Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.1217-1219 OF 2017
[Arising out of S.L.P. (Crl.) Nos. 2640-2642 of 2016]

Ms. Eera
Through Dr. Manjula Krippendorf ... Appellant(s)

Versus

State (Govt. of NCT of Delhi) & Anr. ...Respondent(s)

J U D G M E N T

Dipak Misra, J.

Leave granted.

2. The pivotal issue that emanates for consideration in these appeals, by special leave, pertains to interpretation of Section 2(d) of the Protection of Children from Sexual Offences Act, 2012 (for short, "the POCSO Act"), and the primary argument of the learned counsel for the appellant is that the definition in Section 2(d) that defines "child" to mean any person below the age of 18

years, should engulf and embrace, in its connotative expanse, the "mental age" of a person or the age determined by the prevalent science pertaining to psychiatry so that a mentally retarded person or an extremely intellectually challenged person who even has crossed the biological age of 18 years can be included within the holistic conception of the term "child".

3. Before I note the submissions of Ms. Aishwarya Bhati, learned counsel for the appellant, the supporting submissions by the respondent State and the proponements in oppugnation by the learned senior counsel who was engaged on behalf of the accused-respondent No. 2 by the Court as the said respondent chose not to enter appearance, few facts are essential to be noted. The appellant is represented by her mother on the foundation that she is suffering from Cerebral Palasy (R. Hemiparesis) and, therefore, though she is biologically 38 years of age, yet her mental age is approximately 6 to 8 years. In this backdrop, it is contended that the trial has to be held by the Special Court established under the POCSO Act. As the facts

would unroll, the mother of the appellant had lodged FIR No. 197 of 2014 at Police Station Defence Colony, New Delhi against the respondent No. 2 alleging that he had committed rape on her mentally retarded daughter and on the basis of the FIR, investigation was carried on and eventually charge sheet was laid for the offence punishable under Section 376(2)(l) of the Indian Penal Code (IPC) before the concerned Judicial Magistrate, who, in turn, committed the case to the Court of the learned Assistant Special Judge/Special Fast Track Court, Saket, New Delhi for trial. Many a fact has been enumerated which need not be stated in detail. Suffice it to mention that the trial commenced and when the question of examination of the appellant came up, various aspects such as camera trial, videography of the trial, absence of congenial atmosphere and many other issues emerged. As the mother of the appellant felt that the trial court was not able to address the same, the victim through her mother, filed a petition under Section 482 of the Code of Criminal Procedure (CrPC) before the High Court of Delhi praying, *inter alia*, that the matter

should be transferred to the Special Court under the POCSO Act as the functional age of the prosecutrix is hardly around 6 to 8 years and there is necessity for trial to be conducted in a most congenial, friendly and comfortable atmosphere and the proceeding should be videographed. The High Court vide order dated 15.06.2015 issued directions for making necessary arrangements for videography of the proceeding as the prosecutrix mainly communicates through gestures. The order passed in that regard read as follows:

> "Vide order dated 15th September, 2014, the learned ASJ, Special Fast Track Court, Saket had directed that the prosecutrix who is a physically and mentally challenged girl suffering from cerebral palsy will be provided a special educator/interpreter and necessary arrangements be made for videographing the in-camera trial at the time of recording of the statement of the prosecutrix. When the evidence of the prosecutrix was sought to be recorded on 15th May, 2015 the learned Judge noted that the concerned officer of the vulnerable witness Court complex submitted that the videographing of the proceedings is not permissible. The learned Additional Sessions Judge has sought necessary directions regarding videography from the learned Sessions Judge (South) in this regard and has listed the matter for 27th May, 2015. It is also informed by the learned APP on instructions from the investigating officer that

> two doctors of AIIMS have been contacted who will be present on the date when the evidence of the prosecutrix has to be recorded.
>
> Learned counsel for the petitioner states that the prosecutrix is terrified by the presence of males and it would be thus appropriate if female doctors/interpreters are available at the time of the evidence of the prosecutrix. Learned APP will file a status report in this regard before the next date.
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> In the meanwhile the learned Sessions Judge (South District) will make necessary arrangements for videography of the proceedings as the prosecutrix mostly communicates through gestures."

4. The matter was finally disposed of vide order dated 29.06.2015 and the appellant felt aggrieved as the two main prayers, namely, (i) transfer of the case to the Special Court established under the POCSO Act as the functional age of the prosecutrix is 6 to 8 years and (ii) the transfer of the case from P.S. Defence Colony to the Crime Branch for proper supervisional investigation were not allowed. As the impugned order would show, the High Court directed that the case should be assigned to a trial court presided over by a lady Judge in Saket Court.

5. When the matter was listed on 01.04.2016, it was contended by Ms. Bhati, learned counsel for the appellant that the prosecutrix has been suffering from a devastating mental and physical disorder since her birth and though she is biologically aged about 38 years, she has not mentally grown beyond six years. In support of her stand, a certificate of the neuro-physician and the psychologist of AIIMS, New Delhi was filed. She had referred to Section 28 of the POCSO Act which deals with Special Courts. She had also drawn attention of the Court to Sections 24 to 27 of the POCSO Act to highlight that there is a special procedure for recording statement of the child and, therefore, when medical evidence had established the mental age, the victim's biological age should not be the governing yardstick but she should be considered as a child because she is intellectually challenged and mentally retarded under the POCSO Act.

6. As the respondent No. 2 did not appear, the Court appointed Mr. Sanjay R. Hegde, learned senior counsel, as Amicus Curiae to argue and put forth the points on behalf of respondent No. 2. On behalf of respondent

No.1, that is, State (Government of NCT of Delhi), Mr. P.K. Dey and Mr. Siddharth Dave, learned counsel assisted the Court.

7. After the matter was heard, the judgment was reserved and after some time, an office note was circulated that the sole accused, the respondent No. 2, had died during the pendency of the proceeding. When the matter was listed again because of the subsequent event, it was contended by Ms. Bhati appearing for the appellant that under the POCSO Act and the Rules framed thereunder, the victim would be entitled to get compensation and the procedure would be different. That apart, she also submitted that after the death of the accused, the grievance still remains and as the procedure for grant of compensation is different, this Court may deal with the principal issue. And, I have thought it appropriate to address the same.

8. Learned counsel for the appellant submits that Section 2(d) that defines "child" to mean any person below the age of eighteen years should not be conferred a restricted meaning to convey that the words "eighteen

years" are singularly and exclusively associated with the biological or chronological age and has nothing to do with the real concept or conception of "age". Elaborating the argument, she would contend that "child", as defined under Article 1 of the United Nations Convention on the Rights of Children, is to mean "every human being below the age of 18 years unless under the law applicable, majority is attained earlier".

9. It is urged by her that the principle of purposive construction is required to be adopted keeping in view the intrinsic perspective of POCSO Act and construction should be placed on the word "age" to compositely include biological and mental age so that the protective umbrella meant and recognized for the child under the law to avoid abuse and exploitation is achieved. It is contended by her that likes of the appellant who suffer from mental disabilities or are mentally challenged are unable to keep pace with biological age and their mental growth and understanding is arrested and unless they get the protection of law that the legislature has conceived, it would be an anathema that the law that has

been brought in to protect the class, that is, child, leaves out a part of it though they are worse than the children of the age that is defined under the POCSO Act. Elaborating further, she would submit that a mentally retarded person may have the body mass, weight and height which will be matching the chronological age or biological age of 30 years, but in reality behaves like a child of 8 to 10 years, for the mental age, as it is called, stops progressing. She has drawn a comparison between various provisions of the IPC where the legislature has recognized a person of unsound mind to be on the same pedestal as child which indicates that IPC prescribes protection on the basis of maturity of understanding, to the persons suffering from unsoundness of mind. Emphasis is on departure from the chronological age by the legislature by laying stress on capacity to understand the nature and consequence of the act. She has also referred to Chapter XXV of the CrPC that enumerates the provisions as to the accused persons of unsound mind.

10. Learned counsel would contend that dignity of a child is of extreme significance and this Court has

eloquently accentuated on the sustenance of such dignity. To buttress her submission, she has relied upon ***Reena Banerjee & another v. Govt. (NCT of Delhi) and others***[1], ***Mofil Khan & another v. State of Jharkhand***[2], ***Suchita Srivastava & another v. Chandigarh Administration***[3], and ***Tulshidas Kanolkar v. State of Goa***[4].

11. It is propounded by her that to read mental age with biological age will not cause any violence to Section 2(d) of POCSO Act but on the contrary, it would be in accord with the context of the scheme of the POCSO Act and also inject life to the words which constitute the fulcrum of the spirit of the legislation that is meant to protect the victims. The legislature has used the word "child" and restricted it to age of 18 years, but when a mentally retarded child is incapable of protest and suffers from inadequacy to understand, chronological age should not be the guiding factor or laser beam but the real mental age, for the cherished purpose of the POCSO

[1] (2015) 11 SCC 725
[2] (2015) 1 SCC 67
[3] (2009) 9 SCC 1
[4] (2003) 8 SCC 590

Act is to give protection to the child and check sexual abuse of a child. A literal construction, according to the learned counsel, would defeat the intendment of the legislature. For the aforesaid purpose, she has commended us to the authorities in ***Bharat Singh v. Management of New Delhi Tuberculosis Centre, New Delhi and others***[5], ***Githa Hariharan (Ms.) and another v. Reserve Bank of India and another***[6], ***Union of India v. Prabhakaran Vijaya Kumar and others***[7], ***Regional Provident Fund Commissioner v. Hooghly Mills Company Limited and others***[8], ***Bangalore Turf Club Limited v. Regional Director, Employees' State Insurance Corporation***[9].

12. Mr. Dey, learned counsel appearing for the first respondent – State, submits that POCSO Act has been introduced with a view to provide protection of the children from the offences of sexual assault, sexual harassment and abuse with due regard to safeguard the

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[5] (1986) 2 SCC 614
[6] (1999) 2 SCC 228
[7] (2008) 9 SCC 527
[8] (2012) 2 SCC 489
[9] (2014) 9 SCC 657

interest and well being of the children at every stage of judicial proceeding including children friendly procedure, recording of evidence and establishment of Special Courts for the speedy trial and, therefore, a person who is mentally challenged/retarded is required to be brought within the definition of a child so that the life is ignited to the piece of legislation. Learned counsel would submit that when such a person is incapable of understanding what is happening to her, she is equal to a child and when such an interpretation is placed, it serves the basic purpose of behind the Act that the legislature has intended to achieve. It is his further submission that there is a distinction between two terms, namely, “age” and “years”, for “age” signifies mental or biological/physical age whereas “years” refer to chronology and hence, it is possible to interpret the word “age” in a particular provision to mean mental age without offending the term of the word “year” which means year and “year” has been defined in the General Clauses Act, 1897 as period of 365 days. He has referred to the Juvenile Justice (Care and Protection of Children)

Act, 2015 to highlight that the legislative intention there is explicit with regard to mental capacity of a person which would have a relevant factor to determine the forum of trial. It is further contended by him that if the trial is held in case of mental retarded person whose biological age is more than 18 years by the Special Court as provided under the POCSO Act, the accused is no way affected because the punishment for the offence remains the same even if the trial is held by the Court of Session under the CrPC. Learned counsel in his written note of submissions has placed reliance upon ***Sheikh Gulfan & others v. Sanat Kumar Ganguli***[10], ***Yudhishter v. Ashok Kumar***[11], ***Pratap Singh v. State of Jharkhand and another***[12], ***Directorate of Enforcement v. Deepak Mahajan and another***[13].

13. Mr. Dave, while supporting the stand of Mr. Dey has commended us to the decision in ***Deepak Mahajan*** (supra).

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[10] AIR 1965 SC 1839
[11] (1987) 1 SCC 204
[12] (2005) 3 SCC 551
[13] (1994) 3 SCC 440

14. Mr. Hegde, learned senior counsel, who has been engaged by the Court to assist on behalf of respondent No. 2, has referred to Article 1 of the United Nations Convention on the Rights of the Child which has been acceded to by India on 11.12.1992. Relying on the definition in the Black's Law Dictionary and the Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edn. 2005 p. 175, learned senior counsel would submit that there is distinction between mental age and chronological age. Had it been the intention of the Parliament not to make such a distinction, it would have included within the protective ambit of the definition pertaining to adults whose mental age is less than 18 years. It is urged by him that when the language of the dictionary clause is clear and unambiguous, it should be given its ordinary literal meaning. It is further argued by him that wherever the legislature has intended to refer to other definition of "age" including mental age, it has specifically made like the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 and, therefore, in the absence of a specific provision in the POCSO Act, the

Court ought to adopt the actual grammatical meaning and for the said purpose, he has drawn inspiration from Bennion on ***Statutory Interpretation***, 5th Edn. p.825. He would put forth the stand that if the term "age" is interpreted to mean "mental age", it would lead to ambiguity, chaos and unwarranted delay in the proceedings and also it would have the effect potentiality to derail the trial and defeat the purpose of the Act, for the informant will have the option to venture on the correctness of the mental age. Learned senior counsel would further urge that various Courts in other parts of the world have treated the child keeping in view the chronological age unless the mental age has been specifically considered for inclusion by the legislature. Mr. Hegde, in his written notes of submission, has reproduced passages from ***R. v. Sharpe***[14] [British Columbia Court of Appeal], ***R v. Cockerton***[15] [Kings Bench] and ***Ogg-Moss v. R***[16] [Supreme Court of Canada]. According to him, when the definition of "child" in

[14] BCCA 1999 416
[15] [1901] 1 KB 726
[16] [1984] 2 SCR 173

Section 2(d) is plain and intelligible, the Court ought not add or read words into the same regard being had to the pronouncements in ***P.K. Unni v. Nirmala Industries and others***[17] and ***Lt. Col. Prithi Pal Singh Bedi etc. v. Union of India and others***[18].

15. Learned senior counsel would submit that if mental age is read into the definition of the "child", it will be against the manifest intention of the legislature. As an instance, he has referred to Section 5(k) of the POCSO Act which alludes to child's mental or physical disability in the context of aggravated penetrated sexual assault. He has submitted that if the term "age" is interpreted to engulf mental and biological age, the scheme of the POCSO Act shall be defeated and it will lead to inconsistencies. For the said purpose, he has referred to the concept of "mental age" in respect of which the scientific views and methods vary. The eventual stand of the learned senior counsel is that mental age with a proximate figure can never be constant and is likely to

[17] (1990) 2 SCC 378
[18] (1982) 3 SCC 140 : [1983] 1 SCR 393

vary with time and surrounding circumstances and, therefore, interpreting the word "age" falling under the definition of "child" to include mental age also would breach the settled principles of criminal jurisprudence and usher in uncertainty.

16. Having noted the rivalised submissions, I shall presently focus on the preamble, the Statement of Objects and Reasons and the essential features of the POCSO Act. The said piece of legislation came into effect on 19.6.2012 and has a long Preamble. The relevant parts of the **Statement of Objects and Reasons** of the POCSO Act are as follows:

> "1. .....
>
> 2. .....
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> 3. The date collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the 'Study on Child Abuse: India 2007' conducted by the Ministry of Women and Child Development. Moreover, sexual offences against children are not adequately addressed by the existing laws. A large number of such offences are neither specifically provided for nor are they adequately penalized. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences

against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.

4. It is, therefore, proposed to enact a self contained comprehensive legislation inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.

5. .....

6. .....

7. ....."

17. The Preamble of the POCSO Act reads thus:

"An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

WHEREAS clause (3) of article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;

AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of

standards to be followed by all State parties in securing the best interests of the child;

AND WHEREAS it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;

AND WHEREAS it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;

AND WHEREAS the State parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent –

a. the inducement or coercion of a child to engage in any unlawful sexual activity;

b. the exploitative use of children in prostitution or other unlawful sexual practices;

c. the exploitative use of children in pornographic performances and materials;

AND WHEREAS sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed".

18. The purpose of referring to the Statement of Objects and Reasons and the Preamble of the POCSO Act is to

appreciate that the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the preamble, it is manifest that it recognizes the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. Best interest and well being are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The statement of objects and reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a

mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child-friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act.

19. Having analysed the Statement of Objects and Reasons and the Preamble of the POCSO Act, it is necessary to appreciate what precisely the POCSO Act projects.

20. Chapter II of the POCSO Act deals with sexual offences against children. Part A of the said Chapter provides for penetrative sexual assault and punishment therefor. Section 3 stipulates what is the penetrative sexual assault and Section 4 provides punishment for such offence. Part B of the said Chapter deals with aggravated penetrative sexual assault and punishment therefor. Section 5 copiously deals with what can constitute aggravated penetration sexual assault. It is extremely significant to note that Section 5(a)

enumerates number of circumstances where the offence becomes aggravated one. It includes in its ambit various situations and also certain categories of persons. The provision is quite elaborate. Section 5(k) to which my attention has been drawn reads thus:

> "(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child;"

The aforesaid provision, as is evident, lays stress on the mental disability of the child.

21. Part C of Chapter II deals with sexual assault and punishment therefor. Section 7 lays down about the sexual assault. Part D deals with aggravated sexual assault and punishment therefor. Section 9 deals with aggravated sexual assault which is akin to Section 5. Part E deals with sexual harassment and punishment therefor. The said harassment lays down various acts which will amount to sexual harassment.

22. On a reading of the aforesaid Chapters, it is quite manifest and limpid that the legislature has intended to protect the child from any kind of sexual assault and harassment. It has also laid stress upon the mental and

physical disability of the child. The child, as per the definition, is the principal protagonist and the POCSO Act protects the child from any sexual act and also takes into consideration his mental disability. Thus, the legislature was alive to the condition of mental disability. Chapter III of the POCSO Act deals with using child for pornographic purposes and punishment therefor. Chapter IV deals with abetment of and attempt to commit an offence. Chapter V deals with the procedure for reporting of cases and Chapter VI provides for procedure for recording statement of the child. Sections 24 to 27, which have been pressed into service by Ms. Bhati, relate to recording of statement of a child; recording of statement of a child by Magistrate; additional provisions regarding statement to be recorded and medical examination of a child.

23. Section 27 stipulates that medical examination of a child in respect of whom any offence has been committed under the Act is to be conducted in accordance with Section 164A of the CrPC. It is also significant to note that the said examination has to be done

notwithstanding an FIR or complaint has not been registered for the offences under the POCSO Act. I shall refer to Section 164A CrPC at a later stage. Section 28 of the POCSO Act deals with Special Courts. Section 31 provides that the CrPC shall apply to the proceedings before a Special Court. Section 32 requires the State Government to appoint a Special Public Prosecutor for every Special Court for conducting the cases under the provisions of the POCSO Act. Chapter VIII deals with the procedure and powers of the Special Courts and recording of evidence. Section 35 provides for a period for recording of evidence of child and disposal of case. Section 36 stipulates that child should not see the accused at the time of testifying. The said provision protects the child and casts an obligation on the Special Court to see that the child, in no way, is exposed to the accused at the time of recording of evidence. Recording of the statement of a child is through video conferencing or by utilizing single visibility mirrors or curtains or any other device is permissible. This provision has its own sanctity. Section 37 deals with trials to be conducted in

camera and Section 38 provides assistance of an interpreter or expert while recording evidence of a child. Section 42A lays the postulate that POCSO Act is not in derogation of the provisions of any other law.

24. Section 45 empowers the Central Government to make rules for carrying out the purposes of the POCSO Act. In exercise of powers conferred under Section 45, a set of rules, namely, the Protection of Children from Sexual Offences Rules, 2012 ('2012 Rules') has been framed and the said Rules have come into force on 14.11.2012. Rule 7 which deals with compensation reads as under:

> "**7. Compensation** - (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 First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.
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> (2) The Special Court may, on its own or on an 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 offence.

(3) Where the Special Court, under sub-section (8) of section 33 of the Act read with sub-sections (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.

(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.

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

(6) Nothing in these rules shall prevent a child or his parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking

> relief under any other rules or scheme of the Central Government or State Government."

25. I have extracted the relevant provisions of the POCSO Act and referred to the schematic content in its perspective context. The enthusiastic submissions of Ms. Bhati and the submission advanced in support by Mr. Dey are meant to urge the Court to adopt the purposive approach regard being had to the centripodal interest of the "child" that can, in its connotative contextual expanse, include a person who has not mentally grown in age, though may have felt the sketchy shadow of biological years. Their accent is not only on the provisions of the Act but also on the methodology of computation under the POCSO Act.

26. Presently, I shall refer to certain authorities as regards the purposive interpretations and its contours, for learned counsel for the appellant would like us to perceive the provision through the said magnified glass using different lens. In ***Cabell v. Markhan***[19] Learned

[19] 148 F 2d 737 (2d Cir 1945)

Hand, J. articulated the merits of purposive interpretation:

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

27. The House of Lords in ***Regina (Quintavalle) v. Secretary of State for Health***[20] observed:

> "The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in *River Wear Commissioners v. Adamson*[21]. In any event, nowadays the shift towards purposive interpretation is not in doubt. The qualification is that the degree of liberality permitted is influenced by the context, e.g. social welfare legislation and tax statutes may have to be approached somewhat differently. …"

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[20] [2003] UKHL 13 : [2003] 2 AC 687 : [2003] 2 WLR 692 (HL)
[21] (1877) LR 2 AC 743 at p. 763 (HL)

28. The above expansion of purposive interpretation has been approvingly quoted by the majority in ***Abhiram Singh v. C.D. Commachen (dead) by legal representatives and others***[22] and that is why Section 123(3) of the Representation of the People Act, 1951 has been construed keeping in view electorate-centric interpretation rather than candidate-centric one. The submission is that the purposive interpretation has become the *elan vital* of statutory interpretation because of progressive social climate and Judges' statesmanship. Krishna Iyer, J., in his inimitable style, had said "when legislative purpose or intention is lost, then the process of interpretation is like to adorn the skin, and to miss the soul". A court has to be progressive in its thought and should follow the path of construction that comprehensively meets the legislative intention. If a Judge gets stuck with the idea that construction is the safest, the enactment is not fructified, the purpose is missed and the soul is dismissed. A narrow construction

[22] (2017) 2 SCC 629

of a concept invites a hazard whereas a broad exposition enlarges the sweep and achieves the statutory purpose. These are certain abstractions. It will apply in a different manner in different statutes, like tax law, penal law, social welfare legislation, excise law, election law, etc. That apart, the law intends to remedy a mischief. It also sets goal and has a remedial intent. It also states certain things which clearly mean what has been said. In that case, there is no room for the Judge and solely because he is a constructionist Judge, cannot possess such tool to fly in the realm of fanciful area and confer a different meaning. His ability to create in the name of judicial statesmanship is not limitless. It has boundaries. He cannot afford to romance all the time with the science of interpretation. Keeping these aspects in mind, I shall presently refer to some authorities where purposive construction has been adopted and where it has not been taken recourse to and the cardinal principle for the same.

29. In ***Gurmej Singh v. Pratap Singh Kairon***[23], the Constitution Bench was dealing with the true construction of Section 123(7) of the Representation of the People Act, 1951. The question that arose before the Constitution Bench was whether a Lambardar, a person in the service of Government or covered by any of the clauses of Section 123(7) of the 1951 Act. The Election Tribunal had held that Lambardar was a revenue officer. The High Court set at naught the finding recorded by the Election Tribunal by opining that Lambardars though appointed by the Government for the purpose of collecting the land revenue and receiving a statutory percentage of the sums realized by them as their remuneration for so doing, yet they were included along with village accountants who are called Patwaris in State and hence, they are clearly excluded by the provisions of clause (f). It was contended before this Court that Lambardar is a revenue officer and village accountant within the meaning of clause (f) of sub-section (7) of Section 123 of the 1951 Act. While dealing with the

[23] AIR 1960 SC 122

submission, the Court held that it is an elementary rule that construction of a section is to be made of all the parts together and not of one part only by itself and that phrases are to be construed according to the rules of grammar. Proceeding further, the Court observed that:

> "The words "revenue officers", in whatever sense they are used, cannot obviously comprehend officers who are not revenue officers, and in that situation there is no necessity to exclude such officers from the group of revenue officers. The Legislative device of exclusion is adopted only to exclude a part from the whole, which, but for the exclusion, continues to be part of it. This interpretation must be rejected as it involves the recognition of words which are surplusage."

The aforesaid analysis clearly shows that a section has to be construed in entirety and not of one part only and further there should be no attempt to recognize words which are surplusage.

30. In ***State of Himachal Pradesh & another v. Kailash Chand Mahajan & others***[24], the Court referred to a passage from Francis Bennion's ***Statutory Interpretation*** (1984 edn.) which illustrates the

[24] 1992 Supp. (2) SCC 351

distinction between the legislative intention and the purpose or object of the legislation. The said passage reads as follows:

> "The distinction between the purpose or object of an enactment and the legislative intention governing it is that the former relates to the mischief to which the enactment is directed and its remedy, while the latter relates to the legal meaning of the enactment."

31. After reproducing the same, the Court observed that there is a great distinction between the two. While the object of legislation is to provide a remedy for the malady, on the contrary, the legislative intention relates to the meaning from the exposition of the remedy as enacted. The Court further ruled that for determining the purpose of legislation, it is permissible to look into the circumstances which were prevalent at that time when the law was enacted and which necessitated the passing of that enactment and for the limited purpose of appreciating the background and the antecedent factual matrix leading to the legislation, it is open to the court to look into the 'Statement of Objects and Reasons' of the

Bill which accentuated the statement to provide a remedy for the then existing malady.

32. It is worthy to state here that where a purposive construction is conceived of or the said principle is sought to be applied, the context becomes an important and influential aspect and when one tries to understand the legislative intention, the meaning from the exposition of the purpose or the effort to have the remedy through the enactment has to be appositely perceived.

33. In ***R.M.D. Chamarbaugwalla and another v. Union of India and another***[25], Sections 4 and 5 of the Prize Competitions Act (42 of 1955) were impugned as unconstitutional. The object of the said legislation, as stated in the preamble was "to provide for the control and regulation of prize competitions." Section 2(d) of the said Act defined "prize competition" as meaning "any competition (whether called a cross-word prize competition, a missing-word prize competition, a picture prize competition or by any other name), in which prizes are offered for the solution of any puzzle based upon the

[25] AIR 1957 SC 628

building up, arrangement, combination or permutation of letters, words or figures." The question arose whether that applies to prize competition in which success depends on a substantial degree of skill. It was contended before the Court that the language employed in Section 2(d) being clear and unambiguous, it was not open to the Court to read into any limitations which are not there by reference to other and extraneous considerations. Dealing with the same, the Court observed that when a question arises as to the interpretation to be put on an enactment, what the Court has to do is to ascertain "the intent of them that make it", and that must, of course, be gathered from the words actually used in the statute. That, however, does not mean that the decision should rest on a literal interpretation of the words used in disregard of all other materials. The Court further opined that "The literal construction then", says Maxwell on *Interpretation of Statutes*, 10th Edn., p. 19, "has, in general, but *prima facie* preference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim,

scope and object of the whole Act; to consider, according to Lord Coke: (*1*) What was the law before the Act was passed; (*2*) What was the mischief or defect for which the law had not provided; (*3*) What remedy Parliament has appointed; and (*4*) The reason of the remedy". Turning to the history of the legislation, various provisions of the said Act and doctrine of severability, the Court came to hold that it will not be questioned that competitions in which success depends to a substantial extent on skill and competitions in which it does not so depend, form two distinct and separate categories. The difference between the two classes of competitions is as clear-cut as that between commercial and wagering contracts. The Court further held that whether the Parliament would have enacted the law in question if it had known that it would fail as regards competitions involving skill, there can be no doubt, having regard to the history of the legislation, as to what gives the answer. Nor does the restriction of the impugned provisions to competitions of a gambling character affect either the texture or the colour of the Act; nor do the provisions require to be

touched and re-written before they could be applied to them. They will squarely apply to them on their own terms and in their true spirit, and form a code complete in themselves with reference to the subject. The conclusion, the Court said, was that it was inescapable that the impugned provisions, assuming that they apply by virtue of the definition in Section 2(d) to all kinds of competitions, were severable in their application to competitions in which success did not depend upon any substantial extent on skill.

34. The aforesaid authority has identified two clear cut classes of prize competitions and ultimately applied the doctrine of severance. The Court was not persuaded by the laudable object that the Parliament intended to control and regulate the prize competition but keeping in view all the factors that can legitimately be taken into account, interpreted the provision. Thus, the Court was cautious and only tried to take into account what could legitimately be taken into consideration.

35. In ***Commissioner of Income-tax, Madhya Pradesh v. Shrimati Sodra Devi***[26] the Court ruled that unless there is any such ambiguity it would not be open to the Court to depart from the normal rule of construction which is that the intention of the legislature should be primarily gathered from the words which are used. It is only when the words used are ambiguous that they would stand to be examined and construed in the light of surrounding circumstances and constitutional principle and practice. For the said purpose, the Court referred to the view of Lord Ashbourne in ***Nairn v. University of St. Andrews***[27].

36. In the said case, the Court referred to the objects and reasons of the Income-Tax Act, 1922 and turned to Section 16(3) to understand the intention of the legislature and stated thus:

> "27. ... If this background of the enactment of Section 16(3) is borne in mind, there is no room for any doubt that howsoever that mischief was sought to be remedied by the amending act, the only intention of the Legislature in doing so was to include the

[26] AIR 1957 SC 832
[27] 1909 AC 147

income derived by the wife or a minor child, in the computation of the total income of the male assessee, the husband or the father, as the case may be, for the purpose of assessment.

If that was the position, howsoever wide the words "any individual" or "such individual" as used in Section 16(3) and Section 16(3)(*a*) may appear to be so as to include within their connotation the male as well as the female of the species taken by themselves, these words in the context could only have been meant as restricted to the male and not including the female of the species. If these words are used as referring only to the male of the species the whole of the Section 16(3)(*a*) can be read harmoniously in the manner above comprehending within its scope all the four cases specified in sub-clauses (*i*) to (*iv*) thereof and so also Section 16(3)(*b*).

We are therefore of opinion that the words "any individual" and "such individual" occurring in Section 16(3) and Section 16(3)(*a*) of the Act are restricted in their connotation to mean only the male of the species, and do not include the female of the species, even though by a disjunctive reading of the expression "the wife" or "a minor child" of "such individual" in Section 16(3)(*a*) and the expression "by such individual" for the benefit of his wife or a minor child or both in Section 16(3)(*b*), it may be possible in the particular instances of the mothers being connected with the minor children in the manner suggested by the Revenue to include the mothers also within the connotation of these words. Such inclusion which involves different interpretations of the words "any individual" or

> "such individual" in the different contexts could never have been intended by the legislature and would in any event involve the addition of the words "as the case may be" which addition is not normally permissible in the interpretation of a statute."

37. Though the case related to the interpretation of a taxing statute and not a social welfare legislation, yet the Court kept in view the surrounding circumstances and the reasons that led to the passing of the legislation and further opined that the meaning sought to be placed by the revenue could not be conceived of without addition of words which is not normally permissible in the statute. It had also ruled that the Court should avoid bringing a particular category within the expansive connotation of the words used.

38. In ***Sheikh Gulfan*** (supra), the controversy related to construction of Section 30(c) of the Calcutta Thika Tenancy Act, 1949. I need not state the facts of the case. Section 30(c) of the said Act read as follows:

> "Section 30: Nothing in this Act shall apply to —
>
> x x x x

> (c) any land which is required for carrying out any of the provisions of the Calcutta Improvement Act, 1911."

39. While interpreting the said provision, the Court observed that the words used in the statute were simple, but their construction was not easy and in that context, it held, on a careful consideration and scrutiny of Section 30(c), the inevitable conclusion was that the words used in Section 30(c) did not justify the conclusion that a private landholder was intended to be equated with Government or with the other special bodies or authorities whose lands were exempted from the operation of the Act by Section 30. The Court further ruled that the legislature never intended that the provisions of the Act should cease to apply to all lands which were comprised in the scheme, because such a provision would appear to be inconsistent with the categories of cases covered by clauses (a) and (b) of Section 41. Addressing on the issue of the intention of the legislature in enacting Section 30(c), the Court held that it would have been easy for the legislature to say

that lands comprised in the improvement schemes should be exempted from the application of the Act. Section 30 had provided for an exception to the application of the beneficent provisions of the Act and it would not be unreasonable to hold that even if Section 30(c) was reasonably capable of the construction, the Court should prefer the alternative construction which is also reasonably possible. In construing the provisions which provide for exceptions to the applicability of beneficent legislation, if two constructions are reasonably possible, the Court would be justified in preferring that construction which helps to carry out the beneficent purpose of the Act and does not unduly expand the area or the scope of the exception.

40. On a proper analysis of the aforesaid authority, it is clear as crystal that when two constructions are reasonably possible, preference should go to one which helps to carry out the beneficent purpose of the Act; and that apart, the said interpretation should not unduly expand the scope of a provision. Thus, the Court has to be careful and cautious while adopting an alternative

reasonable interpretation. The acceptability of the alternative reasonable construction should be within the permissible ambit of the Act. To elaborate, introduction of theory of balance cannot be on thin air and in any case, the Courts, bent with the idea to engulf a concept within the statutory parameters, should not pave the path of expansion that the provision by so stretch of examination envisages.

41. In ***Pratap Singh*** (supra), the Constitution Bench was required to resolve the conflicting views between ***Arnit Das v. State of Bihar***[28] and ***Umesh Chandra v. State of Rajasthan***[29] and in that context, the issue before the larger Bench was whether the date of occurrence will be the reckoning date for determining the age of the alleged offender as juvenile offender or the date when he is produced in the court/competent authority under the Juvenile Justice Act, 1986. The Court adverted to Section 2 of the said Act that dealt with presumption and determination of age, and Section 32

[28] (2000) 5 SCC 488
[29] (1982) 2 SCC 202

that provided presumption and determination of age. Referring to the said Section, it was contended that the word “is” used in two places of the Section and that the word “is” suggests that for determination of age of juvenile the date of production would be the reckoning date as the inquiry with regard to his age begins from the date he is brought before the court and not otherwise. The Court held that the word “is” employed in Section 32 is referable to a juvenile who is said to have committed an offence on the date of the occurrence. To arrive at the said conclusion, the Court ruled that the legislative intendment underlying Sections 3 and 26 read with the preamble, aims and objects of the Act is clearly discernible and a conjoint reading of the sections, preamble, aims and objects of the Act leaves no manner of doubt that the legislature intended to provide protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication thereof. It further proceeded to say that the whole object of the Act is to provide for the care, protection, treatment, development and rehabilitation of

juveniles and the Act being a benevolent legislation, an interpretation must be given which would advance the cause of the legislation, that is, to give benefit to the juveniles.

42. This decision has to be carefully understood. It dissected the provision from which it was discernible that the age of the juvenile is the date of occurrence and the said construction is in consonance with the legislative objective. There is neither abnormally stretched interpretation nor the subject of the Act is read out of context. Thus, the context and the exposition of intention of words in the schematic backdrop struck a harmonious bond.

43. In ***Shankar Kisanrao Khade v. State of Maharashtra***[30], the Court, taking into consideration the conduct of the police for not registering a case under Section 377 IPC against the accused, the agony undergone by a child of 11 years with moderate intellectual disability, non-reporting of offence of rape committed on her after having witnessed the incident

[30] (2013) 5 SCC 546

either to the local police or to the Juvenile Justice Board, gave certain directions for compliance in future which are necessary to protect the children from such sexual abuses. The Court ruled that it has a duty to do so because the Court has guardianship over minor children, especially with regard to the children having intellectual disability, since they are suffering from legal disability.

44. I may hasten to state here that observations and directions given in the said case are absolutely within the permissible limits of Juvenile Justice Act, 2000 and as well as CrPC. Accentuation on duty and role of the Court in the said case do not throw any laser beam or show the guiding principle for interpreting the definition of the word "child" as used in Section 2(d) of the POCSO Act.

45. In ***Chandra Mohan v. State of Uttar Pradesh and others***[31], Subba Rao, CJ, while speaking for the Bench, had a pragmatic approach. The learned Chief Justice held that if two constructions are possible then the Court must adopt that which will ensure smooth and

[31] AIR 1966 SC 1987

harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well established provisions of existing law nugatory. I have referred to this decision as it used the words, "give rise to practical inconvenience".

46. In ***Deepak Mahajan*** (supra), the Court referred to a passage from Maxwell on Interpretation of Statutes, Tenth Edn., at p. 229 which is extracted below:

> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. … Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

47. The Court also referred to various other decisions and finally ruled that it is permissible for courts to have functional approaches and look into the legislative intention and sometimes it may be even necessary to go behind the words and enactment and take other factors

into consideration to give effect to the legislative intention and to the purpose and spirit of the enactment so that no absurdity or practical inconvenience may result and the legislative exercise and its scope and object may not become futile.

48. As the aforesaid statement would show that the Court has been inclined to adopt a functional approach to arrive at the legislative intention. Needless to emphasise, there has to be a necessity to do so.

49. In ***Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. & others***[32], Chinnappa Reddy, J., emphasizing on the importance of the text and context in which every word is used in the matter of interpretation of statutes, opined:

> "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by

[32] (1987) 1 SCC 424

> phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

The aforesaid passage by Chinnappa Reddy, J. had been referred to and placed reliance upon to appreciate the context and the purpose regard being had to the nature of the text. The learned Judge has also emphasized that no words of a statute should be construed in isolation.

50. In ***Union of India v. Elphinstone Spinning and Weaving Co. Ltd. and others***[33], the Constitution Bench, while dealing with the concept of interpretation and the duty of the Judge, opined that while examining a particular statute for finding out the legislative intent it

[33] (2001) 4 SCC 139

is the attitude of Judges in arriving at a solution by striking a balance between the letter and spirit of the statute without acknowledging that they have in any way supplement the statute would be the proper criteria. The duty of Judges is to expound and not to legislate is a fundamental rule. There is, no doubt, a marginal area in which the courts mould or creatively interpret legislation and they are thus finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing. Reference in this context was made to ***Corocraft Ltd. v. Pan American Airways Inc.***[34] and ***State of Haryana & others v. Sampuran Singh & others***[35]. The Court further observed that by no stretch of imagination a Judge is entitled to add something more than what is there in the statute by way of a supposed intention of the legislature. The cardinal principle of construction of statute is that the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or

[34] (1968) 3 WLR 714, p.732,
[35] (1975) 2 SCC 810

object which comprehends the mischief and its remedy to which the enactment is directed. In the said case, dwelling upon the concept of context, the larger Bench opined that the context means; the statute as a whole, the previous state of law, other statutes in *pari materia*, the general scope of the statute and the mischief that it was intended to remedy. It was further ruled that long title which precedes is a part of an Act itself and is admissible as an aid to its construction. That apart, the preamble of an Act, no doubt, can also be read along with other provisions of the Act to find out the meaning of the words in enacting provisions to decide whether they are clear or ambiguous but the preamble in itself not being an enacting provision is not of the same weight as an aid to construction of a Section of the Act as are other relevant enacting words to be found elsewhere in the Act. The utility of the preamble diminishes on a conclusion as to clarity of enacting provisions. It is therefore said that the preamble is not to influence the meaning otherwise ascribable to the enacting parts unless there is a compelling reason for it.

51. In ***Central Bank of India v. State of Kerala and others***[36], the three-Judge Bench, speaking through Singhvi, J., quoted Professor H.A. Smith as has been quoted by Justice G.P. Singh in his book ***Principles of Statutory Interpretation***. The said passage is reproduced below:

> "'No word', says Professor H.A. Smith 'has an absolute meaning, for no words can be defined in vacuo, or without reference to some context'. According to Sutherland there is a 'basic fallacy' in saying 'that words have meaning in and of themselves', and 'reference to the abstract meaning of words', states Craies, 'if there be any such thing, is of little value in interpreting statutes'. ... in determining the meaning of any word or phrase in a statute the first question to be asked is — 'What is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase.' The context, as already seen, in the construction of statutes, means the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy."

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[36] (2009) 4 SCC 94

52. The Court thereafter referred to the authorities in ***Poppatlal Shah v. State of Madras***[37] and ***Peerless General Finance and Investment Co. Ltd.*** (supra) and quoted observations of Lord Steyn in ***R (Westminister City Council) v. National Asylum Support Service***[38]. I think it apposite to reproduce the same:

> "5. … The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is, therefore, wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen."

53. In ***Chief Justice of Andhra Pradesh & others v. L.V.A. Dixitulu & others***[39], it has been ruled that the primary principle of interpretation is that a constitutional or statutory provision should be construed 'according to the intent of they that made it' (Coke), and normally, such intent is gathered from the language of the provision. If the language or the phraseology employed by the legislation is precise and plain and thus

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[37] AIR 1953 SC 274
[38] (2002) 1 WLR 2956 : (2002) 4 All ER 654 (HL)
[39] (1979) 2 SCC 34

by itself, proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow, but if the words used in the provision are imprecise, protean or evocative or can reasonably bear meanings more than one, the rule of strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. In such a case, in order to ascertain the true meaning of the terms and phrases employed, it is legitimate for the court to go beyond the arid literal confines of the provision and to call in aid other well-recognised rules of construction, such as its legislative history, the basic scheme and framework of the statute as a whole, each portion throwing light on the rest, the purpose of the legislation, the object sought to be achieved, and the consequences that may flow from the adoption of one in preference to the other possible interpretation. Thus, the Court in certain situations allows room to go beyond the confines of the literal meaning and to take recourse to other aids for construction. Consequence of preference of one on the other also gets accent.

54. In ***Kehar Singh & Ors v. State (Delhi Admn.)***[40], the Court ruled that the Court should not consider any provision out of the framework of the statute and not view the provisions as abstract principles separated from the motive force behind. It is the duty of the Court to consider the provisions in the circumstances to which they owe their origin and to ensure coherence and consistency within the law as a whole and to avoid undesirable consequences. That apart, the said adventure, no doubt, enlarges the discretion of the Court as to interpretation, but it does not imply power to substitute individual notions of legislative intention. It implies only a power of choice where differing constructions are possible and different meanings are available. As is manifest, the individual notions should not come in the way of legislative intention.

55. In this regard, reference to ***Gem Granites v. Commissioner of Income Tax, T.N.***[41] would be fruitful. In the said case, the Court observed that an argument founded on what is claimed to be the intention of

[40] (1988) 3 SCC 609
[41] (2005) 1 SCC 289

Parliament may have appeal but a court of law has to gather the object of the statute from the language used, but what one may believe or think to be the intention of Parliament cannot prevail if the language of the statute does not support that view. In ***Padma Sundara Rao (Dead) and others v. State of T.N. and others***[42], the Constitution Bench referred to two principles of construction – one relating to *casus omissus* and other in regard to reading the statute as a whole. I am referring to the authority to appreciate the principle of "*casus omissus*". In that context, the Court has ruled that:

> "14. … a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. …"

56. In ***Hindustan Lever Ltd. v. Ashok Vishnu Kate and others***[43], the question arose for entertaining

[42] AIR 2002 SC 1334
[43] (1995) 6 SCC 326

complaint filed under Section 28(1) of the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971. In the said case, the Labour Court in which the complaints were filed took the view that such complaints were not maintainable as the actual orders of discharge or dismissal were not yet passed by the employer. The learned single Judge confirmed that view, but the appellate Bench of the High Court dislodged the same. Dealing with the appeal preferred by the employer, while interpreting the said Act, the Court took note of the background of the Act, examined the scheme of the enactment and referred to the preamble in extenso and various other provisions and interpreting the words which were used in the provisions opined that the scheme of the legislation intends to prevent commission of unfair labour practices through the intervention of the Court and for that purpose, the said Act has been enacted. The two-Judge Bench referred to the decision in ***Workmen of American Express International Banking Corporation v.***

Management of American Express International Banking Corporation[44] wherein Chinnappa Reddy, J. had made the following observations:

> "The principles of statutory construction are well settled. Words occurring in statutes of liberal import such as social welfare legislation and human rights' legislation are not to be put in Procrustean beds or shrunk to Lilliputian dimensions. In construing these legislations the imposture of literal construction must be avoided and the prodigality of its misapplication must be recognised and reduced. Judges ought to be more concerned with the 'colour', the 'content' and the 'context' of such statutes (we have borrowed the words from Lord Wilberforce's opinion in *Prenn* v. *Simmonds*[45]). In the same opinion Lord Wilberforce pointed out that law is not to be left behind in some island of literal interpretation but is to enquire beyond the language, unisolated from the matrix of facts in which they are set; the law is not to be interpreted purely on internal linguistic considerations."

57. In ***Githa Hariharan*** (supra) the Court was dealing with the Constitutional validity of Section 6(a) of Hindu Minority and Guardianship Act, 1956 and Section 19(b) of the Guardian and Wards Act, 1890. A contention was raised that the said provision violated Articles 14 and 15

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[44] (1985) 4 SCC 71
[45] (1971) 3 All ER 237 : (1971) 1 WLR 1381

of the Constitution. Section 6(a) of the HMG Act reads as follows:

> "6. **Natural guardians of a Hindu minor**.—The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—
>
> a) in the case of a boy or an unmarried girl — the father, and after him, the mother: Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;"

Be it noted, in the said case, the Reserve Bank of India had questioned the authority of the mother, even when she had acted with the concurrence of the father, because in its opinion she could function as guardian only after the lifetime of the father and not during his lifetime. The question arose, what meaning should be placed 'after the lifetime'? The Court observed that if this question is answered in affirmative, the section has to be struck down as unconstitutional as the same is undoubtedly violates of gender equality, one of the basic principles of our Constitution. Interpreting the said provision, the Court came to hold that:

> "16. While both the parents are duty-bound to take care of the person and property of their minor child and act in the best interest of his welfare, we hold that in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother can act as natural guardian of the minor and all her actions would be valid even during the lifetime of the father, who would be deemed to be "absent" for the purposes of Section 6(a) of the HMG Act and Section 19(b) of the GW Act."

Be it noted, the said interpretation was placed to keep the statutes within the constitutional limits.

58. Recently, in ***Ajitsinh Arjunsinh Gohil v. Bar Council of Gujarat and another***[46], the Court, while interpreting Section 36-B of the Advocates Act, 1961, quoted the following observations of Sabyasachi Mukharji, J. (as his Lordship then was) in ***Atma Ram Mittal v. Ishwar Singh Punia***[47]:

> "*9.* … Blackstone tells us that the fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs most

[46] (2017) 5 SCC 465
[47] (1988) 4 SCC 284

> natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or *the spirit and reason of the law*. See *Commentaries on the Laws of England* (facsimile of 1st Edn. of 1765, University of Chicago Press, 1979, Vol. 1, p. 59). Mukherjea, J. as the learned Chief Justice then was, in *Poppatlal Shah* v. *State of Madras*[48] said that each word, phrase or sentence was to be construed in the light of purpose of the Act itself. But words must be construed with imagination of purpose behind them, said Judge Learned Hand, a long time ago. It appears, therefore, that though we are concerned with seeking of intention, we are rather looking to the meaning of the words that the legislature has used and the true meaning of those words as was said by Lord Reid in *Black-Clawson International Ltd.* v. *Papierwerke Waldhof-Aschaffenburg A.G.*[49] We are clearly of the opinion that having regard to the language we must find the reason and the spirit of the law."
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> (Emphasis in original)

59. Thereafter, the Court referred to ***S. Gopal Reddy* v. *State of A.P.***[50] and ***High Court of Gujarat and another v. Gujarat Kishan Mazdoor Panchayat and others***[51] and opined:

> "28. The aforesaid authorities give stress on textual interpretation that would match context and further to explore the intention of the legislature. The authorities further emphasise that the words have to be understood regard

[48] AIR 1953 SC 274
[49] 1975 AC 591 : (1975) 2 WLR 513 (HL)
[50] (1996) 4 SCC 596
[51] (2003) 4 SCC 712

> being had to the purpose behind it and hence, the concern with the intention is basically to decipher the meaning of the word that the legislature has placed on it. …"

60. In ***Raghunandan Saran Ashok Saran v. Pearey Lal Workshop***[52], it has been held that if the words of statute are clear, there is no question of interpretation and in that context, grammatical construction is required to be accepted as the golden rule. In ***Commissioner of Income Tax, Bangalore v. J.H. Gotla***[53], it has been held:

> "46. Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the Legislature, the Court might modify the language used by the Legislature so as to achieve the intention of the Legislature and produce a rational construction. The task of interpretation of a statutory provision is an attempt to discover the intention of the Legislature from the language used. …"

61. In ***Polestar Electronic (Pvt.) Ltd. v. Additional Commissioner, Sales Tax and another***[54], it has been held:

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[52] (1986) 3 SCC 38
[53] (1985) 4 SCC 343
[54] (1978) 1 SCC 636

> "11. ... If the language of a statute is clear and explicit, effect must be given to it, for in such a case the words best declare the intention of the law-giver. It would not be right to refuse to place on the language of the statute the plain and natural meaning which it must bear on the ground that it produces a consequence which could not have been intended by the legislature. It is only from the language of the statute that the intention of the Legislature must be gathered, for the legislature means no more and no less than what it says. It is not permissible to the Court to speculate as to what the Legislature must have intended and then to twist or bend the language of the statute to make it accord with the presumed intention of the legislature. ..."

62. I have referred to the aforesaid authorities to highlight that legislative intention and the purpose of the legislation regard being had to the fact that context has to be appositely appreciated. It is the foremost duty of the Court while construing a provision to ascertain the intention of the legislature, for it is an accepted principle that the legislature expresses itself with use of correct words and in the absence of any ambiguity or the resultant consequence does not lead to any absurdity, there is no room to look for any other aid in the name of creativity. There is no quarrel over the proposition that the method of purposive construction has been adopted

keeping in view the text and the context of the legislation, the mischief it intends to obliterate and the fundamental intention of the legislature when it comes to social welfare legislations. If the purpose is defeated, absurd result is arrived at. The Court need not be miserly and should have the broad attitude to take recourse to in supplying a word wherever necessary. Authorities referred to hereinabove encompass various legislations wherein the legislature intended to cover various fields and address the issues. While interpreting a social welfare or beneficent legislation one has to be guided by the 'colour', 'content' and the 'context of statutes' and if it involves human rights, the conceptions of Procrustean justice and Lilliputtian hollowness approach should be abandoned. The Judge has to release himself from the chains of strict linguistic interpretation and pave the path that serves the soul of the legislative intention and in that event, he becomes a real creative constructionist Judge. I have perceived the approach in ***Hindustan Lever Ltd.*** (supra) and ***Deepak Mahajan*** (supra), ***Pratap Singh*** (supra) and many

others. I have also analysed where the Court has declined to follow the said approach as in ***R.M.D. Chamarbaugwalla*** (supra) and other decisions. The Court has evolved the principle that the legislative intention must be gatherable from the text, content and context of the statute and the purposive approach should help and enhance the functional principle of the enactment. That apart, if an interpretation is likely to cause inconvenience, it should be avoided, and further personal notion or belief of the Judge as regards the intention of the makers of the statute should not be thought of. And, needless to say, for adopting the purposive approach there must exist the necessity. The Judge, assuming the role of creatively constructionist personality, should not wear any hat of any colour to suit his thought and idea and drive his thinking process to wrestle with words stretching beyond a permissible or acceptable limit. That has the potentiality to cause violence to the language used by the legislature. Quite apart from, the Court can take aid of *causus omissus,*

only in a case of clear necessity and further it should be discerned from the four corner of the statute. If the meaning is intelligible, the said principle has no entry. It cannot be a ready tool in the hands of a Judge to introduce as and what he desires.

63. Keeping in view the aforesaid parameters, I am required to scrutinize whether the content and the context of the POCSO Act would allow space for the interpretation that has been canvassed by the learned counsel for the appellant, which has also got support from the State, before us. The POCSO Act, as I have indicated earlier, comprehensively deals with various facets that are likely to offend the physical identity and mental condition of a child. The legislature has dealt with sexual assault, sexual harassment and abuse with due regard to safeguard the interest and well being of the children at every stage of judicial proceeding in an extremely detailed manner. The procedure is child friendly and the atmosphere as commanded by the provisions of the POSCO Act has to be congenial. The protection of the dignity of the child is the spine of the

legislation. It also lays stress on mental physical disadvantage of a child. It takes note of the mental disability. The legislature in its wisdom has stipulated a definition of the "child" which I have noted hereinbefore. The submission is that the term "age" should not be perceived through the restricted prism but must be viewed with the telescope and thereby should include the mental age.

64. Learned counsel for the appellant has drawn support from ***Daniel Johannes Stephanus Van Der Bank v. The State***[55] wherein the High Court of South Africa was dealing with an appeal against the conviction and, in appeal there issues arose, two of which are – (1) the appointment of an intermediary in accordance with the provisions of Section 170A of the Criminal Procedure Act 51 of 1977 and (2) that the court a *quo* erred in accepting the evidence of the complainant who, to all intents and purpose, was a single witness. In the said case, the High Court of South Africa was dealing with mental age of a victim. At the time of her testimony, she

[55] [2014] ZAGPPHC 1017

was 19 years old and the State led evidence of a clinical psychologist who had consulted and conducted tests on her on several occasions. The evidence was led with regard to her lack of understanding and various other aspects. The High Court posed the question with regard to object of Section 170A (1) of the said Act. Though the amendment of Section 170A (1) which included the mental age had not come into existence, yet the court accepted the stand of the prosecution that the victim though 19 years of age, could give the assistance of an intermediary. The aforesaid judgment of the High Court of South Africa shows that mental age can be considered by the Court though the relevant amendment in relation to a crime that had occurred before the amendment came into force.

65. The matter travelled to the Supreme Court of Appeal of South Africa in ***Daniel Johannes Stephanus Van Der Bank v. The State***[56] which took note of the fact that intermediary was appointed and how he had

[56] [2016] ZASCA 10

assisted the complainant in testifying. Leave granted by the Supreme Court was limited to the following:

> "Leave to appeal is limited to the issue whether the complainant's evidence was inadmissible on the basis that it was given through an intermediary in conflict with the provisions of s 170A of the Criminal Procedure Act as applicable at the time she gave evidence."

The Supreme Court referred to Section 170A. On the date the complainant testified, the said Section read as follows:

> "Section 170A. Evidence through intermediaries. — (1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary."

It was contended before the Court that once the witness reached the age of 18 years, there was no power or discretion to invoke Section 170A. The Apex Court took note of the subsequent amendment made in 2007 by Section 68 of Act 32 of 2007 to include not only witnesses who were biologically under the age of eighteen

but also those who were mentally under the age of eighteen. The Court referred to the decision in ***S v Dayimani***[57] and dealt with the same by stating thus:

> "In *Dayimani*, the complainant was regarded as 'moderately mentally retarded' and s 170A was nonetheless invoked (wrongly so that court held) because the complainant was eighteen years old at the time of testifying. It is not necessary to consider whether *Dayimani* has been correctly decided. The proper approach, in my view, would be to consider the evidence other than that adduced by the complainant and assess it to establish whether the convictions should be sustained or set aside."

Thereafter the Court held thus:

> "By definition, common law rape is the unlawful and intentional sexual intercourse by a person without the consent of the other. Consent has to be free, voluntary and consciously given in order to be valid. In our law, valid consent requires that the consent itself must be recognised by law; the consent must be real; and the consent must be given by someone capable of consenting.2 The first two requirements do not need to be discussed since the issue is whether the complainant was capable of giving consent - related to the third requirement. Where a person in intellectually challenged, his or her condition must be expertly assessed and only then can a finding as to such capability be made. …"

[57] 2006 (2) SACR 594 (E)

In the ultimate analysis, the Supreme Court of Appeal of South Africa confirmed the view of the High Court by holding that the trial court was correct in rejecting the appellant's contention that the complainant had consented to engage in these activities and it was known that she was backward with a mental age of far less than 16 years - her biological age in 1999. Moreover, there was overwhelming evidence on record that she was incapable of giving required consent.

66. In ***Director of Public Prosecutions, Transvaal v. Minister of Justice and Constitutional Development and others***[58] the Constitutional Court of South Africa while considering the challenge to the South African Criminal Law (Sexual Offences and Related Matters) Amendment Act observed:

> "74. Courts are now obliged to give consideration to the effect that their decisions will have on the rights and interests of the child. The legal and judicial process must always be child sensitive. As we held in *S v M*, statutes "must be interpreted . . . in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for

[58] (2009) ZACC 8 ; (2009) 4 SA 222 (CC) ; (2009) 2 SACR 130 (CC); (2009) 7 BCLR 637 (CC)

> children's rights." Courts are bound to give effect to the provisions of section 28(2) in matters that come before them and which involve children. …"

67. The learned counsel for the appellant has emphasized on the same to bolster the proposition that the POCSO Act being child friendly and meant for protecting the dignity of the child regard being had to her physical and mental or body and mind integrity interpretation of the term "age" should include mental age so that statute becomes purposively child sensitive.

68. In ***Her Majesty The Queen v. D.A.I.***[59], before the Supreme Court of Canada the question arose whether the trial Judge had incorrectly interpreted the requirements of Section 16 of the Canada Evidence Act for the testimonial competence of persons of 14 years of age or older (adults) with mental disabilities. Section 16(3) of the said Act imposes two requirements for the testimonial competence of an adult with mental disabilities: (1) the ability to communicate the evidence; and (2) a promise to tell the truth. In the said case, the

[59] [2012] 1 RCS 149

victim was an adult aged about 26 years and her mental age was assessed at 6 years old. She was sexually assaulted. The trial court acquitted the accused which was confirmed by the Court of Appeal. The Supreme Court of Canada by majority judgment unsettled the conclusion of the trial court and the Court of Appeal after dealing with provisions pertaining to Section 16 of the Canada Evidence Act as introduced in 1987. The trial Judge excluded her evidence and acquitted the accused which was confirmed by the Court of Appeal, as stated earlier. The majority while disagreeing speaking through the learned Chief Justice adverted to the principle of competence to testify, concept of admissibility and the responsibility of the trial Judge under the said Act to decide what evidence, if any, to be accepted. Thereafter reference was made to competence of adult witness with mental disability and Section 16 which governs competence of adult witnesses with mental disabilities was analysed. A contention was raised that Section 16(3) should be supplemented by the requirement that an adult witness with mental disability who cannot take an

oath or affirm must not only be able to communicate the evidence and promise to tell the truth, but must also understand the nature of a promise to tell the truth. The majority disagreeing with the said submission analysed the historical background, legislative content and the intention of the Parliament and ultimately held thus:

> "34. The foregoing reasons make a strong case that s. 16(3) should be read as requiring only two requirements for competence of an adult with mental disabilities: (1) ability to communicate the evidence; and (2) a promise to tell the truth. ..."

It is apt to note here that two other arguments were raised in support of this interpretation – first, without a further requirement of an understanding of the obligation to tell the truth, a promise to tell the truth is an "empty gesture"; second, Parliament's failure in 2005 to extend to adults with mental disabilities the Section 16.1(7) prohibition on the questioning of children means that it intended this questioning to continue for adults. The Court, dealing with the first aspect, held that the shortcoming in the said submission was that it departed from the plain words of Section 16(3), on the basis of an

assumption that it was unsupported by any evidence and contrary to Parliament's intent. Imposing an additional qualitative condition for competence that is not provided in the text of Section 16(3) would demand compelling demonstration that a promise to tell the truth cannot amount to a meaningful procedure for adults with mental disabilities. That apart, when such a witness promises to tell the truth, it reinforces the seriousness of the occasion and the need to do so. In dealing with the evidence of children in Section 16.1, Parliament held that a promise to tell the truth was all that is required of a child capable of responding to questions. Parliament did not think a child's promise, without more, is an empty gesture.

69. The second argument, raised in support of the proposition that "promising to tell the truth" in Section 16(3) implies a requirement that the witness must show that she understands the nature of the obligation to tell the truth is that Parliament has not enacted a ban on questioning adult witnesses with mental disabilities on the nature of the obligation to tell the truth, as it did for child witnesses in 2005 in Section

16.1(7). To understand this said argument, the Court briefly traced the history of Section 16.1., and noted the submission:

> "[52] The final and most compelling answer to the equivalency argument is simply this: When it comes to testimonial competence, precisely what, one may ask, is the difference between an adult with the mental capacity of a six-year-old, and a six-year-old with the mental capacity of a six-year-old? Parliament, by applying essentially the same test to both under s. 16(3) and s. 16.1(3) and (6) of the Canada Evidence Act, implicitly finds no difference. In my view, judges should not import one.
>
> [53] I conclude that s. 16(3) of the Canada Evidence Act, properly interpreted, establishes two requirements for an adult with mental disabilities to take the stand: the ability to communicate the evidence and a promise to tell the truth. A further requirement that the witness demonstrate that she understands the nature of the obligation to tell the truth should not be read into the provision.
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> x x x x
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> [63] I conclude that, insofar as the authorities suggest that "promising to tell the truth" in s. 16(3) should be read as requiring an abstract inquiry into an understanding of the obligation to tell the truth, they should be rejected. All that is required is that the witness be able to communicate the evidence and promise to tell the truth."

Eventually, the majority ruled that the threshold of reliability for hearsay evidence differs from the threshold ability to communicate the evidence for competence; a ruling on testimonial capacity cannot be subsequently justified by comments in a ruling on hearsay admissibility. Had the competence hearing been properly conducted, this might have changed the balance of the trial, including the hearing (if any) on hearsay admissibility. Ultimately, the Court allowed the appeal and set aside the acquittal and directed for new trial.

70. I have already dealt with in extenso the decisions as cited by the learned counsel for the appellant. The South African view, as I find, by adopting the interpretative process justifies the appointment of an intermediary in respect of an adult woman who is mentally retarded. It is a different situation altogether. The rule of evidence which was not there but amended later on by the Parliament, the Supreme Court of South Africa looking into various aspects of the statute applied the principle of inherent inclusiveness in the words and interpreted the provision. The Constitutional Court of South Africa has

spoken about the requirement of sensitivity to a child. Both the aspects, according to me, are distinguishable. As far as the majority view of the Supreme Court of Canada is concerned, it interpreted Section 16(3) of the Canada Evidence Act and appreciated the various aspects of the evidence tendered by an adult who is mentally challenged and has declined to add something which the Parliament has not envisaged. It has only elaborated the process of adequate, proper and sensitive appreciation keeping in view the words used in the statute.

71. In this context, a passage from ***Tulshidas Kanolkar*** (supra) will be appropriate to refer. In the said case, the victim of rape was an adult who was a mentally challenged person and her IQ was not even 1/3rd of what a normal person has. She had become pregnant, and on being asked by her parents, as to who was responsible for her pregnancy, she on her own way pointed out finger at the appellant therein. During the trial, the accused indirectly took the stand of consent apart from other

pleas. The trial court repelled the plea of consent and found the appellant guilty. In appeal, the High Court negatived the contention raised by the accused-appellant by upholding the conviction but reduced the sentence to seven years. Before this Court, it was contended that in the absence of any other person being examined, the testimony of the prosecutrix could not be placed reliance upon. The Court analysed the evidence and placed reliance on the version of the victim and rejected the plea of consent stating it as absolutely shallow. The Court held that a mentally challenged person cannot give legal consent which would involve understanding of the effect of such consent and it has to be a conscious and voluntary act. A distinction was drawn between "consent" and "submission" and ruled that every consent involves a submission but the converse does not follow and an act of helpless resignation could not be treated as a consent. Proceeding further, the Court said for constituting consent there must be exercise of intelligence based on the knowledge of the significance and the moral effect of

the Act. While parting with the case, the Court added one aspect which requires to be noted:

> "8. … a few words are necessary to be said about prescription of sentence in a case where a mentally challenged or deficient woman is the victim. In sub-section (2) of Section 376, clause (*f*) relates to physical age of a woman under 12 years of age. In such a case sentence higher than that prescribed for one under sub-section (1) is provided for. But what happens in a case when the mental age of the victim is not even 12 years? Such a woman is definitely in a more vulnerable situation. A rapist in such a case in addition to physical ravishment exploits her mental non-development and helplessness. The legislature would do well in prescribing higher minimum sentence in a case of this nature. The gravity of offence in such case is more serious than the enumerated categories indicated in sub-section (2) of Section 376."

As it seems, the Court left it to the legislature for prescribing a higher minimum sentence. The said passage, as I perceive, does not help the proposition canvassed in the instant case.

72. The learned counsel for the appellant has drawn my attention to various Sections of IPC, namely, Sections 89, 90, 98, 228A, 305, 361 and 491. Section 89 IPC deals with an act done in good faith for benefit of child or insane person by or by consent of guardian. It stipulates

that nothing would be done in good faith for the benefit of a person under twelve years of age or of unsound mind by or by consent either express or implied of the guardian or other person having lawful charge of that person would be an offence by reason of any harm which it may cause or be intended by the doer to cause or be known by the doer to be likely to cause to that person. Section 90 deals with consent known to be given under fear or misconception. It also encapsulates of insane person and consent of child which is a person who is under twelve years of age. Section 98 covers right of private defence against the act of a person of unsound mind and when an act which would otherwise be an offence is not offence by reason of want of maturity of understanding, the unsoundness of mind. Section 305 deals with abetment of suicide of child or insane person and provides punishment with death or imprisonment for life, or imprisonment for a term not exceeding ten years. Section 361 deals with kidnapping of minor under the age of 16 years of age from lawful guardianship. The learned counsel for the appellant relying upon the said

provisions would contend that IPC prescribes protection on the basis of maturity of understanding to a child, and the same protection has been extended to persons suffering from unsoundness of mind and, therefore, it is limpid that a penal law sometimes makes departure from the chronological age by placing more emphasis on capacity to understand the nature and consequences of an act. On that basis, an argument has been structured to treat the mental age of an adult within the ambit and sweep of the term "age" that pertains to age under the POCSO Act. In this regard, I am obligated to say what has been provided in the IPC is on a different base and foundation. Such a provision does treat the child differently and carves out the nature of offence in respect of an insane person or person of unsound mind. There is a prescription by the statute. Learned counsel would impress upon us that I can adopt the said prescription and apply it to dictionary clause of POCSO Act so that mental age is considered within the definition of the term "age". I am not inclined to accept the said submission.

73. In this regard, it is worthy to note that the legislature despite having the intent in its Statement of Objects and Reasons and the long Preamble to the POCSO Act, has thought it wise to define the term "age" which does not only mention a child but adds the words "below the age of 18 years". Had the word "child" alone been mentioned in the Act, the scope of interpretation by the Courts could have been in a different realm and the Court might have deliberated on a larger canvass. It is not so.

74. There is distinction between mental retardation and mentally ill person. In this regard, it would be fruitful to analyse the concept. In ***Suchita Srivastava*** (supra), the assail was to the orders passed by the Division Bench of the High Court which had ruled that it was in the best interests of a mentally retarded women to undergo an abortion. The said woman was an inmate at a government-run welfare institution and after discovery of her pregnancy, the administration of the Union Territory

of Chandigarh had approached the High Court for the termination of her pregnancy keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her or her prospective child. The High Court had appointed an expert body who had given a finding that the victim had expressed her willingness to bear a child. As the High Court, as already stated earlier, directed the woman to undergo abortion, Special Leave to Appeal was preferred before this Court. The three-Judge Bench referred to The Metical Termination of Pregnancy Act, 1971 (for short, 'the 1971 Act') which clearly indicates that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer from any "mental illness". The Court observed that there is clear distinction between "mental illness" and "mental retardation" for the purpose of the 1971 Act. The next issue the Court addressed is the exercise of "*parens patriae*" jurisdiction. The Court opined that the victim's reproductive choice has to be respected in spite of other factors such as lack

of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy with full term and the assumption of maternal responsibilities therefor. The Court adopted the said view as the applicable statute contemplates that even a woman who is found to be mentally retarded should give her consent for termination of her pregnancy. Analysing Section 3 of the 1971 Act, the Court ruled that the legislative intention was to provide a qualified right to abortion and the termination of pregnancy has never been recognized as a normal recourse for expecting mothers. In the said context, the Court held:

> "22. There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to

> their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices."

And again:

> "25. In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in Section 3(4)(*b*) of the MTP Act, 1971."

Dealing with the exceptions to the rule, the Court referred to Section 3(4)(a) of the 1971 Act which reads thus:

> "(4)(*a*) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian."

The Court took note of the fact that the 1971 Act was amended in 2002 by way of which the word "lunatic" was replaced by the expression "mentally ill person" in

Section 3(4)(a) of the 1971 Act. "Mentally ill person" has been defined under Section 2(b) of the 1971 Act which means a person who is in need of treatment by reason of any mental disorder other than mental retardation.

75. Dealing with the definition, the Court referred to the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, '1995 Act') and opined that in the said Act also "mental illness" has been defined as mental disorder other than mental retardation. The Court also took note of the definition of "mental retardation" under the 1995 Act. The definition read as follows:

> "2(*r*) 'mental retardation' means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence."

76. The Court also took note of the fact that the same definition of "mental retardation" has also been incorporated under Section 2(g) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. In that context, the Court further expressed the view that the

legislative provisions in the various Acts clearly show that persons who are in a condition of "mental retardation" should ordinarily be treated differently from those who are found to be "mentally ill". While a guardian can make decisions on behalf of a "mentally ill person" as per Section 3(4)(a) of the 1971 Act, the same cannot be done on behalf of a person who is in a condition of "mental retardation". After so stating, the Court opined that there cannot be a dilution of the requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. The Court analysed the reasoning enumerated by the High Court and reversing the view of the High Court held:

> "32. Besides placing substantial reliance on the preliminary medical opinions presented before it, the High Court has noted some statutory provisions in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 as well as the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 where the distinction between "mental illness" and "mental retardation" has been collapsed. The same has been done for the purpose of providing affirmative action in public employment and

> education as well as for the purpose of implementing anti-discrimination measures. The High Court has also taken note of the provisions in IPC which lay down strong criminal law remedies that can be sought in cases involving the sexual assault of "mentally ill" and "mentally retarded" persons. The High Court points to the blurring of these distinctions and uses this to support its conclusion that "mentally ill" persons and those suffering from "mental retardation" ought to be treated similarly under the MTP Act, 1971. We do not agree with this proposition.
>
> 33. We must emphasise that while the distinction between these statutory categories can be collapsed for the purpose of empowering the respective classes of persons, the same distinction cannot be disregarded so as to interfere with the personal autonomy that has been accorded to mentally retarded persons for exercising their reproductive rights."

In the said case, the Court referred to the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 and reproduced the principles contained therein. I think it appropriate to reproduce the same:

> "1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.
>
> 2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.
>
> 3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work

> or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.
>
> 4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.
>
> 5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests.
>
> 6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.
>
> 7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities."

77. The two-Judge Bench laid emphasis on principle No. 7, as reproduced above, for it prescribes that a fair procedure should be used for the "restriction or denial" of the rights guaranteed to mentally retarded persons which

should ordinarily be the same as those given to other human beings. It is significant to note that in the said decision, the Court referred to 'eugenics theory' which was used in the past to perform forcible sterilizations and abortions on mentally retarded persons. Commenting on the same, it was observed that such measures are anti-democratic and violative of the guarantee of "equal protection before the law" as laid down in Article 14 of our Constitution. The Court referred to a condition of "mental retardation" and in that context, observed:

> "55. It is also pertinent to note that a condition of "mental retardation" or developmental delay is gauged on the basis of parameters such as intelligence quotient (IQ) and mental age (MA) which mostly relate to academic abilities. It is quite possible that a person with a low IQ or MA may possess the social and emotional capacities that will enable him or her to be a good parent. Hence, it is important to evaluate each case in a thorough manner with due weightage being given to medical opinion for deciding whether a mentally retarded person is capable of performing parental responsibilities."

78. I have copiously referred to the said authority as it has analysed the distinction between "mental illness" and "mental retardation". It has also noted that a condition

of mental retardation or developmental delay is gauged on the basis of parameters such as intelligence quotient (IQ) and mental age (MA) which mostly relate to academic abilities. The Court has narrated about the possibility of late IQ or MA may possess the social and emotional capacities that will enable him or her to be a good parent. Persons with borderline, mild or moderate mental retardation are capable of living in normal social conditions even though they may need some supervision and assistance from time to time. It observed:

> "40. We must also be mindful of the varying degrees of mental retardation, namely, those described as borderline, mild, moderate, severe and profound instances of the same. Persons suffering from severe and profound mental retardation usually require intensive care and supervision and a perusal of academic materials suggests that there is a strong preference for placing such persons in an institutionalised environment. However, persons with borderline, mild or moderate mental retardation are capable of living in normal social conditions even though they may need some supervision and assistance from time to time.
>
> 41. A developmental delay in mental intelligence should not be equated with mental incapacity and as far as possible the law should respect the decisions made by persons who are found to be in a state of mild to moderate "mental retardation"."

79. Be it noted, similar distinction has been maintained in The Rights of Persons with Disabilities Act, 2016. The purpose of referring to the said judgment is that this Court has kept itself alive to the fact that the Parliament has always kept the mental retarded person and mentally ill person in two different compartments.

80. Mr. Hegde, learned senior counsel appearing for respondent No. 2, would contend that degree of mental retardation or the IQ test may not always be a determinative factor and, therefore, the principle of *casus omissus* would not be applicable to the case at hand.

81. I have already referred to the judgment of the Constitution Bench in ***Padma Sundara Rao*** (supra). In the said case, the Court mentioned the situations where the principle of *casus omissus* would be applied. Applying the said principle, it can be stated without any fear of contradiction that the said principle cannot be applied to the provision that has arisen for consideration.

82. The situation can be viewed from another aspect. The POCSO Act has identified minors and protected them by prescribing the statutory age which has nexus with the legal eligibility to give consent. The Parliament has felt it appropriate that the definition of the term "age" by chronological age or biological age to be the safest yardstick than referring to a person having mental retardation. It may be due to the fact that the standards of mental retardation are different and they require to be determined by an expert body. The degree is also different. The Parliament, as it seems, has not included mental age. It is within the domain of legislative wisdom. Be it noted, a procedure for determination of age had been provided under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2000. The procedure was meant for determination of the biological age. It may be stated here that Section 2(12) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016) defines "child" to mean a person who not completed eighteen years of age. There is a procedure provided for determination of the biological age. The

purpose of stating so is that the Parliament has deliberately fixed the age of the child and it is in the prism of biological age. If any determination is required, it only pertains to the biological age, and nothing else.

83. The purpose of POCSO Act is to treat the minors as a class by itself and treat them separately so that no offence is committed against them as regards sexual assault, sexual harassment and sexual abuse. The sanguine purpose is to safeguard the interest and well being of the children at every stage of judicial proceeding. It provides for a child friendly procedure. It categorically makes a distinction between a child and an adult. On a reading of the POCSO Act, it is clear to us that it is gender neutral. In such a situation, to include the perception of mental competence of a victim or mental retardation as a factor will really tantamount to causing violence to the legislation by incorporating a certain words to the definition. By saying “age” would cover “mental age” has the potential to create immense anomalous situations without there being any guidelines or statutory provisions. Needless to say, they are within

the sphere of legislature. To elaborate, an addition of the word “mental” by taking recourse to interpretative process does not come within the purposive interpretation as far as the POCSO Act is concerned. I have already stated that individual notion or personal conviction should not be allowed entry to the sphere of interpretation. It has to be gathered from the legislative intention and I have already enumerated how the legislative intention is to be gathered. Respect for the dignity of a person, as submitted, has its own pedestal but that conception cannot be subsumed and integrated into a definition where the provision is clear and unambiguous and does not admit of any other interpretation. If a victim is mentally retarded, definitely the court trying the case shall take into consideration whether there is a consent or not. In certain circumstances, it would depend upon the degree of retardation or degree of understanding. It should never be put in a straight jacket formula. It is difficult to say in absolute terms.

84. In this regard, I may profitably refer to Section 164 CrPC which deals with recording of confessions and statement. Section 164(5A)(b), which is pertinent, reads as under:

> "(b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial."

The purpose of referring to the said provision is to highlight that the Parliament has legislated to safeguard the interest of mentally disabled person.

85. Needless to emphasise that courts sometimes expand or stretch the meaning of a phrase by taking recourse to purposive interpretation. A Judge can have a constructionist approach but there is a limitation to his sense of creativity. In the instant case, I am obliged to state that stretching of the words "age" and "year" would be encroaching upon the legislative function. There is no

necessity. In ***Census Commissioner & others v. R. Krishnamurthy***[60], the three-Judge Bench has ruled:

> "No adjudicator or a Judge can conceive the idea that the sky is the limit or for that matter there is no barrier or fetters in one's individual perception, for judicial vision should not be allowed to be imprisoned and have the potentiality to cover celestial zones. Be it ingeminated, refrain and restrain are the essential virtues in the arena of adjudication because they guard as sentinel so that virtuousness is constantly sustained. Not for nothing, centuries back Francis Bacon[61] had to say thus:
>
> > "Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue. … Let the Judges also remember that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne."

In the said case, a passage from Frankfurter, J.[62] was reproduced which I think it apt to quote:

> "For the highest exercise of judicial duty is to subordinate one's private personal pulls and one's private views to the law of which we are all guardians—those impersonal convictions that make a society a civilised community, and not the victims of personal rule."

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[60] (2015) 2 SCC 796

[61] Bacon, "Essays: Of Judicature in Vol. I The Works of Francis Bacon" [Montague, Basil, Esq (Eds.), *Philadelphia: A Hart, Late Carey & Hart*, 1852], pp. 58-59.

[62] Frankfurter, Felix in Clark, Tom C., "Mr Justice Frankfurter: 'A Heritage for all Who Love the Law' " (1965) 51 ABAJ 330 at p. 332

86. In ***State of Uttar Pradesh and others v. Subhash Chandra Jaiswal and others***[63], it has been held:

> "17. A Judge should not perceive a situation in a generalised manner. He ought not to wear a pair of spectacles so that he can see what he intends to see. There has to be a set of facts to express an opinion and that too, within the parameters of law.
>
> x x x x
>
> .19. In *Vemareddy Kumaraswamy Reddy* v. *State of A.P.*[64] the Court observed that:
>
> > "*15*. ... the Judges should not proclaim that they are playing the role of a law-maker merely for an exhibition of judicial valour. They have to remember that there is a line, though thin, which separates adjudication from legislation. That line should not be crossed or erased."

87. In view of the aforesaid principles, the only conclusion that can be arrived at is that definition in Section 2(d) defining the term "age" cannot include mental age.

88. Having said so, I would have proceeded to record the formal conclusion. But, in the instant case, I am disposed to think, more so, when the accused has

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[63] (2017) 5 SCC 163
[64] (2006) 2 SCC 670

breathed his last and there is a medical certificate from AIIMS as regards the mental disability of the victim, there should be no further enquiry as envisaged under Section 357A of the CrPC. The said provision reads as follows:

> **"357A Victim compensation scheme. -** (1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.
>
> (2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).
>
> (3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.
>
> (4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.
>
> (5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due

> enquiry award adequate compensation by completing the enquiry within two months.
>
> (6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."

On a perusal of the aforesaid provision, it is quite vivid that when Court makes a recommendation for compensation, the District Legal Services Authority or the State Legal Services Authority is required to decide the quantum of compensation to be awarded under the Scheme prepared by the State Government in coordination with the Central Government. The State/District Legal Services Authority has to conduct an inquiry and award the adequate compensation by completing the inquiry. Had the accused been alive, the trial would have taken place in a Court of Session as provided under the CrPC. As the accused has died and the victim is certified to be a mentally disabled person and is fighting the *lis* for some time to come within the

purview of the POCSO Act wherein the trial is held in a different manner and the provisions relating to the compensation are different, I direct that the State Legal Services Authority, Delhi shall award the compensation keeping in view the Scheme framed by the Delhi Government. As regards the quantum, I am of the convinced opinion that it is a fit case where the victim should be granted the maximum compensation as envisaged under the Scheme. I clarify that it is so directed regard being had to the special features of the case.

89. The appeals are disposed of, accordingly.

.....J.
[DIPAK MISRA]

NEW DELHI;
JULY 21, 2017

Reportable

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CRIMINAL) NOS.2640-2642 OF 2016

Ms. Eera through Dr. Manjula Krippendorf …Petitioner

Versus

State (Govt. of NCT of Delhi) and Anr. …Respondents

J U D G M E N T

R.F.NARIMAN, J. (concurring)

1. Having read the erudite judgment of my learned brother, and agreeing fully with him on the conclusion reached, given the importance of the Montesquiean separation of powers doctrine where the judiciary should not transgress from the field of judicial law making into the field of legislative law making, I have felt it necessary to add a few words of my own.

2. Mr. Sanjay R. Hegde, the learned Amicus Curiae, has argued before us that the interpretation of Section 2(1)(d) of the Protection of Children from

Sexual Offences Act, 2012 cannot include "mental" age as such an interpretation would be beyond the '*Lakshman Rekha'* – that is, it is no part of this Court's function to add to or amend the law as it stands. This Court's function is limited to interpreting the law as it stands, and this being the case, he has exhorted us not to go against the plain literal meaning of the statute.

3. Since Mr. Hegde's argument raises the constitutional spectre of separation of powers, let it first be admitted that under our constitutional scheme, Judges only declare the law; it is for the legislatures to make the law. This much at least is clear on a conjoint reading of Articles 141 and 245 of the Constitution of India, which are set out hereinbelow:-

> "141. Law declared by Supreme Court to be binding on all courts.
>
> The law declared by the Supreme Court shall be binding on all courts within the territory of India.
>
> 245. Extent of laws made by Parliament and by the Legislatures of States.

> (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.
>
> (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

4. That the Legislature cannot 'declare' law is embedded in Anglo Saxon jurisprudence. Bills of attainder, which used to be passed by Parliament in England, have never been passed from the 18th century onwards. A legislative judgment is anathema. As early as 1789, the U.S. Constitution expressly outlawed bills of attainder vide Article I Section 9(3). This being the case with the Legislature, the counter argument is that the Judiciary equally cannot 'make' but can only 'declare' law. While declaring the law, can Judges make law as well? This interesting question has haunted Anglo-Saxon jurisprudence for at least 500 years. Very early in the history of this jurisprudence, **Heydon's case, 76 E.R. 637** [1584] declared as under:

> "And it was resolved by them, that for the sure and true interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:-
>
> 1st. What was the common law before the making of the Act,
>
> 2nd. What was the mischief and defect for which the common law did not provide,
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth,
>
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."

5. Several centuries later, the Privy Council, (in a case which came up from the Bombay High Court, construing the Ship Registry Act of 1841) in **Crawford** v. **Spooner**, Moore's Indian Appeals, Volume 4 (1846 to 1850) 179, held as follows:-

> "Their Lordships are clearly of opinion, that the Judgment of the Court of Bombay cannot stand. The construction of the Act must be taken from the bare words of the Act. We cannot fish out

> what possibly may have been the intention of the Legislature; we cannot aid the Legislature's defective phrasing of the Statute; we cannot add, and mend, and, by construction, make up deficiencies which are left there. If the Legislature did intend that which it has not expressed clearly; much more, if the Legislature intended something very different; if the Legislature intended something pretty nearly the opposite of what is said, it is not for Judges to invent something which they do not meet with in the words of the text (aiding their construction of the text always, of course, by the context); it is not for them so to supply a meaning, for, in reality, it would be supplying it: the true way in these cases is, to take the words as the Legislature have given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered; and, therefore, if any other meaning was intended than that which the words purport plainly to import, then let another Act supply that meaning, and supply the defect in the previous Act."
>
> "It appears to their Lordships, therefore, that this is a case, free from all reasonable doubt, and that they must construe the words of the Act, as they find them." (at pages 187 & 189)

6. About a decade later, in **Grey** v. **Pearson**, 1857 (6) HLC 61, Lord Wensleydale declared:-

> "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in

> the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther. This is laid down by Mr. Justice Burton, in a very excellent opinion, which is to be found in the case of Warburton v. Loveland (see ante, p. 76. n.).” (at page no.1234)

7. This celebrated passage has since come to represent what has been described as the ‘Golden Rule’ of interpretation of statutes. The construction of a clause in a will was before the House of Lords and not the construction of a statute. Nevertheless, the “Golden Rule” was held to cover the construction of wills, statutes and all other written instruments.

8. It will be noticed, that both the Privy Council and the House of Lords emphasized the literal meaning of the text of a statute. Interestingly, the Privy Council added that the text must necessarily be construed with the aid of the context of the words

that are to be construed, and that the words in question could be controlled or altered by the context or the Preamble of the statute. The House of Lords went further, and stated that the grammatical and ordinary sense of the words to be construed would be given effect to unless it would lead to some absurdity, repugnance, or inconsistency with the rest of the statute, in which case the grammatical and ordinary sense of the words may be modified so as to avoid such absurdity or inconsistency, but no further. It is important to note that, even under this rule, the literal meaning of the text of a statute is not sacrosanct, and can, in certain exceptional circumstances, be modified. However, the immediate consequence of applying the literal rule of construction of a statute is that words must be understood in their ordinary grammatical sense. One obvious problem with this is that words often have different shades of meaning and are not fixed in their content. This was put rather well by Justice Holmes in **Towne** v. **Eisner**, 245 U.S. 418:

> "But it is not necessarily true that income means the same thing in the Constitution and the Act. A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." [65]

9. Judge Learned Hand of the Court of Appeals New York also conveyed the same thought rather felicitously in **Commissioner of Internal Revenue v. Ickelheimer**, 132 Federal Reporter, 2d Series, 660 as follows:

> "Compunctions about judicial legislation are right enough as long as we have any genuine doubt as to the breadth of the legislature's intent; and no doubt the most important single factor in ascertaining its intent is the words it employs. But the colloquial words of a statute have not the fixed and artificial content of scientific symbols; they have a penumbra, a dim fringe, a connotation, for they express an attitude of will, into which it is our duty to penetrate and which we must enforce ungrudgingly when we can ascertain it, regardless of imprecision in its expression." (at page 662)

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[65] Interestingly, Charles Evans Hughes argued the case on behalf of the appellant just after he stepped down from the Supreme Court as a Justice thereof in order to fight a Presidential election. He fought the election and lost. Thereafter, he went to New York and set up an extremely lucrative law practice. He eventually became the 11th Chief Justice of the Supreme Court of the United States, being appointed in 1930 and having retired in 1941.

10. In an illuminating article by Archibald Cox in 60 Harv. Law Rev. 370, 1946-47, the learned author put the dilemma between literal and purposive construction thus:-

> "The task of interpretation, thus conceived, presents a second insoluble dilemma. Since the words of a statute are chosen by the legislature to express its meaning, they are "no doubt the most important single factor in ascertaining its intent." Our belief in the supreme importance of a public, fixed, and ascertainable standard of conduct requires, moreover, a measure of adherence to what those subject to a statute would understand to be the meaning of its terms. Yet "there is no surer way to misread any document than to read it literally." Common speech is not exact and often does not precisely fit those situations, and those only, which a statute seeks to cover. Indispensable words have gathered up connotations in the past which cling persistently in new surroundings. And even if some technical terminology like that of science were available, legislatures could not anticipate and provide with particularity for each set of circumstances comprehended within a general purpose. The result is that "in every interpretation we must pass between Scylla and Charybdis." No one has ever suggested that the courts must always follow the letter of a statute regardless of the outcome, nor does anyone contend that the words may be entirely disregarded. The issue is where

> to strike the balance." (at page Nos.375 and 376)

11. Added to these problems is the problem of inept draftsmanship. In **Kirby v. Leather,** 1965(2) All E.R. 441, Danckwerts, L.J., criticised the language of the Limitation Act, 1939 when he spoke of the custody of a parent. He wrote:

> "The custody of a parent": what a strange conception that is in regard to a capable young man of twenty-four years and over. <u>This is such an extraordinary provision that at times it seemed to me that the draftsman must have been of unsound mind.</u> Of course that is absurd. The same provision has been repeated in the Law Reform (Limitation of Actions, &c.) Act, 1954, and the Limitation Act 1963. We must strain ourselves to give it a sensible meaning. The idea behind this provision is, I suppose, that the parent in such a case will be capable of taking proceedings as the next friend of the person in question." (at page 445)

12. Similarly, in **Vandyk v. Oliver** [1976] 1 All ER 466, Lord Lord Wilberforce, lamented:

> "It is said, however, that this result, far-reaching as it is, follows from the wording of the section. As to this I would say two things: first, if ever there was a case for preferring a purposive to a literal interpretation, this is such a case. <u>The section is a labyrinth, a minefield of obscurity.</u> The key subsection (*d*) refers

> back to (*a*), (*b*) or (*c*) with a connecting link described as similarity in kind: yet no criterion of similarity is given; so we are offered criteria based on "purpose" or "function", or on these words in combination. But this introduces yet further difficulties, for there is acute dispute, if purpose is the test, whose purpose is meant and whether this must be the sole or dominant purpose, or any purpose: if function is meant whether this is the same thing as actual use, or whether the word again introduces the conception of purpose. Then on the incorporated subsections, there is a difference of view whether a National Health authority had power to provide accommodation for a person in the position of the ratepayer or whether the power (conferred by the 1968 Act) is an ancillary power to the provision of care. Similar difficulties arise under para (*c*). My Lords, I revolt against a step by step approach, from one doubtful expression to another, where each step is hazardous, through referential legislation, towards a conclusion, to my mind so far out of accord with any credible policy. <u>The fact that Parliament for its own purposes chooses to legislate in this obscure manner does not force us to be the blind led by the blind.</u>" (at page No.470)

13. The Indian Income Tax Act, 1960 has also been the subject matter of judicial criticism. Often, amendment follows upon amendment making the numbering and the meaning of its sections and sub-sections both bizarre and unintelligible. One such

criticism by Hegde, J. in **Commissioner of Income Tax v. Distributor (Baroda) (P) Ltd.,** (1972) 4 SCC 353, reads as follows:

> "We have now to see what exactly in the meaning of the expression "in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments" in the main Section 23-A and the expression "in the case of a company whose business consist wholly or mainly in the dealing in or holding of investments" in clause (*i*) of Explanation 2 to Section 23-A. The Act contains many mind-twisting formulas but Section 23-A along with some other sections takes the place of pride amongst them. Section 109 of the 1961 Income Tax Act which has taken the place of old Section 23-A of the Act is more understandable and less abstruse. But in these appeals we are left with Section 23-A of the Act." (Para 15)

14. All this reminds one of the old British ditty:

> "I'm the Parliament's draftsman,
> I compose the country's laws,
> And of half the litigation
> I'm undoubtedly the cause!"

15. In order that inept draftsmanship be explained, in the old days sometimes the Judges themselves enquired of the King's Council what a statute meant. (See Dias' jurisprudence Second edition – see page 110 footnote 2). The whole

difficulty lies in defining the limits of the *'Lakshman Rekha'.* In a House of Lord's judgment, in **Boyse v. Rossborough,** 1857 6 HLC 61 which dealt with whether a will was valid, Lord Cranworth held:

> "The inquiries must be: First, was the alleged testator at the time of its execution a person of sound mind? And if he was, then, secondly, was the instrument in question the expression of his genuine will, or was it the expression of a will created in his mind by coercion or fraud?
>
> On the first head the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or of a drivelling idiot, in saying that he is not a person capable of disposing of property. But between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. <u>There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine.</u>"

16. All this leads to whether Judges do creatively interpret statutes and are unjustifiably criticized as having in fact legislated, or whether in the guise of creative interpretation they actually step outside the *'Lakshman Rekha'.* As Justice Cardozo has

picturesquely put it: the Judge is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness (See: Cardozo, Nature of Judicial Process, P. 141). Opposed to this rather conservative view is the view of Justice Holmes, in a celebrated dissent, in **Southern P. Co. v. Jensen**, 244 US 205 at page 221:

> "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."

17. The Supreme Court of India has echoed the aforesaid statement in at least two judgments. In **V.C. Rangadurai v. D. Gopalan & Others**, 1979 1 SCR 1054, Krishna Iyer, J. when confronted with the correct interpretation of Section 35(3) of the Advocates Act, 1961, held:

> **"**Speaking frankly, Section 35(3) has a mechanistic texture, a set of punitive pigeon holes, but we may note that words grow in content with time and circumstance, that phrases are flexible in semantics, that the printed text is a set of vessels into which the court may pour appropriate judicial meaning. That statute is sick which is allergic to change

> in sense which the times demand and the text does not countermand. That court is superficial which stops with the cognitive and declines the creative function of construction. So, we take the view that "quarrying" more meaning is permissible out of Section 35(3) and the appeal provisions, in the brooding background of social justice sanctified by Article 38, and of free legal aid enshrined by Article 39-A of the Constitution.
>
> xx xx xx
>
> Judicial "Legisputation" to borrow a telling phrase of J. Cohen, is not legislation but application of a given legislation to new or unforeseen needs and situations broadly falling within the statutory provision. In that sense, "interpretation is inescapably a kind of legislation" [Dickerson: The Interpretation and Application of Statutes, p. 238]. This is not legislation *stricto sensu* but application, and is within the court's province." (at pages 1059 and 1060)

18. Similarly, in **C.I.T. v. B.N. Bhattacharjee**, 1979 (3) SCR 1133 the same learned Judge in construing Section 245M of the Income Tax Act stated:

> "We are mindful that a strictly grammatical construction is departed from in this process and a mildly legislative flavour is imparted by this interpretation. The judicial process does not stand helpless with folded hands but

> engineers its way to discern meaning when a new construction with a view to rationalisation is needed." (at page 1155)

19. In **Directorate of Enforcement v. Deepak Mahajan**, 1994 3 SCC 440, this Court held:

> "Though the function of the Courts is only to expound the law and not to legislate, nonetheless the legislature cannot be asked to sit to resolve the difficulties in the implementation of its intention and the spirit of the law. In such circumstances, it is the duty of the court to mould or creatively interpret the legislation by liberally interpreting the statute.
>
> 25. In *Maxwell on Interpretation of Statutes*, Tenth Edn. at page 229, the following passage is found:
>
> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. … Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

26. In *Seaford Court Estates Ltd.* v. *Asher* [(1949) 2 All ER 155, 164] Denning, L.J. said:

"[W]hen a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament … and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

27. Though the above observations of Lord Denning were disapproved in appeal by the House of Lords in *Magor and St. Mellons* v. *Newport Corpn.* [(1951) 2 All ER 839 (HL)] Sarkar, J. speaking for the Constitution Bench in *M. Pentiah* v. *Muddala Veeramallappa* [(1961) 2 SCR 295 : AIR 1961 SC 1107] adopted that reasoning of Lord Denning. Subsequently also, Beg, C.J. in *Bangalore Water Supply and Sewerage Board* v. *A. Rajappa* [(1978) 2 SCC 213: 1978 SCC (L&S) 215 : AIR 1978 SC 548] approved the observations of Lord Denning stating thus: (SCC p. 285, para 148)

"Perhaps, with the passage of time, what may be described as the extension of a method resembling the 'arm-chair rule' in the construction of wills, *Judges can more frankly step into the shoes of*

the legislature where an enactment leaves its own intentions in much too nebulous or uncertain a state." (emphasis supplied)

28. It will be befitting, in this context, to recall the view expressed by Judge Frank in *Guiseppi* v. *Walling* [144 F 2d 608, 620, 622 (CCA 2d, 1944) quoted in 60 Harvard Law Review 370, 372] which read thus:

"The necessary generality in the wordings of many statutes, and ineptness of drafting in others frequently compels the court, as best as they can, to fill in the gaps, an activity which no matter how one may label it, is in part legislative. Thus the courts in their way, as administrators perform the task of supplementing statutes. In the case of courts, we call it 'interpretation' or 'filling in the gaps'; in the case of administrators we call it 'delegation' or authority to supply the details."

29. Subba Rao, C.J. speaking for the Bench in *Chandra Mohan* v. *State of U.P.* [(1967) 1 SCR 77 : AIR 1966 SC 1987 : (1967) 1 LLJ 412] has pointed out that the fundamental rule of interpretation is that in construing the provisions of the Constitution or the Act of Parliament, the Court "will have to find out the express intention from the words of the Constitution or the Act, as the case may be …" and eschew the construction which will lead to absurdity and give rise to practical inconvenience or make the provisions of the existing law nugatory.

> A.P. Sen, J. in *Organo Chemical Industries* v. *Union of India* [(1979) 4 SCC 573 : 1980 SCC (L&S) 92 : (1980) 1 SCR 61] has stated thus: (SCR p. 89 : SCC p. 586, para 23)
>
> "A bare mechanical interpretation of the words 'devoid of concept or purpose' will reduce most of legislation to futility. It is a salutary rule, well established, that the intention of the legislature must be found by reading the statute as a whole."
>
> 30. Krishna Iyer, J. has pointed out in his inimitable style in *Chairman, Board of Mining Examination and Chief Inspector of Mines* v. *Ramjee* [(1977) 2 SCC 256 : 1977 SCC (L&S) 226 : AIR 1977 SC 965] : "To be literal in meaning is to see the skin and miss the soul of the Regulation."" (at page Nos.453 to 455)

20. All this has led to what may be called the theory of Creative Interpretation. This theory was reiterated in **Union of India v. Elphinstone Spinning and Weaving Co. Ltd. and Ors**, 2001 (4) SCC 139:-

> "While examining a particular statute for finding out the legislative intent it is the attitude of Judges in arriving at a solution by striking a balance between the letter and spirit of the statute without acknowledging that they have in any way supplemented the statute would be the proper criterion. The duty of Judges is to expound and not to legislate is a

> fundamental rule. There is no doubt a marginal area in which the courts mould or creatively interpret legislation and they are thus finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing. (See: *Corocraft Ltd.* v. *Pan American Airways Inc*. [(1968) 3 WLR 714 : (1968) 2 All ER 1059 : (1969) 1 QB 616] WLR, p. 732 and *State of Haryana* v. *Sampuran Singh* [(1975) 2 SCC 810].) But by no stretch of imagination a Judge is entitled to add something more than what is there in the statute by way of a supposed intention of the legislature. It is, therefore, a cardinal principle of construction of statutes that the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed." [at para 17]

21. Instances of creative interpretation are when the Court looks at both the literal language as well as the purpose or object of the statute in order to better determine what the words used by the draftsman of legislation mean. In **D.R. Venkatachalam v. Deputy Transport Commissioner**, (1977) 2 SCC 273, an early instance of this is found in the concurring judgment

of Beg, J. The learned Judge put it rather well when he said:

> "It is, however, becoming increasingly fashionable to start with some theory of what is basic to a provision or a chapter or in a statute or even to our Constitution in order to interpret and determine the meaning of a particular provision or rule made to subserve an assumed "basic" requirement. I think that this novel method of construction puts, if I may say so, the cart before the horse. It is apt to seriously mislead us unless the tendency to use such a mode of construction is checked or corrected by this Court. What is basic for a section or a chapter in a statute is provided: firstly, by the words used in the statute itself; secondly, by the context in which a provision occurs, or, in other words, by reading the statute as a whole; thirdly, by the preamble which could supply the "key" to the meaning of the statute in cases of uncertainty or doubt; and, fourthly, where some further aid to construction may still be needed to resolve an uncertainty, by the legislative history which discloses the wider context or perspective in which a provision was made to meet a particular need or to satisfy a particular purpose. The last mentioned method consists of an application of the Mischief Rule laid down in *Heydon's case* long ago." [para 28]

22. In the celebrated judgment of **Reserve Bank of India v. Peerless General Finance &**

Investment Co. Ltd. and Others, (1987) 1 SCC 424, O. Chinnappa Reddy, J. stated:-

> "Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression "Prize Chit" in *Srinivasa* [(1980) 4 SCC 507 : (1981) 1 SCR 801 : 51 Com Cas 464] and we

> find no reason to depart from the Court's construction.” [para 33]

23. Indeed, the modern trend in other Commonwealth countries, including the U.K. and Australia, is to examine text as well as context, and object or purpose as well as literal meaning. Thus, in **Oliver Ashworth Ltd. V. Ballard Ltd.**, [1999] 2 All ER 791, Laws L.J. stated the modern rule as follows:

> “By way of introduction to the issue of statutory construction I should say that in my judgment it is nowadays misleading — and perhaps it always was — to seek to draw a rigid distinction between literal and purposive approaches to the interpretation of Acts of Parliament. The difference between purposive and literal construction is in truth one of degree only. On received doctrine we spend our professional lives construing legislation purposively, inasmuch as we are enjoined at every turn to ascertain the intention of Parliament. The real distinction lies in the balance to be struck, in the particular case, between the literal meaning of the words on the one hand and the context and purpose of the measure in which they appear on the other. Frequently there will be no opposition between the two, and then no difficulty arises. Where there is a potential clash, the conventional English approach has been to give at least very great and often decisive weight to the

> literal meaning of the enacting words. This is a tradition which I think is weakening, in face of the more purposive approach enjoined for the interpretation of legislative measures of the European Union and in light of the House of Lords' decision in *Pepper (Inspector of Taxes) v. Hart* [1993] 1 All E. R. 42, [1993] A.C 593. I will not here go into the details or merits of this shift of emphasis; save broadly to recognise its virtue and its vice. Its virtue is that the legislator's true purpose may be more accurately ascertained. Its vice is that the certainty and accessibility of the law may be reduced or compromised. The common law, which regulates the interpretation of legislation, has to balance these considerations."

And in **R. (Quintavalle) v. Secretary of State for Health**, [2003] 2 All E.R.113, Lord Steyn put it thus:

> "On the other hand, the adoption of a purposive approach to construction of statutes generally, and the 1990 Act in particular, is amply justified on wider grounds. In Cabell v Markham (1945) 148 F 2d 737 at 739 Learned Hand J explained the merits of purposive interpretation:
>
> > 'Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature developed jurisprudence not to make a

> fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'
>
> The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in River Wear Comrs v Adamson (1877) 2 App Cas 743 at 763, [1874-80] All ER Rep 1 at 11. In any event, nowadays the shift towards purposive interpretation is not in doubt. The qualification is that the degree of liberality permitted is influenced by the context, e.g. social welfare legislation and tax statutes may have to be approached somewhat differently. For these slightly different reasons I agree with the conclusion of the Court of Appeal that s 1(1) of the 1990 Act must be construed in a purposive way." (at 122, 123)[66]

We find the same modern view of the law in **CIC Insurance Limited v. Bankstown Football Club Limited, F.C.** (1997) 187 CLR 384, where the High Court of Australia put it thus:

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[66] In a recent judgment by a 7 Judge Bench of this Court , the majority, speaking through Lokur, J., referred to the aforesaid judgment with approval. See Abhiram Singh v. C.D. Commachen - 2017 (2) SCC 629 at Para 37.

“It is well settled that at common law, apart from any reliance upon 15AB of the Acts Interpretation Act 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. **[Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg [1975] UKHL 2; [1975] AC 591 at 614, 629, 638; Wacando v The Commonwealth [1981] HCA 60; (1981) 148 CLR 1 at 25-26; Pepper v Hart [1992] UKHL 3; [1993] AC 593 at 630.]**. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy **[Attorney-General v Prince Ernest Augustus of Hanover [1957] AC 436 at 461, cited in K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd [1985] HCA 48; (1985) 157 CLR 309 at 312, 315.]**. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in Isherwood v Butler Pollnow Pty Ltd. **[(1986) 6 NSWLR 363 at 388.]**, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an

> alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent. **[Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297 at 320-321].**"

24. It is thus clear on a reading of English, U.S., Australian and our own Supreme Court judgments that the '*Lakshman Rekha*' has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of **Heydon,** where the Court must have recourse to the purpose, object, text, and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in Heydon's case, which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid 1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in **Heydon's case**.

25. Coming to the statute at hand, it was argued before us that even though the statute is a

beneficial one, it is penal as well, and that therefore its provisions ought to be strictly construed. Here again, the modern trend in construing penal statutes has moved away from a mechanical incantation of strict construction. In **Lalita Jalan v. Bombay Gas Co. Ltd. and Ors.**, (2003) 6 SCC 107, this Court referred to the correct principle of construction of penal statutes as follows:

> "We would like to mention here that the principle that a statute enacting an offence or imposing a penalty is to be strictly construed is not of universal application which must necessarily be observed in every case. In *Murlidhar Meghraj Loya* v. *State of Maharashtra* [(1976) 3 SCC 684 : 1976 SCC (Cri) 493 : AIR 1976 SC 1929] Krishna Iyer, J. held that any narrow and pedantic, literal and lexical construction of food laws is likely to leave loopholes for the offender to sneak out of the meshes of law and should be discouraged and criminal jurisprudence must depart from old canons defeating criminal statutes calculated to protect the public health and the nation's wealth. The same view was taken in another case under the Prevention of Food Adulteration Act in *Kisan Trimbak Kothula* v. *State of Maharashtra* [(1977) 1 SCC 300 : 1977 SCC (Cri) 97 : AIR 1977 SC 435] . In *Supdt. and Remembrancer of Legal Affairs to Govt. of W.B.* v. *Abani Maity* [(1979) 4 SCC 85 : 1979 SCC (Cri) 902 : AIR 1979 SC

> 1029] the word "may" occurring in Section 64 of the Bengal Excise Act was interpreted to mean "must" and it was held that the Magistrate was bound to order confiscation of the conveyance used in commission of the offence. Similarly, in *State of Maharashtra* v. *Natwarlal Damodardas Soni* [(1980) 4 SCC 669 : 1981 SCC (Cri) 98 : AIR 1980 SC 593] with reference to Section 135 of the Customs Act and Rule 126-H(2)(*d*) of the Defence of India Rules, the narrow construction given by the High Court was rejected on the ground that they will emasculate these provisions and render them ineffective as a weapon for combating gold smuggling. It was further held that the provisions have to be specially construed in a manner which will suppress the mischief and advance the object which the legislature had in view. The contention raised by learned counsel for the appellant on strict interpretation of the section cannot therefore be accepted." [para 18]

This was followed in **Iqbal Singh Marwah and Another vs. Meenakshi Marwah and Another**, (2005) 4 SCC 370 at pages 388 and 389.

26. In fact, interestingly enough, a judgment of this Court in **S. Gopal Reddy vs. State of A.P.**, (1996) 4 SCC 596 construed the Dowry Prohibition Act, which is undoubtedly a beneficial legislation containing drastic penal provisions, as follows:

"It is a well-known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute. The courts must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act. A purposive approach for interpreting the Act is necessary. We are unable to persuade ourselves to agree with Mr. Rao that it is only the property or valuable security given at the time of marriage which would bring the same within the definition of 'dowry' punishable under the Act, as such an interpretation would be defeating the very object for which the Act was enacted. Keeping in view the object of the Act, "demand of dowry" *as a consideration for a proposed marriage* would also come within the meaning of the expression dowry under the Act. If we were to agree with Mr. Rao that it is only the 'demand' made at or after marriage which is punishable under Section 4 of the Act, some serious consequences, which the legislature wanted to avoid, are bound to follow. Take for example a case where the bridegroom or his parents or other relatives make a 'demand' of dowry during marriage negotiations and later on after bringing the bridal party to the bride's house find that the bride or her parents or relatives have not met the earlier 'demand' and call off the marriage and leave the bride's house, should they escape the punishment under the Act. The answer has to be an emphatic 'no'. It would be adding insult to injury if we were to countenance that their action would not attract the provisions of Section 4 of the Act. Such

> an interpretation would frustrate the very object of the Act and would also run contrary to the accepted principles relating to the interpretation of statutes." [para 12]

27. A recent judgment, also discussing the provisions of the Dowry Prohibition Act, is reported as **Rajinder Singh v. State of Punjab,** (2015) 6 SCC 477. Discussing the reach of Section 304B of the Penal Code read with the Dowry Prohibition Act, this Court has held:

> "In order to arrive at the true construction of the definition of dowry and consequently the ingredients of the offence under Section 304-B, we first need to determine how a statute of this kind needs to be interpreted. It is obvious that Section 304-B is a stringent provision, meant to combat a social evil of alarming proportions. Can it be argued that it is a penal statute and, should, therefore, in case of ambiguity in its language, be construed strictly?
>
> The answer is to be found in two path-breaking judgments of this Court. In *M. Narayanan Nambiar* v. *State of Kerala* [AIR 1963 SC 1116 : (1963) 2 Cri LJ 186 : 1963 Supp (2) SCR 724] , a Constitution Bench of this Court was asked to construe Section 5(1)(*d*) of the Prevention of Corruption Act, 1947. In construing the said Act, a penal statute, Subba Rao, J. stated: (AIR p. 1118, para 9)

"9. The Preamble indicates that the Act was passed as it was expedient to make more effective provisions for the prevention of bribery and corruption. The long title as well as the Preamble indicate that the Act was passed to put down the said social evil i.e. bribery and corruption by public servant. Bribery is a form of corruption. The fact that in addition to the word 'bribery' the word 'corruption' is used shows that the legislation was intended to combat also other evil in addition to bribery. The existing law i.e. the Penal Code was found insufficient to eradicate or even to control the growing evil of bribery and corruption corroding the public service of our country. The provisions broadly include the existing offences under Sections 161 and 165 of the Penal Code, 1860 committed by public servants and enact a new rule of presumptive evidence against the accused. The Act also creates a new offence of criminal misconduct by public servants though to some extent it overlaps on the pre-existing offences and enacts a rebuttable presumption contrary to the well-known principles of criminal jurisprudence. It also aims to protect honest public servants from harassment by prescribing that the investigation against them could be made only by police officials of particular status and by making the sanction of the

Government or other appropriate officer a pre-condition for their prosecution. As it is a socially useful measure conceived in public interest, it should be liberally construed so as to bring about the desired object i.e. to prevent corruption among public servants and to prevent harassment of the honest among them.

10. A decision of the Judicial Committee in *Dyke* v.*Elliott, The Gauntlet* [(1872) LR 4 PC 184], cited by the learned counsel as an aid for construction neatly states the principle and therefore may be extracted: Lord Justice James speaking for the Board observes at LR p. 191:

'… No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to

> the fair commonsense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.'

In our view this passage, if we may say so, restates the rule of construction of a penal provision from a correct perspective."

In *Standard Chartered Bank* v. *Directorate of Enforcement* [*Standard Chartered Bank* v. *Directorate of Enforcement*, (2005) 4 SCC 530 : 2005 SCC (Cri) 961] at pp. 547-48, another Constitution Bench, 40 odd years later, was faced with whether a corporate body could be prosecuted for offences for which the sentence of imprisonment is mandatory. By a majority of 3:2, the question was answered in the affirmative. Balakrishnan, J. held: (SCC paras 23-24)

> *"23*. The counsel for the appellant contended that the penal provision in the statute is to be strictly construed. Reference was made to *Tolaram Relumal* v. *State of Bombay* [AIR 1954 SC 496 : 1954 Cri LJ 1333 : (1955) 1 SCR 158] , SCR at p. 164 and *Girdhari Lal Gupta* v. *D.H. Mehta* [(1971) 3 SCC 189 : 1971 SCC (Cri) 279] . It is true that all penal statutes are to be strictly construed in the sense that the court must see that the thing charged as an offence is

within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. All penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment. Here, the legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. It is sheer violence to common sense that the legislature intended to punish the corporate bodies for minor and silly offences and extended immunity of prosecution to major and grave economic crimes.

24. The distinction between a strict construction and a more free one has disappeared in modern times and now mostly the question is 'what is true construction of the statute?' A passage in *Craies on Statute Law*, 7th Edn. reads to the following effect:

'The distinction between a strict and a liberal construction has almost disappeared with regard to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules. "All modern Acts are framed with regard to equitable as

> well as legal principles." "A hundred years ago", said the court in *Lyons case* [*R.* v. *Lyons*, 1858 Bell CC 38 : 169 ER 1158] , "statutes were required to be perfectly precise and resort was not had to a reasonable construction of the Act, and thereby criminals were often allowed to escape. This is not the present mode of construing Acts of Parliament. They are construed now with reference to the true meaning and real intention of the legislature.'

At p. 532 of the same book, observations of Sedgwick are quoted as under:

'The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the legislature, without unwarrantable severity on the one hand or unjustifiable lenity on the other, in cases of doubt the courts inclining to mercy.'

Concurring with Balakrishnan, J., Dharmadhikari, J. added: (*Standard Chartered Bank case* [*Standard Chartered Bank* v. *Directorate of Enforcement*, (2005) 4 SCC 530 : 2005 SCC (Cri) 961] , SCC pp. 550-51, para 36)

> *"36*. The rule of interpretation requiring strict construction of penal statutes does not warrant a narrow and pedantic construction of a provision so as to leave loopholes for the offender to

escape (see *Murlidhar Meghraj Loya* v. *State of Maharashtra* [(1976) 3 SCC 684 : 1976 SCC (Cri) 493]). A penal statute has to also be so construed as to avoid a lacuna and to suppress mischief and to advance a remedy in the light of the rule in*Heydon's case* [(1584) 3 Co Rep 7a : 76 ER 637] . A common-sense approach for solving a question of applicability of a penal statute is not ruled out by the rule of strict construction. (See *State of A.P.* v. *Bathu Prakasa Rao* [(1976) 3 SCC 301 : 1976 SCC (Cri) 395] and also *G.P. Singh on Principles of Statutory Interpretation*, 9th Edn., 2004, Chapter 11, Synopsis 3 at pp. 754 to 756.)"

And Arun Kumar, J., concurring with both the aforesaid Judges, followed two earlier decisions of this Court as follows: (*Standard Chartered Bank case* [*Standard Chartered Bank* v. *Directorate of Enforcement*, (2005) 4 SCC 530 : 2005 SCC (Cri) 961] , SCC p. 556, paras 49-50)

"49. Another three-Judge Bench of this Court in a judgment in *Balram Kumawat* v. *Union of India* [(2003) 7 SCC 628] to which I was a party, observed in the context of principles of statutory interpretation: (SCC p. 635, para 23)

'*23*. Furthermore, even in relation to a penal statute

> any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject-matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out of the meshes of law. Criminal jurisprudence does not say so.'

50. In *M.V. Javali* v. *Mahajan Borewell & Co.* [(1997) 8 SCC 72 : 1997 SCC (Cri) 1239] this Court was considering a similar situation as in the present case. Under Section 278-B of the Income Tax Act a company can be prosecuted and punished for offence committed under Section 276-B; sentence of imprisonment is required to be imposed under the provision of the statute and a company being a juristic person cannot be subjected to it. It was held that the apparent anomalous situation can be resolved only by a proper interpretation of the section. The Court observed: (SCC p. 78, para 8)

> '*8*.Keeping in view the recommendations of the Law Commission and the above principles of interpretation of statutes we are of the opinion that the only harmonious construction that

> can be given to Section 276-B is that the mandatory sentence of imprisonment and fine is to be imposed where it can be imposed, namely, on persons coming under categories (*ii*) and (*iii*) above, but where it cannot be imposed, namely, on a company, fine will be the only punishment.'"

In keeping with these principles, in *K. Prema S. Rao* v.*Yadla Srinivasa Rao* [(2003) 1 SCC 217 : 2003 SCC (Cri) 271] , this Court said: (SCC p. 228, para 27)

> *"27*. The legislature has by amending the Penal Code and the Evidence Act made penal law more strident for dealing with and punishing offences against married women."

In *Reema Aggarwal* v. *Anupam* [(2004) 3 SCC 199 : 2004 SCC (Cri) 699] , in construing the provisions of the Dowry Prohibition Act, in the context of Section 498-A, this Court applied the mischief rule made immortal by *Heydon's case* [(1584) 3 Co Rep 7a : 76 ER 637] and followed Lord Denning's judgment in *Seaford Court Estates Ltd.* v. *Asher*[(1949) 2 KB 481 : (1949) 2 All ER 155 (CA)] , where the learned Law Lord held: (*Seaford Court Estates Ltd. case*[(1949) 2 KB 481 : (1949) 2 All ER 155 (CA)] , KB p. 499)

> "… *He must set to work on the constructive task of finding the intention of Parliament, and he*

> *must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy*, and then he must supplement the written word so as to give "force and life" to the intention of the legislature." (*Reema Aggarwal case* [(2004) 3 SCC 199 : 2004 SCC (Cri) 699] , SCC p. 213, para 25) (emphasis in original)

The Court gave an expansive meaning to the word "husband" occurring in Section 498-A to include persons who entered into a relationship with a woman even by feigning to be a husband. The Court held: (*Reema Aggarwal case* [(2004) 3 SCC 199 : 2004 SCC (Cri) 699] , SCC p. 210, para 18)

> *"18*. … It would be appropriate to construe the expression 'husband' to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerces her in any manner or for any of the purposes enumerated in the relevant provisions—Sections 304-B/498-A, whatever be the legitimacy of the marriage itself for the limited purpose of Sections 498-A and 304-B IPC. Such an interpretation, known and recognised as purposive construction has to come into play in a case of this nature. The absence of a definition of

> ‘husband’ to specifically include such persons who contract marriages ostensibly and cohabit with such woman, in the purported exercise of their role and status as ‘husband’ is no ground to exclude them from the purview of Section 304-B or 498-A IPC, viewed in the context of the very object and aim of the legislations introducing those provisions.”
>
> Given that the statute with which we are dealing must be given a fair, pragmatic, and common sense interpretation so as to fulfil the object sought to be achieved by Parliament, we feel that the judgment in *Appasaheb case* [*Appasaheb* v. *State of Maharashtra*, (2007) 9 SCC 721(2007) 9 SCC 721 : (2007) 3 SCC (Cri) 468] followed by the judgment of *Vipin Jaiswal* [*Vipin Jaiswal* v. *State of A.P.*, (2013) 3 SCC 684 : (2013) 2 SCC (Cri) 15] do not state the law correctly. We, therefore, declare that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Dowry Prohibition Act, at or before or at any time after the marriage which is reasonably connected to the death of a married woman, would necessarily be in connection with or in relation to the marriage unless, the facts of a given case clearly and unequivocally point otherwise.” [Paras 13 to 20]

28. In the case of the Employees’ Provident Funds & Miscellaneous Provisions Act, 1952, again a beneficial legislation with dire consequences to

those who breach it, this Court construed a penalty provision in the said statute by adopting a purposive approach. Thus, in **N.K. Jain v. C.K. Shah**, (1991) 2 SCC 495, this Court said:

> "Relying on the aforesaid principles governing the construction of the penal statute Shri P. Chidambaram, learned counsel for the appellants submitted that the provisions of Section 14(2-A) and Section 17(4) should reasonably be construed and if so construed Section 14(2-A) becomes inapplicable to the facts of the case on hand. It is true that all the penal statutes should be construed strictly and the court must see that the thing charged as an offence is within the plain meaning of the words used but it must also be borne in mind that the context in which the words are used is important. The legislative purpose must be noted and the statute must be read as a whole. In our view taking into consideration the object underlying the Act and on reading Sections 14 and 17 in full, it becomes clear that cancellation of the exemption granted does not amount to a penalty within the meaning of Section 14(2-A). As already noted these provisions which form part of the Act, which is a welfare legislation are meant to ensure the employees the continuance of the benefits of the provident fund. They should be interpreted in such a way so that the purpose of the legislation is allowed to be achieved (vide *International Ore and Fertilizers (India) Pvt. Ltd.* v. *Employees' State*

Insurance Corporation [(1987) 4 SCC 203 : 1987 SCC (L&S) 391 : AIR 1988 SC 79]). In *Seaford Court Estates Ltd.* v. *Asher* [(1949) 2 All ER 155 (CA)] , Lord Denning, L.J. observed: (All ER p. 164)

"The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, *when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature* …. A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do so as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

(emphas
is supplied)

> Therefore in a case of this nature, a purposive approach is necessary. However, in our view the interpretation of the word 'penalty' used in Section 14(2-A) does not present any difficulty and cancellation is not a punishment amounting to penalty within the meaning of this section."

29. Bearing in mind that the Act with which we are concerned is a beneficial/penal legislation, let us see whether we can extend the definition of "child" in Section 2(1)(d) thereof to include persons below the mental age of 18 years.

30. The Statement of Objects and Reasons of the 2012 Act is set out hereunder:

> "**STATEMENT OF OBJECTS AND REASONS**
> Article 15 of the Constitution, *inter alia,* confers upon the State powers to make special provision for children. Further, Article 39, *inter alia*, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.
>
> 2. The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the

State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

3. The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the 'Study on Child Abuse: India 2007' conducted by the Ministry of Woman and Child Development. Moreover, sexual offences against children are not adequately addressed by the existing laws. A large number of such offences are neither specifically provided for nor are they adequately penalized. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.

4. It is, therefore, proposed to enact a self contained comprehensive legislation *inter alia* to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard to safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment

> of Special Courts for speedy trial of such offences.
>
> 5. The Bill would contribute to enforcement of the right of all children to safety, security and protection from sexual abuse and exploitation.
>
> 6. The notes on clauses explain in detail the various provisions contained in the Bill.
>
> 7. The Bill seeks to achieve the above objectives."

Para 1 of the Statement of Objects and Reasons makes it clear that the Act's reach is only towards the protection of children, as ordinarily understood. The scope of the Act is to protect their "childhood and youth" against exploitation and to see that they are not abused in any manner.

31. Section 2(1)(d), with which we are directly concerned, is set out as under :

> "**2. Definitions** : (1) In this Act, unless the context otherwise requires, —
> (a) xxx xxx xxx
> (b) xxx xxx xxx
> (c) xxx xxx xxx
> (d) "child" means any person below the age of eighteen years."

One look at this definition would show that it is exhaustive, and refers to "any person" an elastic

enough expression, below the age of 18 years. "Year" is defined under the General Clauses Act as follows:

> "3(66). "year" shall mean a year reckoned according to the British calendar."

This coupled with the word "age" would make it clear that what is referred to beyond any reasonable doubt is physical age only.

32. Section 5(k) makes this further clear when it states:

> **"5. Aggravated penetrative sexual assault** –
>
> (a) to (j) xxx xxx xxx
>
> (k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child."

It will be seen that when mental disability is spoken of, it is expressly mentioned by the statute, and what is mentioned is a "child's" mental disability and not an adult's.

33. That a child alone is referred to under the other provisions of the Act is further made clear by Section 13(a), which reads as under:

> **"13. Use of child for pornographic purposes. -** Whoever, uses a child in any form of media (including programme or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes—
>
> (a) representation of the sexual organs of a child."

Obviously, the sexual organs of a child cannot ever be the sexual organs of an adult, whose mental age may be less than 18 years.

34. Again, when we come to Section 27(3) of the Act, it is clear that the Act refers only to children, as commonly understood. Section 27(3) of the 2012 Act reads as under :

> "**27. Medical examination of a child. –**
>
> (1) xxx xxx xxx
>
> (2) xxx xxx xxx
>
> (3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence."

35. Section 39 again throws some light on this knotty problem. The said Section reads as under :

> "**39. Guidelines for child to take assistance of experts, etc. -** Subject to such rules as may be made in this behalf, the State Government shall prepare guidelines for use of non-governmental organisations, 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 and trial stage to assist the child."

Here again, "physical health" and "mental health" are juxtaposed with the expression "child development", and again, therefore, refer only to the physical and mental age of a child and not an adult.

36. A reading of the Act as a whole in the light of the Statement of Objects and Reasons thus makes it clear that the intention of the legislator was to focus on children, as commonly understood i.e. persons who are physically under the age of 18 years. The golden rule in determining whether the judiciary has crossed the *Lakshman Rekha* in the guise of interpreting a statute is really whether a Judge has only ironed out the creases that he found in a statute in the light of its object, or whether he has altered the material of which the Act is woven.

In short, the difference is the well-known philosophical difference between “is” and “ought”. Does the Judge put himself in the place of the legislator and ask himself whether the legislator intended a certain result, or does he state that this must have been the intent of the legislator and infuse what he thinks should have been done had he been the legislator. If the latter, it is clear that the Judge then would add something more than what there is in the statute by way of a supposed intention of the legislator and would go beyond creative interpretation of legislation to legislating itself. It is at this point that the Judge crosses the *Lakshman Rekha* and becomes a legislator, stating what the law ought to be instead of what the law is.

37. A scrutiny of other statutes in *pari materia* would bring this into sharper focus. The Medical Termination of Pregnancy Act, 1971, again brings into sharp focus the distinction between “mentally ill persons” and “minors”. Sections 2(b), (c) of the said Act are as follows:-

> **"2. Definitions.-In this Act, unless the context otherwise requires,**-
>
> (a) xxx xxx xxx
>
> (b) "mentally ill person" means a person who is in need of treatment by reason of any mental disorder other than mental retardation.
>
> (c) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority."

38. Section 3(4)(a) of the 1971 Act reads as under :

> "**3. When pregnancies may be terminated by registered medical practitioners. –**
>
> (1) xxx xxx xxx
>
> (2) xxx xxx xxx
>
> (3) xxx xxx xxx
>
> (4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian."

This provision again makes it clear that when "the age of 18 years" occurs in a statute, it has reference only to physical age. The distinction

between a woman who is a minor and an adult woman who is mentally ill is again brought into sharp focus by the statute itself. It must, therefore, be held that Parliament, when it made the 2012 Act, was fully aware of this distinction, and yet chose to protect only children whose physical age was below 18 years.

39. The same result is reached if we peruse certain provisions of the Mental Healthcare Act, 2017. Sections 2(s), 2(t), 14 and 15 of the said Act are as under:

> 2(s) "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence;
>
> 2(t) "minor" means a person who has not completed the age of eighteen years;
>
> 14 (1) Notwithstanding anything contained in clause (c) of sub-section (1) of section 5, every person who is not

a minor, shall have a right to appoint a nominated representative.

(2) The nomination under sub-section (1) shall be made in writing on plain paper with the person's signature or thumb impression of the person referred to in that sub-section.

(3) The person appointed as the nominated representative shall not be a minor, be competent to discharge the duties or perform the functions assigned to him under this Act, and give his consent in writing to the mental health professional to discharge his duties and perform the functions assigned to him under this Act.

(4) Where no nominated representative is appointed by a person under sub-section (1), the following persons for the purposes of this Act in the order of precedence shall be deemed to be the nominated representative of a person with mental illness, namely:—

(a) the individual appointed as the nominated representative in the advance directive under clause (c) of sub-section (1) of section 5; or

(b) a relative, or if not available or not willing to be the nominated representative of such person; or

(c) a care-giver, or if not available or not willing to be the nominated representative of such person; or

(d) a suitable person appointed as such by the concerned Board; or

(e) if no such person is available to be appointed as a nominated representative, the Board shall appoint the Director, Department of Social Welfare, or his designated representative, as the nominated representative of the person with mental illness:

Provided that a person representing an organisation registered under the Societies Registration Act, 1860 or any other law for the time being in force, working for persons with mental illness, may temporarily be engaged by the mental health professional to discharge the duties of a nominated representative pending appointment of a nominated representative by the concerned Board.

(5) The representative of the organisation, referred to in the proviso to sub-section (4), may make a written application to the medical officer in-charge of the mental health establishment or the psychiatrist in-charge of the person's treatment, and such medical officer or psychiatrist, as the case may be, shall accept him as the temporary nominated representative, pending appointment of a nominated representative by the concerned Board.

(6) A person who has appointed any person as his nominated representative under this section may revoke or alter such appointment at any time in accordance with the procedure laid down for making an appointment of nominated representative under sub-section (1).

(7) The Board may, if it is of the opinion that it is in the interest of the person with mental illness to do so, revoke an appointment made by it under this section, and appoint a different representative under this section.

(8) The appointment of a nominated representative, or the inability of a person with mental illness to appoint a nominated representative, shall not be construed as the lack of capacity of the person to take decisions about his mental healthcare or treatment.

(9) All persons with mental illness shall have capacity to make mental healthcare or treatment decisions but may require varying levels of support from their nominated representative to make decisions.

15. (1) Notwithstanding anything contained in section 14, in case of minors, the legal guardian shall be their nominated representative, unless the concerned Board orders otherwise under sub-section (2).

(2) Where on an application made to the concerned Board, by a mental health professional or any other person acting in the best interest of the minor, and on evidence presented before it, the concerned Board is of the opinion that,—

(a) the legal guardian is not acting in the best interests of the minor; or

> (b) the legal guardian is otherwise not fit to act as the nominated representative of the minor,
> it may appoint, any suitable individual who is willing to act as such, the nominated representative of the minor with mental illness:
>
> Provided that in case no individual is available for appointment as a nominated representative, the Board shall appoint the Director in the Department of Social Welfare of the State in which such Board is located, or his nominee, as the nominated representative of the minor with mental illness."

A perusal of the provisions of the Mental Healthcare Act would again show that a distinction is made between a mentally ill person and a minor. Under Section 14, every person who is not a minor shall have the right to appoint a nominated representative, whereas under Section 15, in case of minors, the legal guardian shall be their nominated representative unless the concerned Board orders otherwise, if grounds are made out under sub-section (2).

40. Similarly, the Rights of Persons with Disabilities Act, 2016 maintains the selfsame distinction. Sections 2(s), 4, 9, 18 and 31 of the said Act read as under:

> "**2. Definitions. –** In this Act, unless the context otherwise requires -
>
> (a) to (r) xxx xxx xxx
>
> (s) "person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others."
>
> **"4. Women and children with disabilities -** (1) The appropriate Government and the local authorities shall take measures to ensure that the women and children with disabilities enjoy their rights equally with others.
> (2) The appropriate Government and local authorities shall ensure that all children with disabilities shall have right on an equal basis to freely express their views on all matters affecting them and provide them appropriate support keeping in view their age and disability."
>
> **"9. Home and family** - (1) No child with disability shall be separated from his or her parents on the ground of disability except on an order of competent court, if required, in the best interest of the child.

(2) Where the parents are unable to take care of a child with disability, the competent court shall place such child with his or her near relations, and failing that within the community in a family setting or in exceptional cases in shelter home run by the appropriate Government or non-governmental organisation, as may be required."

"18. Adult education - The appropriate Government and the local authorities shall take measures to promote, protect and ensure participation of persons with disabilities in adult education and continuing education programmes equally with others."

"31. Free education for children with benchmark disabilities. - (1) Notwithstanding anything contained in the Rights of Children to Free and Compulsory Education Act, 2009, every child with benchmark disability between the age of six to eighteen years shall have the right to free education in a neighbourhood school, or in a special school, of his choice.

(2) The appropriate Government and local authorities shall ensure that every child with benchmark disability has access to free education in an appropriate environment till he attains the age of eighteen years."

A perusal of the aforesaid Sections would show that children with disabilities are dealt with separately and differently from persons with

disabilities. Thus, Sections 4, 9 and 31 give certain rights to children with disabilities as opposed to the other provisions, in particular Section 18, which speaks of adult education and participation thereof by persons with disabilities, obviously referring to persons who are physically above 18 years of age.

41. As a contrast to the 2012 Act with which we are concerned, the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 would make it clear that whichever person is affected by mental retardation, in the broader sense, is a "person with disability" under the Act, who gets protection. The Statement of Objects and Reasons of the said Act reads as under:

> "STATEMENT OF OBJECTS AND REASONS
>
> The Government of India has become increasingly concerned about the need for affirmative action in favour of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability.
>
> 2. In acknowledgement of a wide range of competencies among these individuals, the Central Government

> seeks to set up a National Trust to be known as a National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability. The said Trust will be promotive, proactive and protectionist in nature. It will seek primarily to uphold the rights, promote the development and safeguard the interests of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability and their families.
>
> 3. Towards this goal, the National Trust will support programmes which promote independence, facilitating guardianship where necessary and address the concerns of those special persons who do not have their family support. The Trust will seek to strengthen families and protect the interest of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability after the death of their parents.
>
> 4. The Trust will be empowered to receive grants, donations, benefactions, bequests and transfers. The Central Government will make a one-time contribution of rupees one hundred crores to the corpus of the Trust to enable it to discharge its responsibilities.
>
> 5. The Bill seeks to achieve the aforesaid objectives."

Relevant provisions of this Act are Sections 2(g), 2(j), 14(1) and 17(1), and the same are reproduced as under:

"**2. Definitions. –** In this Act, unless the context otherwise requires -

(a) to (f) xxx xxx xxx

(g) "mental retardation" means a condition of arrested or incomplete development of mind of a person which is specially characterised by sub-normality of intelligence;

(h) & (i) xxx xxx xxx

(j) "persons with disability" means a person suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes a person suffering from severe multiple disability."

"14. Appointment for guardianship.—

(1) A parent of a person with disability or his relative may make an application to the local level committee for appointment of any person of his choice to act as a guardian of the persons with disability."

"17. Removal of guardian.—(1) Whenever a parent or a relative of a person with disability or a registered organisation finds that the guardian is—

(a) abusing or neglecting a person with disability; or

(b) misappropriating or neglecting the property,

it may in accordance with the prescribed procedure apply to the committee for the removal of such guardian."

A reading of the Objects and Reasons of the aforesaid Act together with the provisions contained therein would show that whatever is the physical age of the person affected, such person would be a "person with disability" who would be governed by the provisions of the said Act. Conspicuous by its absence is the reference to any age when it comes to protecting persons with disabilities under the said Act.

42. Thus, it is clear that viewed with the lens of the legislator, we would be doing violence both to the intent and the language of Parliament if we were to read the word "mental" into Section 2(1)(d) of the 2012 Act. Given the fact that it is a beneficial/penal legislation, we as Judges can extend it only as far as Parliament intended and no further. I am in agreement, therefore, with the judgment of my learned brother, including the directions given by him.

……J.
(R.F. Nariman)

New Delhi;
July 21, 2017.