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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ W.P.(CRL) 1196/2024 & CRL.M.A. 11560-11561/2024
TULIR CHARITABLE TRUST Petitioner

Through: Mr.Vakul Sharma, Advocate

versus

UNION OF INDIA & ORS. Respondents

Through: Mr.Sanjay Lau, standing counsel with
Ms.Nandita Rao, ASC for GNCTD
Ms.Anubha Bhardwaj, SPP for CBI
/R-2with Mr.Robin Kumar, Inspector,
CBI
Mr.Ravi Prakash, CGSC, Mr.Ali
Khan, Mr.Taha Yasin, Mr.Astu,
Advocates for UOI

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Date of Decision: 09th May, 2024

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ : (ORAL)

1. Present public interest litigation has been filed challenging the order dated 01st September, 2023 passed by the learned Additional Sessions Judge (Special Court-POCSO) ('ASJ-SC'), Shahdara District, Karkardooma Courts in *SC 18/2022* titled *State v. Raman Gautam & Anr.* ('impugned order'), whereby the respondent nos.3 and 4 herein were discharged of offences under Section 15(2) of the Protection of Children from Sexual



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Offences Act, 2012 (for short 'POCSO Act'). The petitioner also seeks guidelines while hearing cases involving Child Sexual Abuse Material ('CSAM') of unidentified child/children online or offline.

2. A perusal of the impugned order reveals that respondent nos. 3 and 4 were arrayed as accused in FIR No. 20(S)/2021/CBI/SC-III/ New Delhi dated 14th November, 2021 filed by the CBI on the basis of information that respondent nos.3 and 4 along with other unknown persons were involved in circulating, storing and viewing CASM through social media groups.

3. Pursuant to registration of the aforesaid FIR, a search was conducted during which a phone and a hard-disk of five-hundred (500) GB was recovered from the house of respondent no.3 on 16th November, 2021 and two mobile phones were also recovered from respondent no.4. Upon investigation, thirty-four (34) videos from the mobile phone and fourteen (14) videos from the hard-disk were recovered from respondent no.3 and twenty-five (25) videos were recovered from the phones of respondent no.4, wherein children were depicted in sexually explicit manner.

4. Consequently, charge-sheet under Sections 67B of Information Technology Act, 2000 (for short 'IT Act'), Section 15 (2) of POCSO Act, 2012 and Section 120B of Indian Penal Code, 1860 (for short 'IPC') was filed also praying for liberty to carry out further investigation.

5. Vide the impugned order, the learned ASJ-SC held that the provision of Section 15(2) of the POCSO Act cannot be invoked against respondent nos.3 and 4 in absence of criteria of determining the age of the children in the pornographic videos/photos. Consequently, respondent nos. 3 and 4 were discharged of offences under Section 15(2) of POCSO Act.



6. The learned ASJ-SC has held in the impugned order that for invoking Section 15(2) of the POCSO Act, the first and foremost requirement is to determine whether the victim is a 'child' or not. Placing reliance on the judgment of the Supreme Court in *P. Yuvaprakash vs. State Rep. By Inspector of Police, 2023 SCC OnLine SC 846*, the learned ASJ-SC held that the age of the child for the purpose of POCSO Act has to be determined in accordance with the procedure set out under Section 34 of the POCSO Act read with Section 94 of the Juvenile Justice Act, 2015 ('JJ Act'). According to the learned ASJ-SC, since the children depicted in the sexually explicit material were unidentified and untraceable, no medical or scientific test could be carried out and as no documents were available for determining their age, Section 15(2) of the POCSO Act could not be invoked.

7. Learned counsel for the petitioner contends that the learned ASJ-SC has erroneously given benefit of Section 34 of the POCSO Act to the accused persons. He further contends that Section 94(2)(i) of JJ Act is not applicable to victims who are unidentified and untraceable.

8. He states that the impugned order is against the intent and spirit of POCSO Act, as it creates a distinction between 'identified' and 'unidentified' children. He contends that impugned order will lead to a situation, wherein no offender would get punished under Sections 14 and 15 of POCSO Act by questioning veracity of 'age determination' of 'unidentified child'.

9. He points out that the learned ASJ-SC has failed to appreciate the testimonies of two expert medical witnesses. He states that the learned ASJ-SC has further failed to appreciate that there cannot be any medical test for determining the age of the alleged children visible in the pornographic



videos/photos. According to him, the approach taken by the learned ASJ-SC defeats the very purpose of POCSO Act. He contends that subjecting unidentified children to age determination would embolden the perpetrators of CSAM to freely trade, publish or transmit videos/photos of ‘unidentified child/children victims’ online as well as offline, thereby rendering POCSO Act, toothless.

10. He submits that the learned ASJ has misinterpreted the judgment of the Supreme Court in *P. Yuvaprakash* (supra). According to him, the judgment is applicable in cases where the children can be identified and their medical examination can be conducted as per Section 94 of the JJ Act. He states that in the instant matter, children are not identified and they cannot be medically examined.

11. During the hearing, this Court asked the learned counsel for the CBI as to whether an appeal or revision has been filed against the order on charge dated 01st September, 2023. Learned counsel for CBI states that the said order has not been challenged by the CBI before any Court and they do not intend to challenge the same, as trial is proceeding ahead under Sections 67B of the IT Act and 120B IPC.

12. At the outset, this Court notes that the petitioner, in the present PIL, is not a witness or complainant in the FIR before the learned ASJ-SC. The petitioner is stated to be a charitable trust engaged in combating child sexual abuse. The petitioner as such is a stranger to the criminal proceedings pending against respondent nos. 3 and 4.

13. It is settled law that PIL in criminal matters is normally not to be entertained.



14. The prayer to frame guidelines for benefit of POCSO Special Courts by conducting cases involving CSAM of unidentified child/children is not called for in the present case as there are sufficient legal provisions to deal with it.

15. However, a perusal of the impugned order dated 1st September, 2023 reveals that the findings rendered therein *prima facie* suffer from manifest illegalities and has caused miscarriage of justice. The reasons for reaching this *prima facie* conclusion are as under:-

- i. While interpreting Section 15(2) of the POCSO Act, the learned ASJ-SC has solely relied upon the definition of ‘child’ provided under Section 2(d) of the POCSO Act. The learned ASJ-SC has failed to consider the definition of ‘child pornography’ provided under Section 2(da) of the POCSO Act, which reads as hereunder:

“Section-2(da): *“child pornography” means any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer generated image indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child.”*

(emphasis supplied)

In the opinion of this Court, it is the definition of ‘child pornography’ which is of relevance while considering whether Section 15 of the POCSO Act has to be invoked or not. In terms of Section 2(da) of the POCSO Act, any sexually explicit material involving a child or appear to depict a child would fall under the definition of child pornography, thereby suggesting that only a *prima facie* inference of involvement of a child is sufficient for any sexually explicitly material to be considered as child pornography. This is in contrast with the definition of ‘child’ under Section 2(d) of the POCSO Act, inasmuch



as, the determination of a child will be dependent upon the objective criterion of whether a person is above the age of eighteen (18) years. Such objective criterion has to be satisfied as per the procedure set out in the JJ Act. However, for the purpose of Section 2(da) of the POCSO Act, a subjective satisfaction/inference as regards the appearance of persons in the sexually explicit material is sufficient for it to be considered child pornography.

- ii. In the charge sheet filed before the learned ASJ-SC, CBI had relied upon statements of two doctors who had seen the videos recovered from respondent nos.3 and 4. The doctors had opined that some of the persons shown in the video/photos are children, i.e, below eighteen (18) years of age. However, the learned ASJ-SC has disregarded the statements of doctors as there was no medical test for determining the age of children. This Court is of the opinion that the view of the learned ASJ-SC in disregarding the statement of medical witness is wholly unwarranted, especially when there was no medical or scientific material to contradict the statements made by the doctors.
- iii. The learned ASJ-SC has also ignored the principle that at the stage of framing of charge, the only requirement is whether there is sufficient material on record to presume that the accused persons have committed the crime. The statements of the two doctors constitute a *prima facie* view at this stage and the same are sufficient material at the stage of framing of charge for an offence under Section 15(2) of the POCSO Act.
- iv. The reliance placed by the learned ASJ-SC on the judgment of the Supreme Court in *P. Yuvaprakash* (supra) is misplaced, insofar as,



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there are various factors that differentiate the present case with the case before the Supreme Court. First and foremost being that the provision invoked in *P. Yuvaprakash* (supra) was Section 6 of the POCSO Act, which provides for punishment for aggravated sexual assault, the definition whereof has been provided under Section 9 of the POCSO Act. The provisions of Sections 6 and 9 of the POCSO Act have to be interpreted keeping in mind the definition of child provided under Section 2(d) of the POCSO Act, the determination of which will be subject to the steps set out in JJ Act. However, in the present case, the provision invoked is Section 15(2) of the POCSO Act, which has to be interpreted in accordance with the specific definition of ‘child pornography’ under Section 2(da) of the POCSO Act. Second, in *P. Yuvaprakash* (supra), there was a dispute with respect to the age of the victim. In the present case, the two medical experts have opined that the victims were children. Thirdly, the Supreme Court was dealing with a case of elopement which had resulted in a conviction under Section 6 of the POSCO Act. In the present case, there is no sexual assault or elopement but recovery of sexually explicit material involving persons, who *prima facie* appear to be children. Moreover, in the present case, the proceedings were at the stage of framing of charge, whereas *P. Yuvaprakash* (supra) was an appeal filed by the accused therein against the final judgment of the Madras High Court, whereby the accused had been convicted under Section 6 of the POCSO Act. This Court notes that it is patently impossible to follow the steps under Section 34 of the POCSO Act read with Section 94 of the JJ Act in a situation where the victims are



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untraceable and unidentifiable. The procedure set out in Section 34 of the POCSO Act read with Section 94 of the JJ Act, if applied in offences under Section 15 of the POCSO Act, will render the provision otiose and redundant.

16. Recently, in *Parthasarathi M vs. State of Kerala, 2024 SCC OnLine Ker 1883*, the question before the Kerala High Court was whether strict proof of age of victim is required in all cases of child pornography. The Kerala High Court held that strict proof is not required to determine the age of the minor in every case of child pornography. It further held that the identity of the child in CSAM also need not be established by the prosecution as it is practically impossible. According to the Kerala High Court insisting on the same would defeat the objective of the POCSO Act. In the opinion of this Court, the view taken by the Kerala High Court is in consonance with the statute.

17. Under Section 397 of the Code of Criminal Procedure ('Cr.P.C. '), concurrent power of revision is conferred on the Court of Session as well as the High Court to call for and examine the record of any proceeding before any inferior Criminal Court situated within its local jurisdiction. Further, Section 401 Cr.P.C. confers plenary powers on the High Court and this power can be exercised *suo moto* by the Court. The Supreme Court in *Honnaiah T.H. v. State of Karnataka & Others, 2022 SCC Online SC 1001*, has held that the revisional jurisdiction of a High Court under Section 397 read with Section 401 of the Cr.P.C., is a discretionary jurisdiction that can be exercised by the revisional court *suo motu* so as to examine the correctness, legality or propriety of an order recorded or passed by the trial court or the inferior court. As the power of revision can be exercised by the



High Court even suo moto, there can be no bar on a third party invoking the revisional jurisdiction and inviting the attention of the High Court that an occasion to exercise the power has arisen.

18. This Court in *Court on its Own Motion v. Vidyanand & Ors., 2017 SCC OnLine Del 7705*, was a hearing a batch of criminal appeals against judgments dated 30th April, 2013 convicting the accused persons therein. During the hearing of the appeals, a judgment dated 29th April, 1986 in Sessions Case No. 31/86 was brought to the notice of this Court. After a detailed elaboration on the suo moto revisional powers of the High Court, especially in a case of finding of acquittal, this Court invoked suo moto powers of revision under Section 401 of the Cr.P.C against the Judgment dated 29th April, 1986 and issued notice to the accused therein in accordance with Section 401(2) of the Cr.P.C.

19. Therefore, it is settled law that revisional jurisdiction of the High Court can be invoked *suo moto* in cases of manifest illegality, or in cases where the Courts have wrongly appreciated or refused to appreciate evidence.

20. Keeping in view the above, this Court considers appropriate to exercise its *suo moto* revisional jurisdiction under Section 397 read with Section 401 Cr.P.C. and pass the following directions:-

- a) The present public interest litigation be registered as a *suo moto* revision petition and listed according to the roster before a learned Single Judge on 21st May, 2024;
- b) Ms. Aashaa Tiwari, Advocate, Mobile No.9810128673, is appointed as Amicus Curiae to assist the learned Single Judge. The learned counsel for the petitioner is given liberty to assist Ms. Aashaa Tiwari, Amicus



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Curiae. Registry is directed to supply a complete set of writ paper book to learned Amicus Curiae.

- c) Issue notice to the respondent nos.3 & 4 as to why order dated 01st September, 2023 be not set aside.
- d) The Union of India is deleted from the array of the parties.

21. This Court clarifies that the observations made in the aforesaid order are prima facie in nature and the parties are at liberty to raise all their contentions and submissions before the learned Single Judge.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

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