

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.803 OF 2018

Rohan Pradeep Dhungat,
son of Pradeep R. Pai Dhungat,
30 years old, Indian National,
Resident of Building No.3, 4th Floor,
401, Models Status, Caranzalem,
Panaji, Goa, and presently lodged in
Central Jail, Colvale, Bardez, Goa. Petitioner.

Versus

State of Goa
through Chief Secretary,
Secretariat, Porvorim, Bardez, Goa. Respondent.

Mr. S. G. Dessai, Senior Advocate with Mr. Pavithran A.V.,
Advocate for the Petitioner.

Mr. Dattaprasad Lawande, Advocate General with Mr. Deep
Shirodkar, Additional Government Advocate for the Respondent.

***Coram : N.M. Jamdar &
Prithviraj K. Chavan, JJ.***

Date : 6 October 2018.

ORAL JUDGMENT: (Per N.M. Jamdar, J.)

The Petitioner is one of the accused in Special Case
No.28/2006 filed in the Goa Children's Court. He is convicted by
the Children's Court. By this Petition, the Petitioner has sought a

declaration that the Goa Children's Act 2003, enacted by the Goa legislature be declared as void to the extent it is repugnant or inconsistent with the Indian Penal Code, Criminal Procedure Code and the Protection of Children from Sexual Offences Act, 2012. The Petitioner has also sought a writ of mandamus against the Respondent not to enforce the provisions of the Goa Children's Act, 2003 (the Goa Act), as conflicting or repugnant or inconsistent to the provisions of the Indian Penal Code, Criminal Procedure Code and the Protection of Children from Sexual Offences Act.

2. The State has placed a copy of the judgment passed by the Goa Children's Court for reference. The Prosecution case, as can be seen from the judgment briefly is as follows. On 14 August 2006, parents of a missing child approached the Vasco Police Station. They informed the authorities that they had received a phone call from their son and his captors had made a demand for ransom. A Complaint was registered under Crime No.197/06 under Section 364-A of the Indian Penal Code. On 15 August 2006, the Police Authorities received information that a dead body of child was lying in bushes. The information was received under UD No.80/06 under Section 174 of the Criminal Procedure Code. Description of the dead body was found matching with the missing child. According to the prosecution, a criminal conspiracy was

hatched by four accused, including the Petitioner, to kidnap the child for ransom and share the booty. The child was assaulted with baseball bats and was strangled with a cotton rope. The body was then disposed of in the bushes.

3. Since the deceased was a minor under the Goa Act, the complaint was filed before the Children's Court, and it was registered as Special Case No.28/2006. The Petitioner along with others, were charged for the offences punishable under Sections 364-A, 302, 201, 120-B of the Indian Penal Code and Section 8(2) of the Goa Act. As per Section 30 of the Goa Children's Act, the Goa Act, the Children's Court assumed the jurisdiction. The case was tried. Fifty seven witnesses were examined. Accused No.5 was tendered pardon and was examined. The learned Special Judge, by judgment and order dated 23 June 2014, convicted the Petitioner for the offenses charged. The Petitioner was sentenced to undergo life imprisonment. The Petitioner, thereafter, has filed a Criminal Appeal bearing No.38/2014, which is pending for hearing. The Petitioner has filed the present Petition seeking a declaration as referred to earlier.

4. Mr. S. G. Dessai, learned Senior Advocate addressed the Court on behalf of the Petitioner. Mr. Dattaprasad Lawande, learned Advocate General defended the legislation.

5. It is the contention of the Petitioner that the Goa Act being void and unconstitutional, the trial and conviction of Petitioner under an unconstitutional and void enactment, is in breach of his fundamental rights under Article 21 of the Constitution of India. The Petitioner contends that he has a fundamental right to be tried by the procedure established by law, and since the Goa Act is void and unconstitutional, his trial and conviction under the Goa Act are in breach of the fundamental rights. The Petitioner has also invoked Article 22 of the Constitution of India.

6. Mr. Dessai narrated the legislative history of various enactments in the State of Goa from 20 December 1961, the date on which Goa was liberated from the Portuguese Rule. He pointed out that the Indian Evidence Act, 1872, Indian Penal Code 1860, Criminal Procedure Code 1898, have been made applicable to Goa post-1961. It is further stated that the Juvenile Justice (Care and Protection of Children) Act, 2000 and the Protection of Children from Sexual Offences Act 2012 (POCSO) enacted by the Parliament are in operation in the State of Goa. The main contention of the Petitioner is that these Acts enacted by the Parliament, occupy the field which is sought to be covered by the Goa Act, and since the Parliament already occupies the field, the

Goa Legislature was denuded of its power to enact the Goa Act. It is contended that the Parliament has enacted the Indian Penal Code, Criminal Procedure Code and the Indian Evidence Act under Entry Nos. 1, 2 and 12 of List III of the Seventh Schedule, so also the Juvenile Justice (Care and Protection of Children) Act, 2000 and Protection of Children from Sexual Offences Act 2012 under Entry 5 of List III. It is contended that though the Goa legislature has the power to enact legislation under these entries, it is subject to the powers of the Parliament as envisaged by the constitutional scheme under Articles 245 to 263 of the Constitution of India. It is contended that in view of this constitutional scheme, the supremacy of the Parliament to make laws in respect of even the Concurrent List is absolute and will override the power of the State. It is further contended that the Goa legislature cannot make any provision of law which is repugnant to the provisions of law made by the Parliament. It is only if the President has granted an assent that in the State, the State legislature will prevail. It is contended that admittedly, the President has not granted any assent to the Goa Act.

7. Mr. Dessai submitted that the Goa Act is directly in conflict with the Indian Penal Code as the crime in respect of kidnapping for ransom and other offences by which the Petitioner

is charged, are referable to Sections 364-A to 364-D of the Indian Penal Code. It is contended that Section 8 of the Goa Act, read with, its definition, clearly is in respect of the very same offences enumerated in Sections 364-A to 364-D of the Indian Penal Code. The Petitioner further contends that similar is the position in respect of Sections 370, 371, 372, 373 and 374 because they include Minors within their ambit. It is also contended that the procedure in the Goa Act so far as it relates to the child witnesses is inconsistent with the procedure laid down in the Criminal Procedure Code and also the provisions of Section 118 of the Indian Evidence Act. It is contended that by prescribing such a different methodology, there is a direct conflict with the procedure laid down in the Parliamentary legislation. It is contended that the Goa Act, by virtue of Section 32(1)(l), places burden of proof on the accused which is in contravention with the provisions of the Indian Evidence Act and basic canon of criminal jurisprudence as the burden is always on the prosecution to establish the guilt of the accused. It is also contended that the objects and reasons of the Goa Act are identical to that of the Protection of Children from Sexual Offences Act 2012 and the Juvenile Justice (Care and Protection of Children) Act, 2000, as amended and these fields already being occupied by the Parliamentary legislation, the impugned enactment will have to be declared as void and secondly

being inconsistent with the Parliamentary law. The Petitioner has relied on the decisions in the cases of *Engineering Kamgar Union vs. Electro Steels Castings Ltd. and anr.*¹, *State of Orissa vs. M.A. Tulloch and Co.*², *Golla Yelugu Govindu vs. State of Andhra Pradesh*³, *Kaiser-I-Hind Pvt. Ltd. and anr. vs. National Textile Corn. (Maharashtra North) Ltd. and ors.*⁴ *State of Kerala and ors. vs. Mar Appraem Kuri Co. Ltd. and anr.*⁵, *Thirumuruga Kirupananda Variyar Thavathiru Sundara Swamigal Medical Educational & Charitable Trust vs State of Tamil Nadu and ors.*⁶ and *Zaverbhai Amaidas vs. The State of Bombay*⁷.

8. In response, Mr. Lawande, the learned Advocate General has contended that the challenge of the Petitioner cannot be akin to a public interest litigation and it will have to be restricted *qua* the rights of the Petitioner and only in respect of the provisions which have been put against the Petitioner. He submitted that the Petitioner was charged with Sections 302, 364-A, 201, 120-B of the Indian Penal Code and as far as Goa Act is concerned, it is only the provisions of Section 8(2) thereof is

¹ (2004) 6 SCC 36

² AIR 1964 SC 1284

³ (2008) 16 SCC 769

⁴ (2002) 8 SCC 182

⁵ (2012) 7 SCC 106

⁶ (1996) 3 SCC 15

⁷ AIR 1954 SC 752

referable to punishment for child abuse. He pointed out that the Petitioner is not charged for committing any sexual offence. It is his contention that in view of this position, the limited inquiry should be in respect of the conflict between the State enactment and the Parliamentary enactments in respect of the provisions which are applicable in the present case. It is contended that every other conflict, if any, need not be considered as such challenge would be academic. In furtherance of the contention regarding academic issues not to be decided, reliance is placed on *Loknath Padhan vs. Birendra Kumar Sahu*⁸ and *Nagpur Distillers Pvt. Ltd. vs. State of Maharashtra and anr.*⁹.

9. On the question of the constitutional validity, Mr. Lawande contended that the Goa Act is enacted pursuant to Article 15(3) of the Constitution of India, read with the Directive Principles and in consonance with the preamble of the Constitution of India, for the welfare of the minors in the State. It is contended that the Parliamentary enactments such as the Indian Penal Code, and the Criminal Procedure Code operate in an entirely different field. He submitted POCSO has a different object dealing with sexual abuse, whereas the Goa Act deals with broader subjects and all aspects of the welfare of the minors. It is

⁸ (1974) 1 SCC 526

⁹ 2016 (2) Mh.L.J. 755

pointed out that neither the Petitioner nor the accused are the juvenile, nor there are any child witnesses in the present case. It is contended that even otherwise, the protection under the Goa Act giving protection to a child witness is in consonance with the object of the Act and not in conflict with the Criminal Procedure Code. It is contended that the burden of proof in the Goa Act is not absolute and the Evidence Act also envisages placing of the burden on the accused in certain circumstances. It is contended that there are various enactments which place such burden on the accused and there is nothing in the Goa Act which is, therefore, either contrary to the Indian Penal Code, Criminal Procedure Code or the Indian Evidence Act. He placed reliance on the decisions in the cases of *M. Karunanidhi vs. Union of India and anr.*¹⁰, *Goa Foundation and anr. vs. State of Goa anr.*¹¹ and *Yogendra Kumar Jaiswal and ors. vs. State of Bihar & ors.*¹² in respect of the law governing legislative power in the Concurrent List. Reliance is also placed on the decision in the case of *Independent Thought vs. Union of India and anr.*¹³ to emphasize upon the special status of the legislative enactments for the protection of the children.

¹⁰ (1979) 3 SCC 431

¹¹ (2016) 6 SCC 602

¹² (2016) 3 SCC 183

¹³ (2017) 10 SCC 800

10. Article 254 of the Constitution of India deals with inconsistency between laws made by Parliament and laws made by the Legislatures of States. It reads thus,

“254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State”.

Clause (1) of Article 254 states that if a State law relating to a concurrent subject is “repugnant” to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. Article 254(1) gives supremacy to the law made by Parliament, which Parliament is competent to enact. In case of repugnancy, the State legislation would be void only to the extent of repugnancy. If there is no repugnancy between the two laws, there is no question of application of Article 254(1) and both the Acts would prevail.

11. The Constitution Bench in the case *M. Karunanidhi* has laid down the parameters as regards the conflict arising within the Concurrent List. These parameters are consistently followed. The decision in the case of *Engineering Kamgar Union* cited by the Petitioner relies on the decisions of Constitution Bench in *Karunanidhi* and also in the cases of *Mar Appraem Kuri Co. Ltd.* and *Thirumuruga Kirupananda Variyar*. The decision in *M.A. Tulloch* relied upon by the Petitioner is discussed in the decision of *Karunanidhi*. In *Karunanidhi*, the Constitution Bench was considering the conflict between Tamilnadu Public Men (Criminal Misconduct) Act, 1973 and Prevention of Corruption Act and the Indian Penal Code and the Criminal law (Amendment) Act,

1952). The Constitution Bench held that the State Act therein created distinct and separate offences with different ingredients and did not in any way collide with the Central Act. On the broader principles, the Constitution Bench, after consideration of the earlier decisions, held that in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions so that they cannot stand together or operate in the same field. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes. It is held that where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results. The Constitution Bench held that where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field. In the *Mar Appraem Kuri Co. Ltd.*, the Supreme Court held that Article 254 is attracted only when legislations covering the same matter in List III made by the Centre and by the State operate on that subject; both of them i.e. Parliament and the State Legislatures, being competent to enact laws with respect to the subject in List III. It was further observed that the question of repugnancy between parliamentary legislation and State

legislation arises in two ways. First, where the legislations, though enacted with respect to matters in their allotted spheres, overlap and conflict. Second, where the two legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, the parliamentary legislation will predominate. In the first, by virtue of *non obstante* clause in Article 246(1); in the second, by reason of Article 254(1). In the case of *Goa Foundation*, the Supreme Court summarized the principles for repugnancy to arise as follows. Firstly, there has to be a clear and direct inconsistency between the Central and the State Act. Secondly, such inconsistency should be absolutely irreconcilable. Thirdly, inconsistency should be of the nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other.

12. While deciding the issue of conflict between the legislations, the second primary position that has to be kept in mind is that of Reconciliation. The Supreme Court in *Yogendra Kumar Jaiswal & ors.* has observed that when a situation comes up before the court pertaining to the applicability of parliamentary legislation and any enactment or law enacted by the State Legislature for consideration, the effort of the court should be to see that the provisions of both the Acts are made applicable

13. Third important doctrine is that of Pith and Substance. As per this doctrine where a question arises whether a particular law relates to a particular subject, the court looks to the substance of the matter. This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. The Court has to examine the real character of the enactment, its object, its scope and effect, to ascertain whether the enactment is referable to a field of the legislation allotted to it. The Apex Court in the *Bharat Hydro Power Corpn. Ltd. v. State of Assam* ¹⁴, observed that from time to time situation arises that an enactment though purporting to deal with a subject in one list touches also on a subject in another list and if the legislations are not looked at carefully it may result in a large number of statutes being declared unconstitutional because the legislature enacting law may appear to have legislated in a field reserved for the other legislature. The Supreme Court emphasized on the necessity to examine whether a legislation has impinged on the field of other legislatures, in fact or in substance, or is incidental. For that purpose the true nature of the enactment has

¹⁴ (2004) 2 SCC 553

to be ascertained. This in short is the doctrine of Pith and Substance. Thus the courts should look into the substance of the enactment. An incidental encroachment should not make it invalid.

14. Lastly ,the Courts must keep in mind the special status of the children-centric laws. The Supreme Court in the case of *Independent Thought* considered an issue of public importance, as whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age, is a rape. In this context, the Supreme Court analysed the Law Commission Reports, National Plan, National Policy, statutory enactments, the Constitution of India and the International Conventions. The Supreme Court observed that whatever be the explanation, given the context and purpose of their enactment, primacy must be given to pro-child statutes. The interpretation of Article 15(3) of the Constitution should be in a manner that is affirmative in favour of children.

15. We will now refer to the philosophy behind the impugned enactment, its objects and scheme and also refer to the central enactments. Then we will consider whether there is any conflict between the state and parliamentary enactments, and to what extent the conflict is relevant in the present case.

16. That a child needs to be afforded extra care and protection is recognized in various international Declarations right from the Declaration of the Rights of Child of 1924. India is a signatory to the United Nations Convention on the Rights of the Child. The Universal Declaration of Human Rights has proclaimed that childhood is entitled to special care and assistance. Article 3 of the Convention of the Rights of Child 1990 declares that the State parties will take all appropriate measures to ensure that all actions concerning the children are undertaken by institutions, courts of law, legislative bodies be in the best interest of the child. This Article also calls upon the State parties to take appropriate legislative measures to ensure the protection of the child. Article 4 also calls upon the States to undertake appropriate legislative measures to implement the rights of children recognized in the Convention. Article 19 of the Convention of 1990 proclaims that the State parties shall take appropriate legislative measures to protect the children from all forms of physical, or mental violence, injury or abuse.

17. The Preamble to the Constitution of India guarantees a social, economic and political justice and assures dignity of the individual. Part III of the Constitution refers to Fundamental

Rights. Article 15 gives a guarantee against discrimination on the ground of religion, race, caste, sex or place of birth. Article 15(3) however, specifies that nothing in Article 15 shall prevent the State from making any special provision for women and children. Article 39 lays down certain principle of policies to be followed by the State. Article 39(f) states that the State policy should be directed towards securing that children are given opportunities and facilities to develop in a healthy manner and in a condition of freedom and dignity and child and youth are protected against exploitation and against moral and material abandonment.

18. The Goa Act of 2003 was passed on 30 April 2003. Statement of Objects and Reasons of the Goa Act read thus :

“Statement of Objects and Reasons.

(1) Whereas it is accepted and well recognized that children are the future of any country, hence the best investment society and Government can makes is in their welfare and development. In fact, the Supreme Court of India has observed that the finest investments in the future for any country to make is in its children. Under the Constitution, the State is obligated to promote, protect and support all efforts to uphold the rights of all children residing either irrespective of their origin, ethnicity, gender, caste, religion, language or class.

2. Recognizing this fact, the Government of Goa has announced 2003 as the Year of the Child Fourteen

participatory and transparent consultation were held to collate and define the action necessary to bring about a Child Friendly State which in terms of the resolution of the UN General Assembly is Fit for Children. The recommendations of the Final State Level Workshop held on 9th and 10th January, 2003 culminated in the Goa Declaration on the Rights of the Child which has been adopted by the State Government as the State Policy on Children. A major recommendation of the Goa Declaration is to enact Legislation that will take care of uncovered areas in Central Acts, consider issues which should be covered by legislation, and seek to make enforceable the provisions pertaining to Children in the Directive Principles of State Policy and the Convention on the Rights of the Child. The need for this Act and its justification are as under:-

(a) It has been acknowledged that there is a need to make the provisions of the Directive Principles of State Policy pertaining to children legally enforceable by evolving necessary mechanisms. The 93rd amendment to the Constitution making education fundamental rights is a move in this direction. The Goa Children's Act proposes to make the other provisions of the Directive Principles of State Policy pertaining to children legally enforceable.

(b) India is a signatory to the UN Convention on the Rights of the Child. The Goa Children's Act proposes to make the relevant provisions of this Convention legally enforceable so as to achieve the best interests of the Child.

c) The situation regarding children in Goa is

one of the finest in the country today. Thanks to the hundred percent registration of Births and Death, it can be said with full certainty that the Infant Mortality Rate in Goa is 13.99% which is the lowest in the country. Child Mortality is negligible and there is near 100% immunization coverage. The Goa Compulsory Education Act 1995 has already made education compulsory and free to all children upto the age of 14 years. Goa is thus in a position to prescribe and implement high standards for children. Moreover, the Vision of the State is to be at par with a developed country by 2020.

d. However, many children still face problems and the interests of all children in Goa are not adequately covered by existing Central and State legislation and need to be addressed forcefully. A number of children in Goa are out of school, are employed in various sectors, are victims of abuse with and outside their home and have in addition to this, become victims of sex tourism. The Children's Act proposes to incorporate provisions for protecting all children in order to ensure their holistic development and growth.

(e) Emerging trends in the development of media, technology and scientific research are posing a continued threat to the positive development and survival of children. Access to phonographic sites, children pornography, sexually proactive and vulgar advertisement, female foeticide, to name a few, reflect the dangers that deny the rights of children to be nurtured in a safe and protected environment. The Goa Children's Act proposes to deal with

these aspects within the geographical territory of the State.

(f) At present, existing laws do not adequately cover areas such as institutionalisation of children, child abuse, child trafficking, and dedication of children. The Goa Children's Act proposes to address such issues.

(g) Many countries have a Children's Act and recommendations for taking action on all the points enumerated above feature at almost all seminars and workshops on children's issues. The Goa Children's Act is a natural step in this direction.

(h) The National Agenda of Governance states that "the aim is to ensure that no child remain illiterate, hungry, or lacks medical care, and that measures will be taken to eliminate child labour".

(i) It is essential to give special care and attention to the needs of the girl child and to ensure the eliminate of all gender bias.

(j) The present legal system is not inclined towards the interests of the child. Instead of just suggesting modifications to the existing system, the Act proposes a totally new system which is Child Friendly, that is, a Children's Court.

(k) There are a number of State Acts which give powers to Government officers to take cognizance of violations and impose penalties including fines, for instance the Director of Penchants and the Commissioner Excise. However, there was no similar provision against violation of the rights of a child and this has been sought to be corrected in the Children's Act.

(l) *The state accepts the concept that where children are concerned, they are covered by the phrase 'Res Ipsa Loquitur' meaning 'there is no argument'. The predominant and non-negotiable position of children has to be clearly spelt out, and this is what the Goa Children's Act attempts to do.*

(m) *The 93rd Amendment to the Constitution makes education a Fundamental Right. Children who are on the streets, who are prostitutes, who are engaged in employment etc. cannot avail of education. The Goa Children's Act seeks to create the conditions so that the Rights can be realized.*

(n) *The initiatives proposed in the Act should be seen against the steps taken by the State Government to ameliorate the position of the most vulnerable sections of society. The State Government has decided to launch a Mission to eradicate rural poverty in Goa. The 'Swabhimaan' Project for providing livelihood to women has also been announced. The Government is committed to revitalizing the agricultural sector and to providing 25,000 jobs, many of them in the rural areas. With the uplift of these adults who are the parents of the most susceptible children, the initiatives proposed in the At can be realized."*

The Statement and Objects and Reasons show that Goa Act is enacted to protect, promote and preserve the best interest of Children in Goa and to create a society that is child-friendly.

19. The Scheme of Goa Act, stated briefly is thus: Section 2 of the Act contains definitions. *A caregiver* is defined as a person responsible for looking after well being of the child. *The child in Need* is defined, including child labour, street children and the child who is being dedicated. A child whose parents are separated and divorced is also defined as a child in need. The definition of the *child abuse* includes maltreatment. *Sexual Offences, grave sexual assault, child trafficking* are also defined. Section 3 guarantees certain rights for the children and places an obligation on the State to ensure that the children are protected from child abuse, sexual abuse, exploitation. Section 3 also places an affirmative obligation on the State to promote the educational interest of the children from weaker section raise the level of nutrition, the standard of living and improvement of public health. Section 3 also places responsibility on the State Government to ensure that the Convention of the Rights of Child is implemented. Section 4 expects the State to promote holistic education and lays down detailed provisions regarding education. Section 5 deals with health and nutrition of the children. Various measures are specified such as immunization, creches and day care centres. Section 6 deals with children homes. Section 7 deals with child labour and trafficking. It refers to Child Labour (Prohibition and Regulation) Act, 1986. Section 9 prohibits commercial sexual

exploitation and calls upon the State to prepare a comprehensive plan of action providing education and livelihood skills to such children who are removed from the place of exploitation to be rehabilitated and integrated into the Society. Section 10 lays down that the State shall endeavor to protect children in difficult circumstances. Section 11 lays specific emphasis on the girl child and calls upon the State to implement comprehensive policies and programs to promote, protect and ensure equal opportunities for girls. It also calls upon the State to eliminate all forms of discrimination against the girl child. Section 12 places responsibilities on the State to take special care of the differently abled children. The Goa Act also directs to create State Children Fund. The fines imposed under the Act are to be credited to the Funds. A State Commission for Children is to be established to carry out the functions of the Act. The Commission has to take various measures for improvement of standards of the children in the State.

20. Children's Court is established under Section 27 of the Goa Act. The person to be the President of the Children's Court is to be one qualified to be the District Judge and the appointment is to be made in consultation with the High Court. Section 30 of the Act lays down that the Children's Court shall have jurisdiction

to try all offences against the children. The Children's Court to have all the powers of the Court of Sessions under the Code of Criminal Procedure. It is a Civil Court to summon witnesses, discovery, and production of documents. Every proceeding under Children's Court is deemed to be a judicial proceeding under Section 195 and 228 of the Indian Penal Code. The procedure of Children's Court is referred to under Section 32. It is provided that the procedure shall be child-friendly. The child's right to privacy and confidentiality is to be protected by all means through all the stages in the proceedings. The burden of proving that an offence against a child has not been committed, if the child was in his custody at the time of arrest, committal of offence or removal of the child, is on the accused. Procedure for children's evidence and cross-examination have also been specified.

21. Section 8 deals with *Child Abuse*. The contention of the Petitioner is that it is unconstitutional. Thus, it will be appropriate to reproduce Section 8 of the Act, which is as under :

“8. Child Abuse and trafficking. — (1) All children should be assured of a safe environment. A safe environment is an environment in which he/she will not be abused in any way and his/her development will be nurtured.

(1A) Child Trafficking shall be an offence punishable under this Act. Any person who commits or aids or abets in the child trafficking shall be

punishable with imprisonment for a term which may extend to seven years and a fine which may extend to Rs.1,00,000/-;

(2) Whosoever commits any child abuse or sexual assault as defined under this Act, shall be punished with imprisonment of either description for a term that may extend to three years and shall also be liable to fine of Rs. 1,00,000/-. Whoever commits any Grave Sexual Assault shall be punished with imprisonment of either description for a term that shall not be less than ten years but which may extend to life imprisonment and shall also be liable to a fine of Rs. 2,00,000. Whoever commits incest shall be punished with imprisonment of either description for a term that shall not be less than ten years but which may extend to life imprisonment and also a fine which may extend to Rs.2,00,000/- [Statement of the child victim shall be treated on par with the statement of a child rape victim] under Section 375 of the IPC, as laid down by the Supreme Court of India.

(3) In cases of sexual assault on a child, the investigating authorities shall ascertain the need to medically examine the child victim in consultation with the medical authority. In cases of child abuse or grave sexual assault on a child, such medical examination of the victim child shall be compulsorily done.

(4) No person shall reside with or keep with him, either wholly or partly, one or more children who are not related to him by blood, unless prior permission has been obtained by him from the Director after furnishing due information to the Director in the prescribed form. It shall be the responsibility of such person, desirous to reside with

or keep child or children not related to him by blood, to inform the Director and to obtain prior written permission from the Director for doing so.

(5) Provided that a period of 3 months from the commencement of this Act will be allowed to inform the Director.

(6) The Competent Authority, the Director and the Special Officers shall have the powers to authorize the Officer-in-charge of the nearest police station or District Inspection Team to inspect and check the child/children in each case under sub-section (4) and to submit a report with recommendations, if he considers it necessary.

(7) The Competent Authority or the Director or the Special Officer, as the case may be, shall, after considering the report of the police or the District Inspection Team and having been satisfied of the necessity to do so, issue an order to remove the child and place him in a registered Children's Home or a State-run Institution.

(8) Provided further that nothing in this section shall apply to cases where reasonability exists such as when the child/children are staying with their friends or visiting them on holidays for short period, or students are in a group, or the child is legally adopted etc.

(9) Whoever resides with or keeps with himself one or more children not related to him by blood without the prior written permission of the Director or whoever prevents officers from discharging their duties under sub-section (6) shall be punishable with imprisonment for a term which may extend to three years and to a fine which may extend to Rs. 1,00,000/-.

(10) Onus on Establishment:— (a) All Hotels, and other establishments which provide boarding or lodging or any similar facility shall ensure that children are safe and not at risk of child abuse within their premises including all adjoining beaches, parks etc. if they have access from such establishment.

(b) No child shall be allowed to enter any room of any hotel or establishment which provides boarding or lodging or any similar facility unless the child is registered as staying in that room with family, relatives or person related by blood:

Provided that nothing in this sub-section will be deemed to apply to reasonable areas such as group of school children accompanied by a teacher(s), children who may be staying with their friends and their families, etc.

(c) All Hotels and other establishments which provide boarding or lodging or any similar facility shall ensure that no child has access to any internet facilities which are not fitted with filters and to any objectionable material including through film or videos, disc-players, cable or any other medium provided by that establishment.

(d) The Owner and the Manager of the hotel or establishment shall be held solely responsible for any 56[contravention] of this section.

(e) Whoever fails to comply with or contravenes the provisions of this sub-section shall be liable for punishment with imprisonment for a term which may extend to three years and a fine which may extend to Rs. 1,00,000/-.

(11) [omitted]

(12) Any form of soliciting or publicizing or making children available to any adult or even other children for purposes of commercial exploitation is

prohibited. This includes hosting websites, taking suggestive or obscene photographs, providing materials,

soliciting customers, guiding tourists and other clients, appointing touts, using agents, or any other form which may lead to abuse of a child.

(13) Whosoever commits the offence of sale of children or aids or abets the sale of a child or the body part/organ of a child, or where there is sufficient reason to believe is keeping a child for the purpose of using or selling any body part of the child including its blood, shall be punished by 59[imprisonment of either description for a period of not less than three years and extendable to seven years and a fine which may extend to Rs. 1,00,000/-.

(14) It shall be mandatory for a developer of photographs or films, if he finds that the photos/films developed by him contain sexual/obscene depictions of children, to report this to the Officer-in-Charge of the nearest police station, Failure to report the discovery of such photos/films shall attract a penalty of an imprisonment of either description which shall not be less than one year but which may extend to three years and/or a minimum penalty of Rs. 50,000/-.

(15) The District police, airport authorities, border police, railway police and traffic police shall report any suspected case of (a) child abuse or (b) an adult travelling with or keeping a child under suspicious circumstances or (c) sale of children or (d) sexual offence with a child or (e) child trafficking, to the Officer-in-charge of the nearest police station who shall immediately take cognizance of such case and proceed with investigation. He shall also report the case to a Special Officer or to the Director for action under sections 14 and 15, if so required.

(16) Sale of children 62[] shall be prohibited. For the purposes of this Act, sale of children takes place,—

- (a) when there is trading, i.e. selling children;*
- (b) when a pregnant mother executes an affidavit of consent for adoption for a consideration;*
- (c) when a person, agency, establishment or child-caring institution recruits women or couples to bear children for the purposes of child trafficking;*
- (e) when a doctor, hospital or clinic official or employee, nurse, midwife, local civil registrar or any other person creates birth records for the purpose of child trafficking; or*
- (f) when a person engages in the act of finding children among low-income families, hospitals, clinics, nurseries, day-care centres, or other child-caring institutions, who can be offered for the purposes of child trafficking;*

(17) [omitted]

(18) In all matters, the consent or willingness or otherwise of the child to be party to any offence under this Act] will not be a consideration.

(19) The State shall provide for the setting up of one or more Victim Assistance Units which shall facilitate the child to deal with the trauma of abuse and assist the child in processes involved with appearing as a witness before any Court or authority handling a case of abuse of a child.

(20) The State shall carry out child sensitisation programmes for police officers at all levels which shall include an orientation on child rights laws. Child rights laws and methods of handling child abuse related cases shall also be specifically included in the Police Training School curriculum.

(21) The State shall undertake child sensitization

training for those involved in healing and rehabilitation and other assistance programmes for children who are victims and promote programmes of information support and training for such children.

(22) The Tourism Department of the Government shall collaborate with the Travel and Tourism Trade of Goa to evolve a Child-Friendly Tourism Code for Goa;

(23) The Government shall have the power to appoint persons to go undercover and pose as prospective clients for child prostitutes, as employers of child labour etc. and nothing done in the course of such operations shall be construed as a contravention of the provisions of this Act.”

x

x

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22. The definitions of *Child Abuse, Sexual Offences, Grave Sexual Assault, Child trafficking* also need to be reproduced, which read thus :

“Section 2(m) : Child Abuse

“Child abuse” refers to the maltreatment, whether habitual or not, of the child which includes any of the following:—

(i) psychological and physical abuse, neglect, cruelty, sexual abuse and emotional maltreatment;|

(ii) any act by deeds or words which debases, degrades or demeans the intrinsic worth and dignity of a child as a human being;

(iii) unreasonable deprivation of his basic needs for survival such as food and shelter; or failure to immediately give medical treatment to an injured child resulting in serious impairment of his growth

and development or in his permanent incapacity or death;

Section 2(y)- 'Sexual offences' for the purposes of awarding appropriate punitive action means and includes,—

'Grave Sexual Assault' which covers different types of intercourse; vaginal or oral or anal, use of objects with children, forcing minors to have sex with each other, deliberately causing injury to the sexual organs of children, making children pose for pornographic photos or films, and also includes rape;

'Sexual Assault' which covers sexual touching with the use of any body part or object, voyeurism, exhibitionism, showing pornographic pictures or films to minors, making children watch others engaged in sexual activity, issuing of threats to sexually abuse a minor, verbally abusing a minor using vulgar and obscene language;"

x

x

x

23. This overview of the Goa Act clearly shows that it is a comprehensive piece of legislation to protect, promote the best interest of children in Goa. It deals with all aspects of childhood such as nutrition, education etc and provides an overall protective umbrella, which is traceable to Entry V, of List III of the Seventh Schedule. The State has traced the foundation of the Goa Act to Entry 5 in List III which deals with Infant and Minors. The Goa Act shows that it is an enactment for the overall welfare of the minors and infants in the State of Goa. It even refers to the

children whose parents are divorced. The pith and substance of the Goa Act is the welfare of the minors, and incidentally some of the provisions which deal with the aspects relating to criminal law.

24. Indian Evidence Act is enacted to consolidate, define and amend the law of evidence. Indian Penal Code deals with a general penal code for the Country. The Criminal Procedure Code 1973 is to consolidate and amend the law relating to criminal procedure. The List III of the Seventh Schedule which lays down the Concurrent List has a separate Entry for Criminal Law, including all matters in the Indian Penal Code. List II deals with criminal procedure, including all matters in the Code of Criminal Procedure.

25. The Protection of Children from Sexual Offences Act, 2012 was enacted on 19 February 2012. The preamble of POCSO shows that it is an act to protect children from offences of sexual assault, sexual harassment and provide for special courts for trials of such offences. Section 3 refers to penetrative sexual assault. Section 5 refers to aggravated sexual assault. Section 9 deals with aggravated penetrative sexual assault. Sexual harassment is referred to under Section 11. Chapter III deals with using a child for pornographic purposes.

26. The foundation of the Petitioner's challenge is breach of Article 21 of the Constitution of India on the ground that he is not tried by the procedure established by law. The Petitioner contends that the Goa Act being unconstitutional, his trial and conviction is not by the procedure established by law. For this purpose, a broad proposition is sought to be canvassed that because the field is occupied by the Indian Evidence Act, Indian Penal Code, Criminal Procedure Code, POCSO and Juvenile Justice Act, the State of Goa is denuded of its power to enact the law. This submission is contrary to the scheme of distribution of legislative powers.

27. There is a difference between the exercise of legislative powers under List I by the Parliament and List II by the State Legislature; and the exercise of legislative powers by both under the List III, the Concurrent List. In respect of the Concurrent List, both the State and the Parliament have the power to enact laws. In the present case, it is an admitted position that all the Acts concerned fall under the entry specified in the Concurrent List.

28. The Petitioner cannot contend that the Goa Legislature is completely denuded of its power, invoking the theory of Occupied Field. The question, therefore, would be of conflict between the law laid down by the Parliament and the State. The

Petitioner will have to demonstrate the conflict between the enactments. Before we examine the conflict, we must keep in mind that we should not adjudicate an academic issue. In the case of *Loknath Padhan*, the Supreme Court held that it is a well-settled practice recognized and followed in India as well as England that a court should not undertake to decide an issue, unless it is a living issue between the parties. If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties, it would be a waste of public time and not proper exercise of authority. It observed that it would be meaningless for the Court to decide an academic question, the answer to which would not affect the position of the parties. Further in *Chander Sekhar Singh Bhoi Vs. State of Orissa*¹⁵, at page 65, the Constitution Bench reiterated that the courts ordinarily ought not to go into the question of the validity of an Act or a provision of an Act unless it has been brought into force. Till then, such a question would be academic and it did not approve of the High Court embarking upon an academic question in that case. In *Arnit Das (2) Vs. State of Bihar*¹⁶ the Constitution Bench observed that it is settled practice that this Court does not decide matters which are only of academic interest

¹⁵ 26, (1972)1 S.C.C. 63

¹⁶ (2001)7 S.C.C. 657

on the facts of a particular case. The division bench of this Court in *Ghodawat Pan Masala Products (I) Ltd. and another Vs. State of Maharashtra & others* ¹⁷ referred to this settled position and observed that the Apex Court, time and again, reiterated and warned the High Courts that while deciding the constitutional issues to restrict itself to the questions which are necessary for determination of the real issues necessary for deciding the case at hand and should avoid discussing or recording findings on academic issues. In view of this law, the scrutiny of conflict in this case will have to be precisely in respect of the provisions of the Goa Act which are put against the Petitioner. The argument of the Petitioner of breach of Article 21 to be tried by the procedure established by law would be related to the specific provisions invoked against him and not the entire enactment which the State of Goa undoubtedly has the power to enact.

29. Turning now to the conflict as alleged by the Petitioner, According to the Petitioner, the conflict arises in respect of the punishments imposed under the Goa Act , the burden of proof and the procedure during the trial .

30. As regards the punishment, the conflict is alleged

¹⁷2002(12) L.J. SOFT 88 : 2002(6) Bom.C.R. 466

between the provisions of the Indian Penal Code, Juvenile Justice Act, and POCSO. As regards the procedure, it is contended that the procedure adopted by the Goa Children Court is contrary to the Code of Criminal Procedure. As regards burden of proof, he contends that it is in conflict with the Evidence Act and well-settled canons of criminal jurisprudence of placing the burden on the prosecution.

31. Taking up the aspect of the punishment under the Goa Act first. The Petitioner contends that the Petitioner is convicted under Section 8(2) of the Goa Act. The Petitioner contended that the age of the victim as on 14 August 2006 was 17 years and the entire offence is covered under Section 364-A. Section 8(2) of Goa Act, according to the Petitioner has entrenched upon the field already occupied by the Indian Penal Code and by later law, i.e., POCSO. According to the Petitioner, the definitions contained in Section 2(y) of 'grave sexual assault' and in 2(z) of 'child trafficking' making these offences under the Goa Act cannot exist in view of various sections in the India Penal Code which provide for penalty for the very same actions. According to the Petitioner, these provisions are Sections 359, 360, 361, 364-A, 366-A. In the written submissions reference is even made to Sections 354, 354-A, 354-B, 354-C, 354-D. The Petitioner has read these sections along, with definitions of Man and Woman in Section 10 of the

Indian Penal Code which includes a man and woman of any age. The contention is also raised that Section 7 of the Goa Act is repugnant to Sections 370, 371, 372, 373, 374 of the Indian Penal Code. According to the Petitioner, there is no assent by the President which alone could have saved the Goa enactment. It is also contended that Chapter II of POCSO contains various provisions such as Sections 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 which directly deal with offences against the children. The Respondents pointed out that the offence took place in the year 2006, the Goa Act is of the year 2003 and POCSO was enacted in the year 2012.

32. The Petitioner was charged with and convicted under Sections 302, 364-A, 201, read with 120-B of the Indian Penal Code. Section 8 (2) of the Goa Act read with Section 2(m) which defines 'Child abuse,' including psychological and physical abuse, neglect, cruelty, , was invoked. As per the prosecution case put against the Petitioner, there is no sexual offence. Child Abuse under Section 8(2) of the Goa Act has various connotations. Child Abuse is one as defined in Section 2(m). Section 8 (1A) deals with Child Trafficking. Section 8(2) deals both with Child Abuse and Sexual Assault. Sexual Assault is defined differently from Child Abuse. Even Section 8(2) distinguishes between Child Abuse and Sexual Assault as defined under the Act. Child Abuse as defined under Sec. 2(m) of the Goa Act, is not referred either in the Indian

Penal Code or under POCSO. The argument of the Petitioner calling upon us to strike down the provisions of the Goa Act in respect of Sexual Abuse, will be an entirely academic exercise as the so-called conflict does not give rise to any violation of Article 21 of the Constitution of India so far as petitioner is concerned. It is pointed out to us by the learned Advocate General that in a given case the punishment under the Goa Act is not lesser than the POCSO Act. As regards the Juvenile Justice Act 2015 is concerned, there is not a whisper in the Petition about the implications of the same. The Juvenile Justice Act, in Chapter IV wherein it deals with children in the conflict of law, shows that the thrust is on the child in conflict with the law. The Juvenile Justice Act, when it deals with offences against the children, does not define Child Abuse in the sense it is so defined under the Goa Act. Even, otherwise, the Petitioner was not a juvenile, nor were any of the accused along with the Petitioner.

33. According to the Petitioner, the Goa Act of 2003 is in conflict with the POCSO Act and the subsequent parliamentary legislations. It is contended that the POCSO Act contains the same definition as the Goa Act. But there is no allegation in the prosecution case against the Petitioner that there was any sexual abuse of the victim. The POCSO Act is specifically for the

protection of children from sexual offences. The Goa Act is far more comprehensive in scope. It deals with child abuse and defines Child Abuse as even a mental harassment. There is no definition of Child Abuse under the POCSO Act. We, however, do not deem it appropriate to comment finally on the issue of repugnancy between the Goa Act of 2003 and the POCSO Act of 2012 as the Petitioner is not charged with any sexual offence against the child.

34. The second aspect is of the procedure. According to the Petitioner, sections 32 of the Goa Act and the Goa Children's Court Rules, 2004 provide for a procedure which is in conflict with the Code of Criminal Procedure and the right of the accused of cross-examination is lost. It was contended that the procedure adopted by the Goa Children's Court under the Act is contrary to Chapter IX, more particularly Section 118 of the Indian Evidence Act.

35. The provisions relating to Goa Children's Court and its functioning are found in Sections 27 to 32, which are as under :

“ 27. *Children's Court.*— (1) *The State Government shall, after consultation with the High Court, by Notification in the Official Gazette, constitute a Children's Court for the State of Goa.*
(2) *In all aspects of its functioning, the Children's Court shall be guided at all times by the best interests of the child and all its procedures, the office, the dress*

worn by the Members of the legal profession and all others shall be consciously and deliberately Child-friendly.

X X X

28. *Composition of the Children's Court.*-The Children's Court shall consist of a person who is or has been or is qualified to be a District Judge, who shall be its President:

Provided that the Government may also appoint any Sessions or Additional Sessions Judge as the President of the Children's Court, but no appointment under this section shall be made except after consultation with the High Court.

X X X

29. *Term of Office.*— (1) *The President of the Children's Court shall hold office for a term of five years or upto the age of 65 years, whichever is earlier, and shall not be eligible for reappointment:*

Provided that he may resign his office in writing under his hand-addressed to the State Government and on such resignation being accepted, his office shall become vacant and may be filled by the appointment of a person possessing the same qualifications.

(2) *The salary or honorarium and other allowances payable to and the other terms and conditions of service of the President of the Children's Court shall be as may be prescribed.*

(3) *The Government shall frame rules regarding the detailed functioning and procedure of the Children's Court.*

X X X

30. *Jurisdiction of the Children's Court.*-(1)

Subject to the provisions of this Act, the Children's Court shall have jurisdiction to try all offences against children whether such offence is specified under this Act or not,

(2) [Omitted]

(3) The powers of the Competent Authority and the Special Officers under this Act shall not fall within the jurisdiction of the Children's Court.

X X X

31. Powers of the Children's Court. — (1) The Children's Court shall have all the powers of—

(a) the Court of Sessions under the Code of Criminal Procedure, 1973 (2 of 1974);

(b) a Civil Court for the purpose of summoning and enforcing the attendance of witnesses, compelling the discovery and production of documents and material objects, and administering oath and recording evidence.

(2) Every proceeding of the Children's Court shall be deemed to be a judicial proceeding within the meaning of sections 195 and 228 of the Indian Penal Code, 1860

X X X

32. Procedure of the Children's Court.— (1) The Children's Court shall follow such procedure as may be prescribed:

Provided that the procedure so prescribed shall be child friendly and shall be deemed to include the following.—

[(a) [omitted]

(b) [Omitted]

(c) [Omitted]]

(c) Avoidance of harm: At all stages, from the

initial contact till disposition, extreme care shall be taken to avoid any harm to the sensitivity of the child.

(d) Principle of Best interest: This principle seeks to ensure physical, emotional, intellectual, social and moral development of the child, so as to make him a useful and good citizen by ameliorating the impediments to healthy development.

(e) Principle of non-stigmatizing semantics, decisions and actions. Non-stigmatizing semantics must be strictly adhered to, and the use of adversarial or accusatory words, such as, arrest, remand, accused, charge sheet, trial, prosecution, warrant, summons, conviction, inmate, delinquent, neglected, custody, etc., is prohibited in the processes pertaining to the child under this Act.

(f) Principles of non-waiver of rights: No waiver of rights of the child, whether by himself or the competent authority or anyone acting or claiming to act on behalf of the child is either permissible or valid. Non-exercise of a fundamental right does not amount to waiver.

(h) Principle of equality.— Equality of access, equality of opportunity, equality under the said Act, is guaranteed to the child; and as such there shall be no discrimination on the basis of age, sex, place of birth, disability, race, ethnicity, status, caste, cultural practices, work, activity or behaviour of the child or that of his parents or guardians, or the civil and political status of the child.

(i) Principle of right to privacy and confidentiality: The child's rights to privacy and confidentiality shall be protected by all means and through all stages of the proceedings.

(j) Principle of Fresh Start: The principle of fresh

start promotes new beginning for the child by ensuring erasure of his past records.

(k) Principle of last resort: Institutionalization of a child will be the last resort after reasonable enquiry and that too for the minimum possible duration.

(l) Burden of Proof: Whenever any offence is alleged to have been committed against a child, the burden of proving that such offence has not been committed by the accused shall lie on the accused if the child was in his custody at the time of his arrest or at the time of committal of offence or at the time of rescue or removal of the child victim, as the case may be.]

(m) Procedure for Children's evidence: Whenever a child who is a victim of a crime or a witness to a crime is required to depose before any authority including this Court, the child shall not be exposed to the presence of the accused or the perpetrators of the crime but the Advocate for the accused shall be allowed to be present.

(n) Cross examination of child witness: Whenever there is a need to cross examine a child witness, care shall be taken to see that the tender age or in case of a victim, the psychological condition of the child is taken into consideration and the Children's Court may adopt such procedures which are fair and suitable to the child.

(o) Deposit of fine prior to trial: Whenever the offence alleged involves a fine, in order to ensure the attendance of the accused during the proceeding and compliance of the Court's directives and others thereafter, the Court may direct the accused to deposit, in cash, any amount as deemed fit by the Children's Court and his or her passport at the beginning of the trial itself.

(2) In all dealings with children, the Children's Court shall follow the following guidelines:—

(a) Child victims/witnesses are informed of their role in regard to court proceedings;

(b) Their views are allowed to be heard and respected;

(c) Inconvenience to them is minimized and their privacy is respected;

(d) Delays in the proceedings are reduced;

(e) Aggressive questioning or cross examination of child victims is avoided and the same, if necessary, is done through the judge;

(f) Provisions are made for trials in camera;

(g) The identity of the child victim is protected;

(h) Child victims are prepared for the judicial process and prosecution of alleged abusers is not rushed if a child is not ready to go to court;

(i) The investigator ascertains the need for medical examination of the child victim and when examination is undertaken, ensures that multiple re-examination is avoided;

(j) The medical examination should be conducted in the presence of the parent/guardian and social worker/counsel or as far as possible;

(k) Child's testimony or statement should be recorded in the presence of a social worker/counsellor as early as possible after the abusive incident with other witnesses at hand;

(l) Adequate translation/interpretations and translators/interpreters who are sensitive to the children's needs should be provided wherever needed.

(m) In case of a mentally challenged child, the competent service provider should depose on behalf of the child;

(n) The special needs of the child

victims/witnesses should be catered for. These should include the following:-

(i) Enable children to familiarise themselves with the court surroundings;

(ii) Inform children of the different roles of the key persons at court, such as the judge, the defence lawyer and the prosecutor;

(iii) Inform the court of the special needs of children in general and of individual children in specific cases;

(iv) Help children to be comfortable in the proceedings;

(v) Encourage questionings to be short and clear so as not confuse child witnesses;

(vi) Permit children below eight years of age to respond to leading questions facilitated by a social worker.

36. The relevant provisions of the Goa Children's Court Rules 2004 read thus :

"7. Procedure of the Court. - (1) The Court shall be presided over by the President.

(2) The quorum for the proceedings of the Court shall be the President and one member of the Jury.

(3) The Court shall meet at such times and observe such rules of conduct as the President, in consultation with the High Court, lays down.

(4) A child victim or a child in conflict with law may be produced before an individual member of the Jury or the President, when the Court is not sitting.

(5) the Court may act notwithstanding the absence of any member of the Jury, and no order made

by the Court shall be invalid by reason only of the absence of any member during any stage of proceedings:

Provided that there shall be atleast two members including the President present at the time of final disposal of the case.

(6) In the event of any difference of opinion among the members of the Jury in the interim or final disposition, the opinion of the majority shall prevail, but where there is no such majority, the opinion of the President shall prevail.

8. Procedure to be followed by a Magistrate not empowered under the Act. - (1) When any Magistrate not empowered to exercise the powers of the Court under the Act is of the opinion that a person brought before him under any of the provisions of the Act (other than for the purpose of giving evidence), is a child, he shall without any delay record such opinion and forward the child and the record of the proceedings to any member of the Jury or to the President of the Court or to the Competent Authority under the Act.

(2) The Competent Authority to which the record of the proceedings is forwarded under sub-rule (1) shall hold the inquiry as if the child has been brought before him originally and if found fit refer the child to the Court for necessary action.

X X X

9. Proceedings to be conducted in child friendly atmosphere. - (1) The President shall follow a procedure which is child friendly and in the best interest of the child while examining any child who is a victim of any crime or accused of or a witness to any

crime, and shall give such instructions to the members of the Jury and members of legal profession appearing before him, as he deems fit.

(2) The President may, where necessary, issue general instructions in this behalf and duly notify them in the Official Gazette”

x x x

37. Not only there is no conflict between the Code of Criminal Procedure and the Goa Act, but Section 31(1) of the Goa Act states that the Children's Court will have all the powers of the Court of Sessions under the Code of Criminal Procedure. Section 35 makes it clear that the Goa Act would override anything inconsistent with the State law making it amply clear that it will not override anything inconsistent in the Central law. In any case, whenever there is an irrecoverable conflict, it cannot so override. Article 254 lays down that the conflict has to be "with respect to that matter." As laid down by the Apex Court in *Karunanidhi*, it is not impermissible for the State legislature to enact legislation under the same entry in the Concurrent List as long as it is not in direct conflict with the Parliamentary enactment. In the case of *Independent thought*, the Apex Court has held that primacy must be given to pro-child statutes. The procedure adopted by Goa Children's Court is in consonance with the object for which it was enacted and is in tune with the United Nations Conventions. While enacting the Goa Act and laying down the procedure, the

State has kept in mind the preamble to the Constitution which assures the dignity of the individual under Article 15(3), and also the Articles 37 and 39 of the Constitution of India. The procedure only states that the examination of a child witness has to be with due care and psychological condition of the child be taken into consideration. As regards the Petitioner, this also is entirely irrelevant as no witnesses examined in the trial was a child witness. The victim, a child, was not alive to give evidence.

38. The third argument was of the burden of proof. According to the Petitioner, Section 32(1) (l) of Goa Act casts the burden of proof on the accused which is against the provisions of the Indian Evidence Act and the general criminal jurisprudence. There is no merit in this contention. Section 32(1) (l) of the Goa Act, which is already reproduced, show this burden of proof is not absolute. It lays down that whenever any offence is alleged to have been committed against a child, the burden of proving that such offence has not been committed by the accused shall lie on the accused if the child was in his custody at the time of his arrest or at the time of committal of offence or at the time of rescue or removal of the child victim, as the case may be. This provision is in consonance with Last Seen theory adopted by the Courts. The initial burden of showing that when an offence was committed against the child, and that the child was in custody of the accused,

is on the prosecution. Thereafter it shifts onto the accused to explain the circumstances. There are various enactments such as the Prevention of Food Adulteration Act, 1954 etc., which are traceable to the entries in the Concurrent list, places such a burden of proof. Even under Sections 29 and 30 of POCSO, the presumption of certain offences and presumption of culpable mental state is provided. Under Section 114(A) of the Evidence Act, presumption is to be drawn to the absence of consent in a certain cases of rape. Section 106 of the Evidence Act states that the burden of proving a fact especially within the knowledge of any person is upon him. Therefore, here also there is no conflict at all between Goa Act and the Parliamentary enactments on this aspect. It is stated by the Respondent that in this case, offence is proved by the prosecution against the Petitioner directly and not only on this presumption.

39. Relying on the decision of the Division Bench of this Court in *Maha Seedmen Association & ors. vs. Union of India and ors.*¹⁸, the Petitioner sought to emphasize the role of Advocate General. We do not find this line of argument of any relevance. Though the notice was issued to the learned Advocate General, it is open to the learned Advocate General to point out the law laid

¹⁸ MANU/MH/0627/2018

down by the Apex Court that the Courts should not consider academic issues.

40. Thus the Petitioner has based his challenge on the allegation of violation of Article 21 of the Constitution of India on the ground that he is tried under a void law. This is not a case of conflict between the legislative powers in respect of Lists I and II of the Seventh Schedule of the Constitution of India. The absolute proposition advanced that the Goa legislature is denuded of its power to make any law on the subject of minors because of the enactment of Indian Penal Code, Criminal Procedure Code, Indian Evidence Act, Protection of Children from Sexual Offences Act, cannot be accepted. What has to be examined is the conflict between the legislations. Alleged negation of fundamental right under Article 21 will arise in respect of the provision of law put against the Petitioner. Therefore, at the behest of the Petitioner, the scrutiny and the challenge of the conflict will have to be examined in respect of the provisions put against the Petitioner. This conflict will have to be resolved by keeping in mind the well-settled principles of reconciliation, pith and substance, deference to the legislative powers, and keeping in mind the tests laid down by the Supreme Court in the cited decisions. Section 8(2) of the Goa Act when it punishes a Child Abuse is not in irrevocable conflict with any of the provisions of the Parliamentary

enactments. The alleged conflict in the procedure adopted by the Goa Children's Court in respect of the examination of the witnesses, firstly, factually does not arise and secondly, even assuming it arises, it is not in conflict with the Parliamentary enactments. Even the burden of proof under the Goa Act is not in conflict with the concept of burden of proof under the Indian Evidence Act. The provisions of the POCSO Act operate in a different field than the Goa Act. The Goa Act is traceable to Entry V, of List III of the Seventh Schedule. In pith and substance, the Goa Act is an Act for the welfare of the minors in the State of Goa.

41. As a result of the above discussion, the Writ Petition is dismissed. Rule is discharged. No order as to costs.

Prithviraj K. Chavan, J.

N.M. Jamdar, J.