

PAPER PRESENTATION SUBMITTED BY

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TO BE HELD ON

AT RAJAMAHENDRAVARAM

ON THE TOPICS

Session No.III

Domestic violence Act, 2005:

- e) Parties by whom and against whom reliefs can be sought.
- f) Types of reliefs.
- g) Execution of Orders.

Session No.IV

Protection of Children from Sexual Offences Act, 2012 – An overview:

- h) Nature of Offences.
- i) Presumptions.
- j) Compensation.

Session No.III

Protection of Women from Domestic Violence Act, 2005.

Topics covered under this paper are:

- 1. Introduction of the Act.**
- 2. Parties by whom and against whom reliefs can be sought.**
- 3. Types of Reliefs.**
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1. Introduction:

This Act came into effect from 26th day of October, 2006. The intention of this Act, is to protect women against violence of any kind, especially that is occurring within the family, as the Civil Law does not address this phenomenon in its entirety. Domestic violence is a major social issue in India that affects countless individuals, primarily women. It is a complicated issue rooted in societal standards, economic concerns, and gender based power relations. In Indian culture it is common for Women to be considered less valuable than men. As a result, men believe they have right to control their relationships and will resort to violence to maintain that power. Despite legislative protections and measures to prevent domestic abuse, it remains a prevalent problem with terrible repercussions. Till the year 2005 the remedies available to the victims of Domestic violence were limited. The women either had to go to the Civil Court for a decree of divorce or initiate prosecution in the Criminal Court for the offense punishable under Section 498-A of IPC. Both proceedings does not provided any Civil remedies to the victims. IPC never used the term “domestic

violence”. Section 498-A of IPC does not expand the defence area to dependant, non – matrimonial, women’s family members. Only physical abuse and that also only when combined with dowry has been considered domestic violence. No legislation permitted the granting of reliefs or return to a marital home or domestic security.

2. The main objective of the Act is to provide Civil remedies to the victims for enforcement of her rights like right to residence, maintenance, custody, protection and compensation. The legislative intent of this Act was further emphasized by the **Hon’ble Supreme Court of India in Indra Sarma v/s V.K.V.Sarma, 2013 (15) SCC**, wherein it was held that the D.V Act is enacted to provide a remedy in Civil Law for the protection of the women, from being victims of such relationship, and to prevent the occurrence of domestic violence in the society. The intention of this Act is to provide for more effective protection of the rights of women guaranteed under the constitution who are victims in violence of any kind occurring within the family and for matters connected therewith or incidental thereto.

2. Parties by whom and against whom the reliefs can be sought.

1. Parties by whom the reliefs can be sought. (who are the aggrieved persons).

The Act itself says that it is enacted for the protection of women. Sec 2(a) of the Act defined the term “aggrieved person”. It says that, an “aggrieved person” means any women who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence

by the respondent. Therefore, any women who is or has been in a domestic relationship with the abuser can claim relief against the abuser under this Act.

What is mean by Domestic relationship.

The term “domestic relationship” is also defined by the Act in Sec 2(f). It says that, “Domestic relationship” means a relationship between two persons who live or have lived, together in a shared household when they are related by consanguinity, marriage or through a relationship in the nature of marriage, adoption or family members living together as a joint family.

The Act gives a wide interpretation to the term “domestic relationship” so as to take it outside the confines of a marital relationship, and even includes live-in-relationships in the nature of marriage. In **Chanmuniya v/s Virendra Kumar Singh Kushwaha & another, 2010 AIR SCW 6497** Hon’ble Supreme Court of India held that, women in live-in-relationships are also entitled to all the reliefs given in the Act. The Hon’ble Supreme Court in the case of **D.Veluswamy v/s D.Patchaiammal, AIR 2011 SC 479**, enumerated five ingredients of a live-in-relationship as follows:

1. Both the parties must behave as husband and wife and are recognized as husband and wife in front of society.
2. They must be of a valid legal age of marriage.
3. They should qualify to enter into marriage eg. None of the partner should have spouse living at the time of entering into relationship.

4. They must have voluntarily cohabited for a significant period of time.
5. They must have lived together in a shared household.

In the same case the Supreme Court also observed that not all live-in-relationships will amount to relationship in the nature of marriage to get the benefit of Domestic Violence Ac. To get such benefit the conditions mentioned above shall be fulfilled and this has to be proved by evidence.

The Court further observed that, if a man has a “keep” whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not be a relationship in the nature of marriage. The court also referred to the term “palimony” (the term palimony was first used by the US court in the case of Marvin v/s Marvin (1976) which means grant of maintenance to a woman who has lived for a substantial period of time with a man without marrying and then deserted by him.

What is a Shared Household.

The said word is defined under Section 2 (s) of the Act. It is a household where the aggrieved person lives or has ever lived in domestic relationship with the respondent. It includes (1) Allotted, (2) Tenanted or (3) Joint family property, in which the complainant or the respondent has any right. In **Sathish Chandra Ahuja v/s Sneha Ahuja, AIR 2020 SC 5397**, Hon’ble supreme Court, redefined the meaning of shared household and overruled the Judgment of S.R Batra v/s Tarun Batra 2007 (3)

SCC 169 and held that in event, the shared household belongs to the husband or any relative of the husband (including father-in-law) with whom in a domestic relationship the women has lived, the said house will become a shared household. By this Judgment Hon'ble Apex Court of India has widened this scope of shared household.

Domestic violence.

The word "Domestic Violence" is defined under Section 3 of the Act. As per Section 3 of D.V Act domestic violence is of four types:

1. Mental / physical harm injury which includes -
 - (i) Physical abuse,
 - (ii) Sexual abuse
 - (iii) Verbal and emotional abuse
 - (iv) Economic abuse
2. Harassment or injury caused due to unlawful demand of any dowry or other property or valuable security.
3. Any type of threat by the respondent / husband or any person related to the respondent / husband in order to create any harm the women.
4. Any other harms or injury either physical or mental to the women.

Therefore any women who is, or has been in a domestic or family relationship with the respondent and who has been subjected to domestic violence, can sought reliefs under this Act.

Who can be a complainant under the Act?

1. Any woman who is, or has been in a domestic or family relationship with the respondent and who has been subjected to domestic violence, can file a complaint under this Act for redressal of her grievance.
2. Any protection officer or service provider on behalf of the aggrieved person may also present a complaint to the magistrate seeking one or more reliefs.

2. Against whom the reliefs can be sought: (who is Respondent under this Act?)

As per Section 2(q) “Respondent” means any ‘adult male person’ who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought relief under the Act.

In case of **Hiralal P.Harsora v/s Kusum Narottamdas Harsora**, AIR 2016 SC 4774, Hon’ble Supreme Court held that, words ‘adult male person’ contrary to object of affording protection to women who suffered from domestic violence of any kind and word expression ‘adult male’ is substituted by “any person”. Therefore a respondent can be a female person who is in domestic relationship with the aggrieved.

3. Types of reliefs available under the Act:

An aggrieved person or a protection officer, or any other person on behalf of the aggrieved person may present an application to the magistrate for the relief and

protection. After hearing the aggrieved person and the respondent, the Magistrate may pass any of the following orders:

1. Protection Order.
2. Residence Order.
3. Monetary relief.
4. Interim custody order of children.
5. Compensation order.

Protection Order:

Section 18 of the Act deals with Protection Order. A protection order is passed to protect the woman from any further incidents of violence by prohibiting the respondent from contacting, meeting, committing violence directly or indirectly to the victim, alienating assets, bank lockers and bank accounts owned jointly or separately by the respondent and any other act that is prohibited by the protection order.

After giving an opportunity to the aggrieved person and respondent of being heard and the magistrate is satisfied that a prima facie case of domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person prohibiting the respondent from the following acts such as,

- * Committing any acts of domestic violence.
- * Aiding or abetting in the act of domestic violence
- * Entering the place of employment of aggrieved person or if the person is child, its school or any other places

- * Attempting to communicate in any form including personal, oral or written, electronic or telephonic contact
- * Alienating any assets, operating bank account, bank locker held or enjoyed by both parties jointly or singly by the respondent including her stridhan
- * Causing violence to the dependents, or other relative or any other person who give the assistance to the aggrieved person or
- * Committing any other acts specified by the protection officer

In the case of **V.D. Bhanot v/s Savita Bhanot (AIR 2012 SC 965)**, which upheld the Delhi High Court's view that "even a wife who had shared a household before the Domestic Violence Act came into force would be entitled to the protection of the Domestic Violence Act. Hence, the Domestic Violence Act entitles the aggrieved person to file an Application under the Act even for the acts which have been committed prior to the commencement of the Domestic Violence Act.

Residence orders:

The Magistrate may pass a residence order under Section 19 of the Act if he is satisfied that domestic violence has taken place. The order can include restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, entering into the portion occupied by the aggrieved person, alienating or disposing of the shared household or encumbering the same, renouncing his rights in the shared household, and directing

the respondent to remove himself from the shared household or arrange alternative accommodation for the aggrieved person.

The magistrate being satisfied that a domestic violence has taken place, pass residence order,

- * Restraining the respondent from dispossessing or in any manner disturbing the peaceful possession of the shared household
- * Directing the respondent to remove himself from the shared household
- * Restraining the respondent or his relatives from entering any portion of the shared house hold where the aggrieved person lives
- * Restraining the respondent from alienating or disposing of the shared house hold or encumbering it
- * Restraining the respondent from renouncing his right in the shared household
- * Directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her or to pay rent for the same if the circumstances so require.

No order shall be made against women under this section. Magistrate may impose additional condition and pass any other order to protect the safety of the aggrieved person or her child. Magistrate is also empowered to order direction the concerned station house officer of the police station to give protection to the

aggrieved person to assist in implementing his order. Magistrate may also impose on the respondent to direct stridhan or any other property or valuable security she is entitled.

Monetary relief:-

Section 20 the Act deals with Monetary reliefs. The magistrate may direct the respondent to pay monetary relief to meet the expenses of the aggrieved person and any child as a result of domestic violence and such relief includes:

- * Loss of earnings
- * Medical expenses
- * Loss caused due to destruction or removal or damage of any property
- * Pass order as to maintenance for the aggrieved person as well as her children if any

Including the order under or in addition to an order of maintenance under section 125 criminal procedure code or any other law. The quantum of relief shall be fair reasonable and consistent with the standard of living to which the aggrieved person is accustomed to. Magistrate can order a lump sum amount also. On failure of the respondent to make payment of this order, magistrate shall order employer or debtor of the respondent to directly pay to the aggrieved person or to deposit in the court a portion of the salary or wage due to the respondent. Magistrate can order a lump sum amount also. On failure of the respondent to make payment of this order,

magistrate shall order employer or debtor of the respondent to directly pay to the aggrieved person or to deposit in the court a portion of the salary or wage due to the respondent.

Custody orders:-

Magistrate can grant temporary custody of any child or children under Section 21 of the Act to the aggrieved person or to the person making application on her behalf and specify the arrangements for visit of such child by the respondent. Magistrate can refuse the visit of such respondent in such case if it may harmful to the interest of the child.

Compensation order:-

Magistrate can order the respondent under Section 22 of the Act, on an application made by the aggrieved person, to pay compensation and damages for the injuries, including mental torture and emotional distress caused by the acts of domestic violence committed by the respondent.

Copies of orders passed by the magistrate shall be supplied free of cost to the parties concerned and police officer and service provider.

Any relief available under this Act may also be sought in any other legal proceedings before a civil court, family court or criminal court and such relief may

be sought in addition to and along with relief sought for in suit, or legal proceeding before civil or criminal Court.

4. EXECUTION OF ORDERS:-

The orders of the Magistrate are executed by the Magistrate himself and in the manner in which all such orders of the Magistrate are executed. If the orders are prohibitory orders, the respondent is directed not to interfere with the freedom of the aggrieved woman.

(i) Protection order:-

Section 31 of the DV Act states that a breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

The offence under sub-section (1) shall as far as practicable be tried by the Magistrate who had passed the order, the breach of which has been alleged to have been caused by the accused.

While framing charges under sub-section (1), the Magistrates may also frame charges under section 498A of the Indian Penal Code (45 of 1860) or any other

provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions.

In **Kanaka Raj vs. State of Kerala and another, 2010 Cr.L.J (NOC) 447 (KERALA)**, the Hon'ble Kerala High Court held that only if the order passed by the Magistrate is a protection order or an interim protection order, the Magistrate can direct registration of case and investigate the same under Section 31 of the DV Act and even if award is passed by Lok-Adalath unless made in terms of section 18 of the DV Act, it cannot be a protection order or interim protection order and breach of it will not attract the offence U/Sec.31 of the DV Act.

(ii) Residence order:-

In order to implement the residence orders, the Magistrate is also empowered to order direction to the concerned station house officer of the police station to give protection to the aggrieved person. Magistrate may also impose on the respondent to direct stridhan or any other property or valuable security she is entitled. Residence orders are passed to protect the aggrieved from the dispossession; therefore, a breach of residence order could also be an offence under section 31.

(iii) Monetary relief/Maintenance Order:

As per Rule 6 of the Protection of Women from Domestic Violence Rules, 2006, any application under section 12 of the D.V.Act shall be dealt with and the orders enforced in the same manner laid down U/s 125 of Cr.P.C. In **Renuka vs.**

Yelaguresh, the Hon'ble Karnataka High Court held that orders passed under section 12 of the Protection of Women from domestic Violence Act, 2005 can be enforced in the same manner as laid down in Section 125 of Cr.P.C.

On failure of the respondent to make payment of this order, magistrate shall order employer or debtor of the respondent to directly pay to the aggrieved person or to deposit in the court a portion of the salary or wage due to the respondent. Magistrate can order a lump sum amount also. On failure of the respondent to make payment of this order, magistrate shall order employer or debtor of the respondent to directly pay to the aggrieved person or to deposit in the court a portion of the salary or wage due to the respondent.

If the order is for maintenance the same is executed by attachment of the movable properties of the respondent. If it still remains unfulfilled the order of maintenance may be sent to the District Collector for the recovery of the amount due as if it is an arrear of land revenue, in which proceedings the Collector may attach the immovable properties of the respondent.

In **Shalu Ojha vs. Prashant Ojha, 2014(4) RCR (Civil) 815 (SC)**, the Hon'ble Supreme Court held that where maintenance is granted by Magistrate U/sec.20 of DV Act, on appeal to the court of Session, the Session Court ought not stay the

execution of maintenance order. Power to grant interim orders are not always inherent in every court.

In **Suneesh vs. State of Kerala & Anr**, the Kerala High Court held that breach of monetary relief order cannot be prosecuted under section 31, penalty attracted only for violation of protection orders.

A maintenance order including interim maintenance order passed under section 23, cannot be enforced through section 31 and it can be enforced in the same manner as laid down under section 125 Cr.P.C. Section 20(4) provides the mechanism for compliance with the maintenance order.

(iv) Custody orders:-

If the order is for custody of children the Magistrate with the assistance of the police recovers their custody from the Respondent and hands them over to the aggrieved woman.

Conclusion

The Protection of Women from Domestic Violence Act, 2005 is enacted with a noble intention to provide effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family. But protection of one must not result in harassment of other, therefore, while protecting the rights of aggrieved person the courts have to make a balance between

the conflicting interests. Courts have to address the areas which are still untouched and issues can be settled only by a positive approach so that we the people of India strive towards excellence.

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Session No.IV

Protection of Children from Sexual Offences Act, 2012.

Topics covered under this Paper are:

- 1. An Overview of the Act.**
- 2. Nature of Offenses under this Act.**
- 3. Presumptions under this Act.**
- 4. Compensation.**

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I. An overview

The Protection of children from Sexual Offences Act (POCSO for short) was passed in 2012 to comprehensively deal with the issue of sexual offenses against children. POCSO Act not only spells out the punishments for offenses but also sets out a system for support of victims to safeguard the interest of the child at every stage of the judicial process and for proper development of child in view of his/her protection of the right to privacy and confidentiality and also provides compensation for the injury suffered by the child.

Under POCSO Act 'Child' means any person below the age of 18 years, as defined under Section 2 (d) of the Act. The child could be a male or female. The offender too could be male or female. **POCSO Act is thus a gender neutral law.** The child victim of sexual offence could be boy or a girl. As for the person who commits the crime, he does not matter whether the person is a male or female. Both genders are equally punishable for offences under this law.

The protection of children from Sexual Offences Act, 2012 “POCSO Act, 2012” is a legislation which aims at protecting children from all types of sexual abuse. Although the convention on the rights of the child was adopted by the United Nations in 1989, the offenses against children were not addressed by way of any legislation in India till the year 2012. The Act provides stringent deterrents for the commission of offences against children ranging from a minimum of 20 years of imprisonment to the death penalty in case of aggravated penetrative sexual assault.

Before the Introduction of the POCSO Act, 2012, under the Indian Penal Code, 1860, child sexual abuse was dealt under Sections 375,354 and 377. These provisions neither protect male children from sexual abuse nor protect their modesty. Also definition of the terms like ‘modesty’ and ‘unnatural offence’ or not provided in I.P.C. Owing to the lack of any specific legislation, it was pivotal to establish a statute that pointedly tackles the issue of growing child sexual abuse cases in the country. With the efforts of multifarious NGOs, activists and the Ministry of Women and Child Development, POCSO Act, 2012 was enforced on 14th November, 2012.

Jurisdiction: Under Section 28 of the Act, only Special Court is having jurisdiction to try the cases under this Act. But when the offense is done by a child, such child shall be dealt by Juvenile Justice Board under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000. (Section 34 (1) of the Act).

To safeguard the interest of the child at every stage of the judicial process, the Act provides the following:

1. The statement of a child shall be recorded as far as practicable by a woman police officer not below the rank of sub-inspector at the residence of a child or at the place of choice of the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.
2. At the time of recording the statement the police officer should be not be in police uniform.
3. During investigation stage or trial stage, the child shall not come in contact in anyway with the accused.
4. No child shall be detained in the police station in night for reason.
5. The identity of the child, child's family, school, relatives, neighborhood or any other information by which the identity of the child may be revealed shall be protected from public media, unless otherwise directed by the Special Court in the interest of the child.
6. The medical examination of a victim girl shall be conducted by a woman doctor in the presence of the parents of the victim girl or any other person in whom the child reposes trust or confidence, in their absence, in the presence of a woman nominated by the head of the medical institution.
7. The Special Public Prosecutor or the counsel for the accused shall, communicate the questions to be put to the child in chief, cross or re-examination, which shall in turn put those questions to the child. (Section 33 (2) of the Act)

8. The Special Court may, if it consider necessary permit frequent breaks for the child during the trial.
9. The Special Court shall create a child – friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in court.
10. The Special Court shall ensure that the child is not called repeatedly to testify in the court.
11. The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.
12. The evidence of the child shall be recorded within a period of 30 days of the Special Court taking cognizance of the offense.
13. The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offense.
14. The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence.
15. Non-Governmental organizations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial stage to assist the child.
16. The family or guardian of the child can take the assistance of a legal counsel. When they can not afford, the Legal Services Authority shall provide a lawyer to them.

II. Nature of Offenses

This Act deals with the following offenses.

1. Sexual Offenses (Section 3 to 15 of the Act).
2. Abetment and Attempt to commit Child Sexual Abuse (Section 16 to 18 of the Act).
3. Disclosure of identity of the victim of certain offenses. (Section 23 of the Act).
4. False Complaints and False Information. (Section 22 of the Act)
5. Failure to report. (Section 19 of the Act)
6. Failure to record cases. (Section 19 of the Act)

1. Sexual Offenses (Section 3 to 15 of the Act) : Penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual assault, sexual harassment, use of a child for pornographic purposes, strong of pornographic materials involving a child are the seven types of sexual offenses under this Act.

Penetrative Sexual assault: Section 3 of the POCSO Act defines penetrative sexual assault and Section 4 lays down the punishment which was made more stringent by the 2019 amendment. In the case of *Bandu vs The State of Maharashtra* (2017), a person was committed under Section 4 and 6 of the POCSO Act along with some provisions under the Indian Penal Code, 1860 for having committed penetrative sexual assault on a physically and mentally challenged 10-years-old girl. In **Pranil**

Gupta vs State of Sikkim (2015), the victim aged 15 years stayed with the accused and injuries were found in her genital area. The High Court relied on the statement of the accused that the accused opened her cloths and raped her 5 times in one night. The contention of the accused that he was not aware of the victim being a minor was not accepted and the accused was prosecuted under Section 3 of the POCSO Act.

Aggravated penetrative sexual assault: Section 5 of the POCSO Act lays down the cases in which penetrative sexual assault amounts to aggravated penetrative sexual assault. For example, penetrative sexual assaults on a child by a police officer within the vicinity of a police station, by armed forces within the limits of their area, by a public servant, by the staff of jails, hospitals or educational institutions are considered aggravated penetrative sexual assault and are punishable under Section 6 of the POCSO Act.

Sexual assault: Section 7 of the POCSO Act defines sexual assault as, “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 other act with sexual intent which involves physical contact without penetration is said to commit sexual assault”. In **Subhankar Sarkar v. State of West Bengal (2015)**, on medical examination of the victim, it was found that there was no evidence of penetrative sexual assault but scratch marks on the body of the victim

were found which proved the use of force and thus, the accused was convicted under Section 8 and 12 of the POCSO Act.

The Hon'ble Supreme Court in **Attorney General Of India v/s Satish & Others reported in 2021 SCC Online SC 42**, had set aside the judgment passed by Bombay High Court which held that skin to skin contact is necessary to punish the offender for sexual assault under section 8 of POCSO Act. The Supreme Court held that the most important ingredient to constitute the offense of sexual assault under section 7 of the Act would be the "sexual intent" and not the "skin to skin" contact with the child and any narrow interpretation of the provision which would defeat the object of the provision which would not be accepted.

Aggravated sexual assault: Section 9 and 10 of the POCSO Act contain provisions regarding aggravated sexual assault on a child. In the case of **Sofyan v. State (2017)**, the accused who was a plant operator in the swimming pool area was convicted by the Trial Court under Section 10 of the POCSO and Section 354 of the Indian Penal Code, 1860 for having sexually assaulted a girl of 8 years old. The facts of the case are that when the victim was and inserted his hand in her swimming costume and touched her with sexual intent. The Delhi High Court rejected the argument of the accused that he was implicated falsely and the conviction was upheld.

Sexual harassment: Section 11 of the POCSO Act defines sexual harassment. It includes six cases which constitute sexual harassment of a child.

1. If anyone utters any word or makes any sound or exhibits any object with sexual intent to a child.
2. If anyone makes a child exhibits his body so that it is seen by the offender or any other person.
3. If any person shows any child any form or media for pornographic purposes.
4. if anyone constantly watches or stalks a child directly or online.
5. if anyone threatens to use a real or fabricated depiction of any part of the body of the child or the involvement of the child in a sexual act through electronic, film or digital.
6. if anyone entices a child for pornographic purposes.

Pornography: Section 13 of the POCSO Act states that anyone who uses a child for pornographic purposes by either representing the sexual organs of the child or using a child in real or simulated sexual acts or representing a child indecently or obscenely in programs or advertisements on television or on internet, commits the offense under this section and is liable in accordance with Sections 14 and 15 of the POCSO Act. In the case of **Fatima A.S. v. State of Kerala (2020)**, a woman posted a video on her social media platforms showing her two minor children, a boy (aged 14) and a girl (aged 8), painting on her semi-nude torso carrying the hashtag ‘Body

Art and Politics'. A case was registered against that woman for the offense under Section 10 r/w 9 (n), 14 r/w 13(b) and 15 of POCSO Act. The woman on her part defended her actions as a form of self – expression and an attempt to break free from social and cultural taboos that constrain woman's bodies. The Supreme Court of India observed in this case that, *“every parent tries their best to teach their children all about life. Every parent has the right to raise their children in the manner they wish. Children do not inherently grow up thinking that any action is right or wrong unless it is impressed upon them as such. There is nothing wrong with a mother allowing her body to be used as a canvas by her children to paint to sensitize them to the concept of viewing nude bodies as normal thinking about them as more than just sexual objects only. Such an act can not be termed to be one which is done with sexual intent.”* Thus, sexual intent is *sine quo non* for the applicability of section 7 of POCSO Act and consequently, Section 9.

2. Abetment and Attempt to commit Child Sexual Abuse (Section 16 to 18 of the Act):

Abetment of child sexual abuse

Section 16 of the POCSO Act defines the abetment of the offence. The following acts constitute abetment of offence under the POCSO Act:

- * Instigating any person to commit that offence;

- * Engaging in any conspiracy with one or more persons to commit any offence when any illegal act or omission taken place in consequence of that conspiracy;
- * Aiding to commit that offence intentionally.

The punishment for the abetment of offense is specified under Section 17 of the POCSO Act, 2012 according to which a person who abets the commission of an offense and the offense is executed is to be punished with the punishment that has been provided for that offense under the POCSO Act.

Attempt to child sexual abuse

Section 18 enunciated that attempt to commit any offense under the POCSO Act, 2012 is also an offense. It invites either of the two following punishments under Section 19 of the Act:

- * Imprisonment provided for that offence for a term extending upto one-half of the imprisonment for life, with or without fine:
- * Imprisonment provided for that offense for a term extending up to one-half of the longest term of imprisonment with or without fine.

3. Disclosure of identity of the victim of certain offenses (Section 23 of the Act):

(1) whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offense under section 376, section 376A, section 376AB, Section 376B, section 376C, Section 376D, Section 376DA, section

376DB or section 376E is alleged or found to have been committed shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in subsection (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publications is

(a) by or under the order in writing of the officer in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

(b) by, or with the authorization in writing of, the victim: or

(c) where the victim is dead or minor or of unsound mind, by, or with the authorization in writing of, the next of kin of the victim:

State of Punjab Vs Gurmeet singh (1996) 22 SCC 384 Provided that no such authorization shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognized welfare institution or organization. Explanation for the purposes of this subsection, “recognized welfare institution or organization” means a social welfare institution or organization recognized in this behalf by the Central or State Government. (3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in subsection (1) without the previous permission of such Court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

4. False Complaints and False Information: Section 22 of the Act prohibits any person from making a false complaint or providing false information against a person in respect of an offense committed under section 3,5,7, and 9 of the Act I.e., the offense of penetrative sexual assault and sexual assault, solely with the intention to humiliate, extort or threaten or defame him.

Punishment for False Complaints and False Information: Section 22(1) of the Act provides punishment for a maximum period of six months imprisonment or fine or both, to those who provide false information, regarding sexual assault against children, solely with the intention to humiliate, extort or threaten or defame an individual against whom the complaint under the Act was being made.

However, section 22(2), makes it clear that if the false complaint or false information of sexual assault had been provided by a child, then no punishment shall be imposed on such child.

5. Failure to report: Sexual abuse cases happen behind closed doors and the elders attempt to hide these incidents due to the stigma that is attached to these crimes. Consequently, for the proper implementation of the Act, reporting of these incidents by the third parties who have the knowledge or apprehension of such offense, has been made mandatory. Section 19 of the Act mandates the person who notices the offense committed under POCSO Act to report the same to the police within reasonable time.

Punishment for failure to report: Section 21 (1) of the Act deals with the punishment for failure to report. If the person fails to report the commission of the said offense, then the person is said to have committed an offense and shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

If any person who is an in-charge of any company or an institution, fails to report the commission of the offense under section 19(1) in respect of a subordinate under his control, then he shall be punished with imprisonment for a term which may extend to one year and with fine.

In the case of **State of Gujarat v/s Anirudh Singh and another (1997)**, the Supreme Court had observed that it is the duty of every citizen to aid and cooperate with the investigating agencies and give information regarding the commission of cognizable offenses. In various instances, schools and teachers help the child victims by reporting the sexual abuse cases to the authorities. For example, in the case of **Narbahadur vs State of Sikkim (2016)**, teachers received information that her student is pregnant due to repeated sexual assaults on her by an elderly accused. The teachers informed the panchayat who lodged an FIR in the police station.

Shankar Kisanrao Khade vs State of Maharashtra (2013) is an important case where the Supreme Court laid down guidelines regarding reporting the offence. In this case, rape was committed on an 11-years-old child with moderate intellectual

disability but it was neither reported to the police nor to the juvenile justice board. The Court observed that children with intellectual disabilities are more vulnerable and therefore, the institutions which house them have the responsibility to report sexual abuse incidents against them. Furthermore, it was laid down that non-reporting of crime in accordance with the provisions of the POCSO Act is a serious offence.

6. Failure to record cases. (Section 19 (2) of the Act): Registration of FIR is mandatory. **Lalita Kumari v. Govt. of U.P and Ors., AIR 2014 SC 187**, the following directions were laid down by a Constitutional Bench of the Honorable Supreme Court:

- (i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.
- (ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offense is disclosed or not.
- (iii) If the inquiry discloses the commission of a cognizable offense, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

- (iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.
- (v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.
- (vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under: (a) Matrimonial disputes/family disputes (b) Commercial offences (c) Medical Negligence cases (d) Corruption cases (e) Cases where there is abnormal delay/latches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay. The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.
- (vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed fifteen days generally and in exceptional cases, by giving adequate reasons, six weeks time is provided. The fact of such delay and the causes of it must be reflected in the General Dairy entry.
- (viii) Since the General dairy/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating

to cognizable offences, whether resulting in registration of FIR or leading to any inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

Punishment for failure to report: Section 21 (1) of the Act deals with the punishment for failure to report cases under section 19(2) of the Act. If the police fails to record the information reported about the commission of the offense, then the he is said to have committed an offense and shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

3. Presumptions under this Act.

The basic presumption under Criminal Jurisprudence is, the Accused is presumed to be innocent unless proved guilty; and the entire burden of proof lies on the prosecution to prove the guilt of the Accused. Certain exceptions are there to this basic presumption. Section 29 & 30 of this Act are two such exceptions. They shift the burden of proof from the prosecution to the accused.

Under **section 29 of the Act**, the court presumes that the accused committed, abetted or attempted to commit the offense, unless the accused proves otherwise. This presumption applies to the offenses under section 3,5,7 and 9 of the Act.

Under **section 30 of the Act**, the court presumes that, the accused has a culpable mental state, unless the accused proves otherwise.

The said two presumptions leads to reverse burden of proof i.e., casting the burden of proof of innocence on the Accused himself. However the said two presumptions does not mean that, prosecution need not adduce any evidence as there is already presumption which says that the offense alleged was committed by the accused and it will be for the accused to ‘prove’ that he has not committed an offense and he has to prove it beyond reasonable doubt. Further the accused can not be convicted on the basis of presumption alone. The said view is expressed by Hon’ble Supreme Court in various case.

In **Dhanwantrai Balwantrai Desai v/s State of Maharashtra, 1964 (1) Cr.L.J 437 (SC)**, Hon’ble Supreme Court of India held that, “ *presumptions, are rules of evidence and do not conflict with the presumption of innocence of the accused, for, the burden, on the prosecution, to prove its case, beyond all reasonable doubt, still remains intact*”. In the same case it is also held that, “*when the facts give raise to a presumption of law, the prosecution shall be taken to have discharged its obligation to prove its case beyond reasonable doubt. In such a case, the onus shifts to the accused to prove the contrary. What is, now, of immense importance to note is that, while a presumption of fact can be rebutted by an accused by offering an explanation, which is reasonable and plausible, a presumption of law can not be*

discharged by explanation alone. What must to proved is that, the explanation is true.”

Necessity of Presumptions under this Act:

1. To take care of the child who has limited capacities and capabilities of appreciation and understanding mental state of others and even of himself/herself.
2. To lighten the burden and vulnerabilities of already vulnerable child.
3. To ensure proper and smooth implementation of the Act, to achieve its object of protection of children.

The ultimate effect of the presumption under section 30(1) is :

- * the child is required just to give account of the physical act of the accused.
- * This account has to stand the test of proof beyond reasonable doubt.
- * Once this test is complete, the Statute would fill the required *mens rea* in the alleged act.
- * Then it will be for the accused to disprove culpable mental act.
- * Accused can prove that child had misunderstood or misinterpreted his good acts.

In **Subrato Biswas v/s State of West Bengal**, CRA 011/2018 Cal.SDB dt: 11.06.2019 Hon'ble Calcutta High Court held that, *“the statutory presumption applies when a person is prosecuted for committing offence under Sections 5 and 9 of the Act and a reverse burden is imposed on the accused to prove the contrary. The word “is prosecuted” in the aforesaid provision does not mean that the prosecution has no role to play in establishing and/or probablising primary facts constituting the offence. If that were so then the prosecution would be absolved of the responsibility of leading any evidence whatsoever and the Court would be required to call upon the accused to disprove a case without the prosecution laying the firm contours thereof by leading reliable and admissible evidence. Such an interpretation not only leads to absurdity but renders the aforesaid provision constitutionally suspect. A proper interpretation of the said provision is that in a case where the person is prosecuted under Section 5 and 9 of the Act (as in the present case) the prosecution in absolved of the responsibility of proving its case beyond reasonable doubt. On the contrary, it is only required to lead evidence to establish the ingredients of the offense on a preponderance of probability. Upon laying the foundation of its case by leading cogent and reliable evidence the onus shifts upon the accused to prove the contrary.*

In **Amol Dudhram Barsagade v/s State of Maharashtra**, in Criminal Appeal No. 600/2017 Decided on 23.04.2018 by Nagpur Bench of Bombay High Court held that, *“The submission that statutory presumption under Section 29 of the POCSO Act, is absolute, must be rejected, if the suggestion is that even if foundational facts*

are not established, the prosecution can invoke the statutory presumption. Such an interpretation of Section 29 of the POCSO Act, would render the said provision vulnerable to the vice of unconstitutionality. The statutory presumption would stand activated only if the prosecution proves the foundational facts, and then, even if the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond reasonable doubt. Suffice it if the accused is in a position to create a serious doubt about the veracity of the prosecution case or the accused brings on record material to render the prosecution version highly improbable”.

In **Navin Dhaniram Baraiye v/s State of Maharashtra** dt: 25th June, 2018, Bombay H.C, while interpreting the scope of presumption of culpable intent under section 29 of the Act held that, *“A perusal of the above quoted provision does not show that it is for the accused to prove the contrary and in case he fails to do so, the presumption would operate against him leading to his conviction under the provisions of POCSO Act. It can not be disputed that no presumption is absolute and every presumption is rebuttable. It can not be countenanced that the presumption under section 29 of the POCSO Act is absolute. It would into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under section 29 of the POCSO Act to operate. Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and then claim that the evidence of the prosecution witness would have to be accepted as gospel truth and further that the*

entire burden would be on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under section 29 of the POSCO Act can not be accepted as it would clearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by law”

Whether the presumption of culpable intent under section 29 of the Act is attracted against the accused at the stage of bail?

Hon’ble High Courts expressed different views on this.

In Lingappa v/s The State of Karnataka, Criminal Petition No. 200659 of 2014, the Court refused to apply the presumption at the stage of bail, by holding that, *“it cannot be said there can be any presumption of forcible acts on the part of the petitioner. It is only if the minority of the girl is established then the letter of the law will have to be applied. Till such time, to proceed on the basis that the girl was a minor and to incarcerate the petitioner, virtually punish him for the offenses which are necessarily have to be established at the trial and would lead to miscarriage of justice”*.

Similar view is taken by Delhi High Court **In Dharmander singh v/s State (Govt., of NCT of Delih)**, held that, if a bail plea is considered before charges have been framed, Section 29 of the Act has no application; and the grant or refusal of bail is to be decided on the usual and ordinary settled principles. In a scenario where

a bail plea he is being considered at a stage after charges have been framed, in keeping with the observations of Hon'ble Supreme Court in **Rajballav Prasad**, the presumption of guilt contained in Section 29 of the Act would get triggered and will have to be "taken into consideration".

Same view is taken even by Allahabad High Court in **Monish v/s State of U.P and 3 others** decided on 9th February, 2023.

But different view is taken by **High Court of Kerala** in **Joy v/s State of Kerala**, decided on 29th November 2013, **High Court of Karnataka** in the special case of **Zaibulla v/s Channrayapatna Police Station**, decided on 17th June 2019, **High Court of Jammu and Kashmir** in **Shoki Lal v/s Union Territory of Jammu and Kashmir** decided on 09.02.2024. They held that presumption under Section 29 of POCSO Act would come into play even at pre-trial stage.

In **State of Bihar v/s Rajballav Prasad**, decided on 24th November, 2016, Hon'ble Supreme Court observed that, the High Court while making a general statement of law that, the accused is innocent, till proved guilty, the provisions of Section 29 of POCSO Act have not been taken into consideration.----- Keeping in view of this consideration and other consideration in mind, they opined that, it was not a fit case for grant of bail to the respondent at this stage.

4. Compensation under this Act

Under Section 33 (8) of POCSO Act, the Special Court is empowered to direct payment of compensation to the victim for the physical or mental trauma, or immediate rehabilitation.

Rule 7 of the POCSO Rules, 2012, authorizes the Special Court to award compensation.

Rule 7 (1) : The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the FIR. Such interim compensation paid to the child shall be adjudged against the final compensation, if any.

Rule 7 (2) :- The Special Court may, on its own or on the application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offense.

Rule 7 (3) : Where the Special Court, Under Sub-Section (8) of section 33 of the Act, read with subsections (2) and (3) of section 357A of the Code of Criminal Procedure, makes a direction for the award of compensation to the victim, it shall

take into account all relevant factors relating to the loss or injury caused to the victim, including the following:-

- (i) Type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;
- (ii) The expenditure incurred or likely to be incurred on his medical treatment for physical and/or mental health;
- (iii) Loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;
- (iv) Loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;
- (v) The relationship of the child to the offender, if any;
- (vi) Whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;
- (vii) Whether the child became pregnant as a result of the offence;
- (viii) Whether the child contracted a sexually transmitted disease (STD) as a result of the offence;
- (ix) Whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;
- (x) Any disability suffered by the child as a result of the offence;

- (xi) Financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation;
- (xii) Any other factor that the Special Court may consider to be relevant.

Rule 7 (4) : The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure or any other laws for the time being in force, or, where such fund or scheme does not exist, by the State Government.

Rule 7 (5) : The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

Under this Act, only Special Court is authorized to award compensation. While trying cases under this Act, the Juvenile Justice Board can not pass an order for interim compensation or recommend the award of compensation under Section 33 (8) of the Act and Rule 7 of POCSO Rules, 2012. It shall submit the application to the Special Court for passing of orders.

The Hon'ble High Court of Calcutta in **Bijoy @ Guddu Das v/s State of West Bengal** reported in 2017 (2) Cal LJ 224 while dealing with award of compensation under POCSO Act held that, *“Compensation envisaged under the aforesaid provision*

of law may be awarded by the Special Court at the interim stage also for immediate relief and rehabilitation of a child victim in light of the parameters laid down under Sub-Rule (3) of Rule 7 of the aforesaid Rules. Such compensation payable by the State is independent of the compensation which may be directed to be paid by the convict upon conviction in terms of Section 357 (2) and (3) of the Code. The philosophy of awarding compensation by the State is in the nature of a reparation to the victim of crime on its failure to discharge its sovereign duty to protect and preserve sanctity and safety of the individual from the ravages of such crime". The Court also made reference to Victim Compensation Fund notified by State Government under Section 357-A Cr.P.C. prescribing the minimum amount of compensation that may be awarded for various offences/injuries in the schedule thereunder which is as follows:

Schedule	Sl.No.	Description of Injuries/Loss	Minimum Amount of Compensation.
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1. Acid Attack Rs.3 lakhs
2. Rape Rs.3 lakhs
3. Physical abuse of minor Rs.2 lakhs
4. Rehabilitation of victim of Human Trafficking or other offences like witch hunting etc., Rs.1 lakh
5. Sexual assault (Excluding rape) Rs.50,000/-
6. Death Rs.2 lakhs
7. Permanent Disability (80% or more) Rs.2 lakhs
8. Partial Disability (40% to 80%) Rs.1 lakh

9. Burns affecting greater than 25% of the body (excluding Acid Attack cases) Rs.2 lakhs
10. Loss of foetus Rs.50,000/-
11. Loss of fertility Rs.1.5 lakhs Note: If the victim is less than 14 years of age, the compensation shall be increased by 50% over the amount specified above.

Referring to the above, the Hon'ble Calcutta Court held that *“The aforesaid scheme is, therefore, lays down the minimum limit for award of compensation in cases of offenses relating to rape, sexual assault (excluding rape), physical abuse of minor etc. it also provides for a hike of 50% of the amount of compensation if the victim is below 14 years of age. Although offenses under POCSO are not specifically mentioned in the Schedule, the cognate nature of offences of penetrative sexual assault or aggravated penetrative sexual assault punishable under Section 4 & 6 of POCSO when compared with rape and that of sexual assault with sections 6 & 8 of POCSO, prompts me to hold that the duty of the State of award compensation to victims under the aforesaid Fund would extend to such offenses also. The Special Court, therefore, while dealing with such offenses may make orders of interim or final compensation to victim from the Fund made available by the State. It is further clarified that a conjoint reading of the Section 33 (8) of the Act along with Rule 7 of the Rules made it amply clear that the power of the Special Court to award interim/final compensation is not restricted to the terms of the Victim Compensation Fund promulgated by the State but empowers the Court to award such reasonable and just amount as may be determined by it in the facts of the case in the light of the parameters laid down in Rule 7(3) of the aforesaid Rules to provide succour to a*

child victim. Upon orders being passed by the Special Court relating to such compensation the State Government shall pay the compensation so ordered by the Special Court within 30 days of the receipt of the order by itself or through the State Legal Services Authority or the District Legal Services Authority in whose hands the Victim Compensation Fund may be entrusted. It is also made clear that it shall be open to the Special Court in appropriate cases to grant compensation over and above the limit proposed under the scheme inasmuch as the scheme merely lays down the minimum limits of such compensation and does not provide for a upper limit which is left open to the judicial discretion of the Court to be determined in the light of the parameters laid down in Rule 7 (3) of the aforesaid Rules”.

Conclusion:-

The POCSO Act of 2012 looks into a support system for children through a friendly atmosphere in the criminal justice system with the existing machinery i.e., the CWC and the commission. The positive aspect is the appointment of the support person for the child who would assist during investigation, pre-trial, trial and post trial. The major challenge also would be convergence between different entities under different legislation. The benefits of POCSO Act would trickle down to the child only if this Act is implemented in its true sense and spirit by all the agencies.

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