMISSION FOR THE PROTECTION OF CHILD RIGHTS^{xvii}

It was voiced out that POCSO Act, 2012 is a necessity in India as 40 percent of the population is below 18 years and 53 percent among them have faced sexual abuse in one form or another as revealed from the study conducted by the Ministry of Women and Child Development. Lack of

awareness in the implementation of POCSO Act, 2012 has resulted in a public outcry for the setting up of fast track courts and framing of expeditious new laws. POCSO Act, 2012 is a significant step to protect the children as a distinct class as it deals exclusively with sexual offences against persons below 18 years of age.

The speaker of the conference also highlighted the **Rohtak Apna Ghar Shelter Home Case** in May 2012 in which around 100 inmates were rescued and despite rampant allegations of child sexual abuse, the provisions of the POCSO Act, 2012 was not invoked.

Concern with Regard to POCSO ACT, 2012 are that:

- (a) The Act is relatively unknown.
- (b) Indoctrination, training, familiarization, and actual application by police officers and other stakeholders still remain a far cry.

Also the Supreme Court in the W.P. (Crl.) 102 of 2007 whereby the supreme court has directed all state courts to ensure that the regulation and monitoring bodies are constituted and made functional, but, despite the direction mandated by the supreme court of India no effective steps have been taken.

The concluding remark was that instead of framing new legislation the effort and focus need to be on implementing and strengthening existing laws as far as CSA is concerned the POCSO Act is a complete law. The government machinery should work relentlessly to implement the law in true letter and spirit.

2. WORKSHOP TO ACCESS NATURE OF DIFFICULTIES FACED BY POCSO COURTS^{xviii}

The National Judicial Academy, Bhopal from 24th to 27th September 2015 organized a workshop “Workshop to Access the Nature of Difficulties Faced by POCSO Courts.” The workshop was attended by thirty Learned Judges from various POCSO Courts across the country. In this workshop, the expert and resource persons highlighted various significant characteristics of the POCSO Act, 2012 as sought the following:

- Incorporation of new offenses, the establishment of new special courts and special public prosecutors

- Insertion of special rules and procedures to be followed during the recording of complaints and evidence
- Report to be mandatorily filed
- Continuous monitoring by NCPCR/SCPCR
- Compensation.

ANNUAL NATIONAL SEMINAR ON WORKING OF THE POCSO COURTS IN INDIA^{xix}

The annual national seminar on the “Working of POCSO Courts in India” was conveyed by The National Judicial Academy in Bhopal on 4th and 5th March 2017 and was attended by 42 judicial officers from the various high courts.

The speakers in the seminar stressed the creation of a child-friendly court and that the children must be treated differently otherwise it will be violating Article 14 (equality before law and equal protection of law) of the Indian constitution.

The problems encountered by the judiciary:

As per the findings of this Seminar, there are many problems that are faced Indian judiciary in handling the POCSO related cases viz., the exact number of the cases are not reported, if reported also they are not pursued, child witnesses are found to be tutored and some turn hostile in course of time and further some cases have been found to be doctored and manipulated.

For creating a child-friendly atmosphere the necessities include:

- i. Development of the infrastructure that will include the creation of the victim support centers, mechanisms for video recording of statements, and victim examination suites
- ii. Interpretation of the sentences, available policies, and creating child-friendly atmosphere by the judges.
- iii. The judges should be sensitive while dealing with bails, recording pieces of evidence, and also while pronouncing the decisions.
- iv. Judges of the POCSO courts must use discretion in various matters:
- v. There will be a clear difference between statutory rape and actual rape and then the priority should be given by the Judges to actual rape over statutory rape.
- vi. The judge must apply the discretion to record evidence by any appropriate method.
- vii. Sensitization at public places, ashrams, schools, etc. must be done and legal service authority must be assigned functions in this regard.

- viii. Child Pornography is at its peak and detailed measures need to be taken to curb the same as India is also a signatory to the UNCRC Optional Protocol on Child Pornography and as such proper sensitization of children needs to take place.

8. HINDRANCES TOWARDS ENSURING JUSTICE TO THE VICTIMS OF CHILD SEXUAL ABUSES

Each day four child victims of sexual abuse offenses in India are denied to avail justice due to the closure of their cases by the investigating agencies because of insufficient evidence per a new study namely, "Police case disposal pattern: An inquiry into the cases filed under POCSO Act, 2012" carried on by **Kailash Satyarthi** Children's Foundation (KSCF).^{xx} As the data shows, offenses relating to sexual abuse against children have been increasing in India over the years.

9. CONCLUSION

In conclusion, it can be ascertained that the commitment of the judiciary in dealing with cases of child sexual abuse is very high and the same reflects the judicial sensitivity. The Supreme Court time and again provides guidelines for the speedy disposal of cases. The apex court also demands reports from various high courts regarding the pendency of cases of child sexual abuse in various district courts. As per a news report published in Business Standard, the sad condition of justice dispensation came to light. It reveals that the slow disposal of cases will result in cases registered till 2016 getting disposed of till 2022. The increasing awareness and provision for mandatory reporting have resulted in more cases being registered but the specific infrastructure for the disposal of cases is far from reality. It is certainly true that the conviction rate in cases of offenses related to child sexual abuse is very low. More concrete and effective steps need to be taken to deal with the cases of child sexual abuse. The judgments delivered by the various High Courts and the Apex Court have revealed the strict yet unbiased approach of the judiciary. The evidence produced in support of the offenses is examined in detail so that justice is not compromised. Improvising upon the details of the crime so as to inculcate the accused by the victim is also not encouraged as it would result in the filing of false cases. The apex court also tries to find measures and consequently issues guidelines so that the victim of child sexual abuse is not re-victimized and can freely convey to the court the exact details of the crime faced by the victim and is not traumatized by the presence of the accused. The questions to be asked by the defense counsel needs to be placed before the court to ensure that the questions in no way work to cause discomfort to the victim and the truth comes out before the court. Determination

of the age of the victim is also of vital importance as whether a particular case will fall within the ambit of the POCSO Act, 2012 is totally dependent upon the age of the victim. The blanket ban upon the print and electronic media from disclosing the identity of the victim is also a praiseworthy step in ensuring complete justice to the victim and saving the victim from the social ostracisation which may befall the victim. The setting up of special courts and one-stop centers to deal with the cases of child sexual abuse so that proper medical treatment, as well as counseling, may be done and also justice can be served at the earliest.

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- ^{xix} Annual National Seminar on Working of the POCSO Courts in India, Mr. Sumit Bhattacharya, News Letter of the National Judicial Academy, Vol. 07 No. 1, March 2017,
- ^{xx} This is an analysis of pattern of disposal of POCSO cases by police from 2017 to 2019 and is based on the data and information published by the National Crime Records Bureau (NCRB)