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## PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012- A STUDY WITH SPECIAL REFERENCE TO MS. EERA V NCT CASE\*

Protection of Children against Sexual Offences Act, 2012 (referred as Act) is the outcome of excessive deliberation by Indian illustrious law makers whose vision was to create a protective environment by arming it with austere provisions in case of any of its provisional contravention. This Act is somewhat distinct from Indian Penal Code, 1860 as it talks about protection of a 'child' below the age of 18 years against any sort of sexual abuse, i.e. the Act being gender neutral aims to shield male or female child below the age of 18 years, on the contrary the IPC, 1860 however is more inclined towards wife below the age of 15 years. The Act seemed impeccable at its very outset until 2016 when Supreme Court was shaken from its slumber while accentuating the snag in the Act which has raised many eyebrows and now needs revamping of the provision in question.

The issue was pertaining the 'age' of the child who is ought to be protected '*Child*' means any person below the age of 18 years.<sup>1</sup> Looking at close quarters, it can be deciphered that the Act refers only to the biological age of the child while ascertaining the penalty to be given to the accused guilty of committing any offence as stated in this Act. However, what missed the attention of the legislators is what if any sexual assault takes place with a child who is biologically above the age of 18 years but mentally challenged whereby her mental age is below the age of 18 years. Will her perpetrators be booked under this Act?

This is precisely the question which came before the Indian Apex Court wherein a child who was suffering from cerebral palsy was chronologically of 40 years but mentally she was of 'child like'

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<sup>1</sup> Section 2 (d) Protection of Children from Sexual Offences Act, 2012.

age was raped in 2010, her mother, Delhi-based doctor pleaded that the accused should be tried by Special Court<sup>2</sup> established under the POCSO Act, 2012.<sup>3</sup>

This paper is an attempt to comprehend the issue in line with United Nations Convention on the Rights of the Child, to make it abundantly clear that the purpose of the Act is to “protect children from offences of sexual assault”, “to secure the best interests of the child” and to decide the issue of age as ‘mental age’.

*Keywords: United Nations Convention on the Rights of Child, Protection of Children from Sexual Offences, 2012, Indian Penal Code, 1860.*

Amongst various vulnerable groups classified in India, children’s category is worth mentioning as the atrocities inflicted on them commences from cradle and ends at their death. Such crimes or incidents do not encompass the mental or physical state of the child, as mentally or physically challenged kids are more likely to be intimidated or are threatened with unwarranted sexual acts. To deal with such heinous menace, plethora of protective measures in the form of legislative acts or guidelines had been brought into existence however, the nefarious activities just refuses to stop and thus sections like 375 (2) of Indian Penal Code, 1860 was felt to be inadequate to address the problem from its roots.

In order to effectively address the heinous crimes of sexual abuse and sexual exploitation of children through less ambiguous and more stringent legal provisions, the Ministry of Women and Child Development championed the introduction of the Protection of Children from Sexual Offences (POCSO) Act, 2012.<sup>4</sup>

The Act defines a child as any person below eighteen years of age, and regards the best interests and well-being of the child as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child. It defines different forms of sexual abuse, including penetrative and non-penetrative assault, as well as sexual harassment and pornography, and deems a sexual assault to be “aggravated” under certain circumstances, such as when the abused child is mentally ill or when the abuse is committed by a person in a position of

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<sup>2</sup> Section 28 of Protection of Children from Sexual Offences Act, 2012

<sup>3</sup> Ms. Eera v State, SLP (Crl.) No.(s). 2640-2642/2016

<sup>4</sup> <http://ncpcr.gov.in/index1.php?lang=1&level=1&&sublinkid=14&lid=607>

trust or authority vis-à-vis the child, like a family member, police officer, teacher, or doctor. People who traffic children for sexual purposes are also punishable under the provisions relating to abetment in the Act. The Act prescribes stringent punishment graded as per the gravity of the offence, with a maximum term of rigorous imprisonment for life, and fine.

The Act defines different forms of sexual abuse which includes penetrative and non-penetrative assault. It also involves sexual harassment, pornography, etc. Under certain specific circumstances POCSO states a sexual assault is to be considered “aggravated if the abused child is mentally ill or when the abuse is committed by a member of the armed forces or security forces or a public servant or a person in a position of trust or authority of the child, like a family member, police officer, teacher, or doctor or a person-management or staff of a hospital — whether Government or private.”

The Act also makes it mandatory to report such cases. It makes it the legal duty of a person aware of the offence to report the sexual abuse. In case he fails to do so, the person can be punished with six months’ imprisonment or fine. The Act further states that the evidence of the child should be recorded within a period of thirty days. The Special Court taking cognizance of the matter should be able to complete the trial within the period of one year from the date of taking cognizance of the abuse. It provides that the Special Court proceedings should be recorded in camera and the trial should take place in the presence of parents or any other person in whom the child has trust or confidence.

The Act provides for punishment against false complaints or untrue information. It describes strict action against the offender according to the gravity of the offence. It prescribes rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and also fine as punishment for aggravated penetrative sexual assault. It also prescribes punishment to the people who traffic children for sexual purposes.

The United Nations Convention on the Rights of the Child, or UNCRC, is the basis of all of UNICEF’s work. It is the most complete statement of children’s rights ever produced and is the most widely-ratified international human rights treaty in history. The UNCRC is a legally-binding international agreement setting out the civil, political, economic, social and cultural rights of every child, regardless of their race, religion or abilities.

Under the terms of the convention, governments are required to meet children's basic needs and help them reach their full potential. Central to this is the acknowledgment that every child has basic fundamental rights. These include the right to:

- Life, survival and development
- Protection from violence, abuse or neglect
- An education that enables children to fulfil their potential
- Be raised by, or have a relationship with, their parents
- Express their opinions and be listened to.

In 2000, two optional protocols were added to the UNCRC. One asks governments to ensure children under the age of 18 are not forcibly recruited into their armed forces. The second calls on states to prohibit child prostitution, child pornography and the sale of children into slavery. These have now been ratified by more than 120 states. A third optional protocol was added in 2011. This enables children whose rights have been violated to complain directly to the UN Committee on the Rights of the Child.

With the leading increase in crimes against children, the POCSO Act, 2012 has been amended quite exhaustively till recently in December 2018 as "This is a wholesome initiative whereby the entire POCSO architecture is not only strengthened but also enlarged so that artificial medicines or hormones could not be abused to kill the childliness of a child,"<sup>5</sup>

However, one issue that has been still not been looked into seriously is to clear the air about whether Age encompasses mental age in addition to biological age as well. Clearing this point will be able to extend the ambit of this law to all those hapless victims who are intellectually challenged and cannot seek any help under this law. It is the need of the hour to understand the consent to be understood should be from two consenting parties and both should be in a condition to understand the situation they are consenting to, and this should be beyond biological age factor.

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<sup>5</sup> <https://www.firstpost.com/india/cabinet-approves-amendments-to-pocso-act-introduces-death-penalty-for-aggravated-sexual-offences-5806301.html>



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