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IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.12 OF 2017

ELIZA FERNANDES,
Daughter of Francis Fernandes,
33 years old, spinster, Indian National,
Resident of Ferns Villa,
Eugenia, Caranzalem, Goa. ... Appellant.

Versus

1. STATE
(Through Police Inspector, Panaji
Police Station)

2. PUBLIC PROSECUTOR,
High Court of Bombay, Panaji, Goa. ... Respondents.

Mr S.G. Desai, Senior Advocate with Mr Pavithran A.V and Ms
Shalaka Shelke, Advocates for the Appellant.

Mr Mahesh Amonkar, Additional Public Prosecutor for the
Respondents.

CORAM:	BHARAT P. DESHPANDE, J.
RESERVED ON:	1 December, 2022
PRONOUNCED ON:	23 December, 2022

JUDGMENT:

Appellant challenged the Judgment and conviction dated 31 January 2017 - 13 February 2017 in Special Case No.36/2012 passed by the learned Children's Court for State of Goa holding Appellant/Accused as guilty for the offence punishable under Section 8(2) of Goa Children's Act 2003 and sentenced her to undergo simple

imprisonment for a period of one year and to pay fine of ₹1,00,000/- and in default to undergo simple imprisonment for one year.

2. Appeal was admitted on 9 March 2017.

3. Heard Mr S.G. Desai, learned Senior Advocate who appears with Mr Pavithran A.V and Ms Shalaka Shelke, Advocates for the Appellant and Mr Mahesh Amonkar, Additional Public Prosecutor for the Respondents.

Factual Matrix

4. On 14 March 2012, parents of victim child filed a complaint stating therein that on 24 February 2012 prior to 12:15 hours at Navyug Niketan, Kidzee School at near Hotel Blue Bay, Miramar, the Appellant/Accused being a teacher physically abused the victim child by slapping him on his face and hands, twisted his ears and pinched his legs. On receipt of such complaint, offence was registered at the Panaji Police Station vide Crime No.86/2012 for the offence punishable under Section 8(1) read with Section 4(12) of Goa Children's Act 2003. On 7 June 2012, charge-sheet was filed before the Children's Court for the offence punishable under Section 8(1) read with Section 4(12) of Goa Children's Act 2003. Charges were framed against Appellant on 18 September 2014 for the offence punishable under Section 8(1) read with Section 4(12) and Section 2(m)(i), punishable under Section 8(2) of Goa Children's Act 2003. Accused/Appellant pleaded not guilty and claimed to be tried.

5. Prosecution examined in all seven witnesses. Statement of the Accused under Section 313 Cr.P.C. was recorded wherein Accused

claimed that she has been falsely implicated. Accused stepped into the witness box as DW1 and then examined one witness by name Sweta Sardessai as DW2. The learned children's Court after considering entire material on record, found the Accused/Appellant guilty and accordingly sentence as disclosed above was passed, which is challenged on various grounds as raised in the memo of appeal.

6. Learned Senior Counsel Mr Surendra Desai first of all argued by raising preliminary ground thereby challenging jurisdiction of Children's Court to take cognizance of the said charge-sheet and thereafter deciding it on merit. He submitted that the charges mentioned in the charge-sheet are not at all shown as offences under the Goa Children's Act 2003. He submitted that Section 8(1) and Section 4(12) nowhere provide or substantiate any criminal offence and therefore, taking cognizance of such charge-sheet was itself illegal. He then submitted that entire prosecution of Appellant is against the provisions of Article 21 of the Constitution as no person could be tried/prosecuted without the procedure established by law. He then submitted that competent authority as defined in Section 2(i) of the said Act is the authority before whom such complaint ought to have been filed and not before the police or before the Children's Court. He then invited attention of this Court to various provisions under the Goa Children's Act 2003 to buttress his arguments that the Children's Court had no power or authority to take cognizance and to try and decide and more specifically convict the Appellant. According to him, the entire trial stands vitiated as it was conducted without the procedure established by law.

7. Mr Desai then would submit that the proper recourse in such type of matters is to approach the competent authority/Secretary of Women and Child Development department who after conducting inquiry is competent to file complaint before the police authorities as provided in Section 15 of the said Act. Since no such procedure was followed, even registering complaint by police and that too under Section 8(1) and Section 4(12) of the said Act was not at all justified.

8. Per contra, the learned Additional Public Prosecutor Mr Amonkar appearing for the State would submit that though the charge-sheet discloses only Section 8(1) and Section 4(12) of Goa Children's Act 2003, the Court is competent to take cognizance of the matter under Section 8(2) of the said Act when found that the child was physically and psychologically abused by the teacher in the school. Accordingly, the learned Children's Court took cognizance and then framed the charge against the Accused and rightly so under Section 8(2) of Goa Children's Act which is an offence. He would then submit that there is no bar under the entire Act preventing the Children's Court from taking cognizance of the charge-sheet filed before it by the police. The procedure under Section 15 of the Act is totally a different procedure which could be adopted and such power is discretionary and not mandatory.

9. Since the matter was admitted, arguments were advanced on merit. Mr Desai would then submit that conviction of the Appellant is totally unwarranted and based on no evidence at all. He would submit that there is no direct evidence to show that there was any physical or psychological abuse by the Accused on the said child. At

the relevant time, the child/victim was only two and a half years old whereas his examination in the Court was after a period of four years and therefore, there is every possibility of tutoring the said child. He would submit that the child/victim was with the caretaker of the school as he was required to visit the washroom and therefore, the possibility of the alleged offence committed by the caretaker cannot be ruled out. He would submit that on the alleged day, all children were taken to Kala Academy for the dress rehearsal of the function which was scheduled on the next day. The victim child also went along with other children and then returned to the class. On the next day, the victim child attended the school annual day function held at Kala Academy and took part in it. He then submitted that the certificate issued by doctor nowhere suggests that there was any physical abuse. The examination of the doctor during trial also does not give any indication about such abuse. Finally, Mr Desai would submit that there is no disclosure made by the child/victim himself about the abuse allegedly caused to him at the hands of the Accused. According to Mr Desai, everything was cooked up by the grandmother of the victim child and thereafter everyone started saying so without any confirmation. The victim child clearly admitted that he did not disclose about the alleged incident to any one which creates serious doubts about the story stated by his grandmother in the Court. He would submit that at the most, such incident falls under Section 89 of IPC and is not a case for conviction.

10. Per contra, Mr Amonkar would submit that deposition of child/victim clearly supports the case of Prosecution and there is

corroboration by way of the deposition of the grandmother, father/complainant, the principal, the doctor and so on. He invited attention of this Court to the cross examination of Prosecution witnesses and claimed that their deposition has gone unchallenged on material aspects. He then submitted that delay in lodging complaint is properly explained. He would submit that provisions of Section 89 of IPC are not at all attracted and there was no question of falsely implicating the Accused in the matter. The testimony of child witness is found to be cogent and convincing and therefore, no interference is warranted.

11. Learned Counsel Mr. Rohan Desai appearing for the Intervenor/Yogesh Yadav supported the argument advanced by Mr Amonkar appearing for the State.

12. Mr Desai has relied upon the following judgments:-

(1) G.B. Ghatge v. Emperor¹, (2) Bhagwan Singh and Ors v. State of M.P.², (3) State of Uttar Pradesh v. Krishna Master and Ors.³, (4) Shri Mohit Chari & Anr. v. State Through PP⁴ and (5) Trimurthi Fragrances (P) Ltd. v. Government of N.C.T. of Delhi and Ors.⁵.

13. Rival contentions fall for the determination of this Court as under:-

1 MANU/MH/0153/1948

2 2003 CRI L.J. 1262

3 (2010) 12 SCC 324

4 CRIA 5/2010

5 MANU/SC/1196/2022

1. Whether Children's Court is justified in taking cognizance of the charge-sheet or whether the said Court was competent to take cognizance of such charge-sheet?

2. Whether Prosecution succeeded in proving charges levelled against the Accused beyond all reasonable doubt?

14. Point No.1 – Since Mr Desai challenged the powers of the learned Children's Court, it is necessary to look into the charge-sheet as well as the relevant provisions of Goa Children's Act 2003.

15. Complaint was filed with Panaji Police Station by the parents of the child which is at Exh. 19. Such complaint was filed on 28 February 2012 in connection with the alleged incident dated 24 February 2012. In the margin, there is endorsement as under:-

“CR No. 86/12 u/s 8(1) r/w 4(12) of Goa Children Act 2003 time 18:30 hrs dt: 14/03/2012 SDC No 81/12 LPSP”

16. The charge-sheet filed by Panaji Police Station before the Children's Court at Panaji which is at Exh. 1 in the original file shown in column No.4(iv) other acts and section; - Section 8(1) r/w 4(12) of Goa Children's Act 2003. There is endorsement of the clerk of the Court that the charge-sheet is examined and registered under Special Case No.36/2012 dated 7 June 2012. This endorsement is on the basis of order passed by the learned Children's Court on the last page of the charge-sheet as under:-

“ORDER

*Cognizance taken. Issue
summons to the Accused
r/o 11/3/2013 at 10.00 hrs.*

*sd/-
PRESIDENT
CHILDREN'S COURT
PATTO PLAZA, PANAJI”*

17. Mr Desai would submit that Section 8(1) and Section 4(12) of Goa Children's Act 2003 do not constitute any offence and therefore, taking cognizance of such provision under the Act is itself without authority or without jurisdiction. He would submit that the Children's Court is competent to take cognizance under Section 33 of the said Act which reads thus:-

“Section 33-

Offences to be cognizable and non bailable – Notwithstanding anything contained in the Code of Civil Procedure 1973 (Act 2 of 1974), all offences punishable under this Act shall be cognizable and non-bailable; except those Section 3, 4, 5 and clause (c) of Sub-Section 5 of Section 7.”

18. Section 8(1) reads thus:

“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 anyway and his/her development will be nurtured.”

19. Section 4(12) reads thus:-

“4.(12) Corporal punishment is banned in all schools.”

20. Mr Desai is therefore justified in submitting that Section 8(1) and Section 4(12) are not providing any offences which could be taken cognizance of by the police and by the Children's Court. As quoted earlier, complaint shows that FIR stands registered under Section 8(1) and 4(12) of Goa Children's Act which are not contemplating any specific offence. Similarly, the charge-sheet filed before Children's Court in para 4(iv) specifically refers Section 8(1) r/w Section 4(12) of Goa Children's Act 2003. No other section of the said Act or of IPC is found mentioned in the charge-sheet. Thus, it is clear that the learned Children's Court while passing order on such charge-sheet and while taking cognizance of Section 8(1) r/w Section 4(12) of Goa Children's Act issued process/summons against the Accused. This clearly shows non-application of mind. First of all, there is no offence made out or provided under Section 8(1) r/w Section 4(12) of Goa Children's Act 2003. Registering offence/crime on these sections by Panaji Police Station was itself an irregularity, which is carried by them in the charge-sheet filed before Children's Court and which is further carried by the learned Children's Court while taking cognizance of such sections wherein no offence is found provided. It is not the case that while taking cognizance of the charge-sheet, the learned Children's Court referred to a correct section wherein offence is provided for taking cognizance of the charge-sheet. The material produced along with the charge-sheet suggests that there was psychological and physical abuse of the victim child. Therefore, while taking cognizance of the charge-sheet, the learned Children's Court ought to have mentioned that the Court is taking cognizance of the offence punishable under Section 8(2) of

the said Act. However, there is no such endorsement. Therefore, it has to be considered that cognizance was taken only with respect to the sections mentioned in the charge-sheet i.e. Section 8(1) and Section 4(12) of Goa Children's Act which nowhere provides or describes any offence, particularly as such. Thus, the very basis of taking cognizance is found to be improper.

21. Mr Desai would submit that fundamental rights of the Appellant/Accused under Article 21 stands violated as she has been prosecuted for the alleged offences which are not considered as offences and convicted. He would submit that Appellant is having a fundamental right to be tried only by the procedure established by law and not otherwise including deprivation of her personal liberty. No doubt in the present case FIR stands registered under Section 8(1) and 4(12) of Goa Children's Act 2003, the allegations made in the complaint is with regard to physical assault on the victim child by the teacher.

22. The offences mentioned in Goa Children's Act 2003 are tried by the Special Court. Even though the violations under Sections 3, 4, 5 and clause (c) of Sub-Section 5 of Section 7 could be tried by the competent authority, there is no bar of the Appellants registering offence for the violations of Section 8(2) or for other offences punishable with imprisonment as provided under the Act. Children's Court is competent to directly take cognizance of the charge-sheet filed before it by the police as provided in Section 20(b) read with Section 30(1) of the said Act.

23. In the present matter, there is an apparent error on the part of investigating agency in registering the complaint filed by the parents of the victim, only under Section 8(1) and Section 4(12) of Goa Children's Act 2003. Such error is also repeated in the charge-sheet filed before the Children's Court. It again cropped up in the order of taking cognizance by the Children's Court. However, there is no bar of the police taking cognizance of the offences by applying correct provision of law though separate procedure is provided by giving powers to the competent authority to deal with specifically the violations found in Section 3, 4, 5 and clause (c) of Sub-Section 5 of Section 7 of the said Act, which include corporal punishment. Thus, to my mind, stretching the arguments to the violation of fundamental rights under Article 21 of the Constitution need not arise.

24. Mr Desai would then submit that a special procedure is provided under the Children's Act in regard to the violations as provided in Sections 3, 4 and 5 for which a competent authority is empowered under Section 15 to inquire into and if satisfied, refer the matter to any authority including police. He then submitted that Section 24(3) of the said Act specifically provides that offences under Sections 3, 4 and 5 and clause (c) of Sub-Section 5 of Section 7 are required to be taken cognizance of and tried by the competent authority only. He then invited attention to Section 30(3) of the said Act wherein it is provided that the powers of competent authority and special officers under the said Act shall not fall within the jurisdiction of Children's Court.

25. In order to properly understand the above submissions, the above provisions are quoted below for ready reference:-

“3. Rights of the Child.– (1) The State shall ensure that children are protected from child abuse, sexual offences, child trafficking, child prostitution and violation of their rights against exploitation and that they are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity.

(2) []

(3) The State shall promote with special care the educational interests of children from the weaker sections of society including the Scheduled Castes and Scheduled Tribes.

(4) The State shall regard the raising of the level of nutrition and the standard of living as well as the improvement of public health as among its primary duties.

(5) The provisions of the Convention of the Rights of the Child as acceded to by the Government of India are hereby declared to be part of the law of the land and it shall be the duty and responsibility of the State Government to respect and ensure that the Rights of the Child as declared and enumerated in the Convention, are protected and guaranteed to every child within the territory of Goa.

(6) For the proper implementation of the Rights of the Child included in the Convention and to prevent any discrimination, exploitation or abuse of the child on any ground, government shall take adequate measures;

(7) All the authorities, whether public or private, shall, while undertaking any action concerning children, take the best interest of the child as the primary consideration.

(8) The provisions of the Convention on the Rights of the Child are taken as rights of the child in Goa and are legally enforceable, except where they pertain to the central government or to any other authority which is outside the purview of the state government provided that nothing in this section shall restrain the government from specifying higher standards for children.

4. Education.– *(1) That State shall endeavor to promote holistic education. Universal application of joyful learning processes should be ensured.*

(2) The State accepts the concept of zero rejection for children. No child shall therefore be denied admission to any school on any ground including that the name of the father is not available; the absence of relevant documentation; the child is suffering from HIV or AIDS; belongs to marginalized communities; suffers from any illness or that the child is differently abled.

(3) Counseling facilities by trained personnel shall be provided to the child in all schools;

(4) All schools shall preferably include child rights and gender justice in their curriculum and at least 48 hours of instruction every year shall be exclusively devoted to teaching and discussing all matters related to these. The duties of the child should also be discussed during these sessions. This will apply to all students from Standard V and above.

(5) The school curriculum shall preferably also include health awareness including malaria, AIDS, personal hygiene, nutrition, family life education, communicable diseases, alcoholism, substance abuse, sexuality education, etc. irrespective of the stream of education. This will apply to all students from Standard V and above.

(6) Health applied education towards holistic health shall be preferably included in all schools with, among

other things, yoga, pranayama and meditation, in the physical education curriculum. This will apply to all students.

(7) All schools shall have mechanism such as School Parliament to foster participatory democratic processes. This will apply to all students from Standard VIII and above.

(8) The Government shall strive to work towards the goal of universal elementary education and eradication of child illiteracy within a period of seven years from the commencement of this Act. The State shall prepare a comprehensive Plan of Action for achieving this which may include provision for alternate schooling including non-formal education, vocational and livelihood-skills training, and shall create the necessary infrastructure and an enabling environment in order to realise the goal.

(9) The State shall lay down guidelines for early childhood care and education and for all pre-school educational institutions for children, including registration and regulation of standards.

(10) Every school shall have safe drinking water, toilet facilities and adequate physical infrastructure including barrier free access.

(11) Every school shall be equipped with appropriate and adequate teaching aids.

(12) Corporal punishment is banned in all schools.

(13) The State shall, in the manner prescribed, provide support to all children with disabilities and challenges.

(14) A participatory evaluation and learning process rather than the exam system based on learning by rote and ensuring that all children have attained minimum levels of learning should be evolved.

(15) Any contravention or non-adherence of the provisions of this section shall be dealt with by the

Competent Authority only and shall be punishable with a fine which may extend to Rs. 50,000/-.

5. Health & Nutrition.– (1) *Mandatory immunisation with MMR vaccine in children, Rubella vaccine in adolescent in girls and Hepatitis B vaccine in infancy should be introduced in a phased manner as part of the on going free Immunisation programme of the State.*

(2) *The State shall endeavour to make possible Maternity leave of 6 months in all sectors of employment including for adoptive mothers and single parents.*

(3) *Creches and day care centers for infants and children of working mothers in all sectors of employment may be set up at the work site or close to the same, in cities and villages, to the maximum extent of available resources.*

(4) *The State should ensure the creation and maintenance of comprehensive Health cards inclusive of growth and developmental, immunisation and other records for all infants and children including those in crèches, homes and schools, and migrant children.*

(5) *The State shall seek to provide for palliative and terminal care for infants and children with life threatening and terminal illnesses like cancer and HIV/AIDS.*

(6) *That State shall take effective steps so that parents do not transmit the HIV virus to their child.*

(7) *It shall be the duty of all individuals, organizations, institutions etc., to keep their immediate environment clean and free of garbage, faeces, and other items harmful to children. Non-observance of the provisions of this sub-section will carry a penalty which may range from Rs. 100/- to Rs. 1000/-.*

(8) The State shall strive to reach higher standards for children by protecting them from malaria and from all avoidable illness and diseases.

(9) Special provisions shall be made for the treatment, education and integration of all children with leprosy.

(10) Special attention shall be given to issues of substance psycho-social well being drug and alcohol abuse in children.

(11) No medical institution or clinic or hospital or nursing home shall reject admission or treatment of a child or pregnant mother who has any illness or disease or ailment which has a social stigma attached with it, such as Leprosy, AIDS, etc.

(12) Any contravention or non-adherence of the provisions of this section, except for sub-section (7), shall be dealt with by the Competent Authority only and shall be punishable with a fine which may extend to Rs. 50,000/-.

for all forms of domestic labour, a fine of Rs. 50,000/- (Rupees fifty thousand only) for the person employing the domestic child labour;”

15. Powers of the [Competent Authority, Director and Special Officer].– (1) If the Competent Authority or Director or Special Officer, as the case may be, is satisfied, whether upon information received or otherwise or in any other fit case, of the violation of the rights of a child, he shall issue a notice, requiring the person or persons who the Competent Authority or Director or Special Officer, as the case may be, deems to be responsible for the violation to appear before him and to show cause why action should not be taken against him and take one or more of the following steps, within a period as may be fixed in the notice, and not exceeding sixty days in any case:–

(a) to dismiss the representation or petition;

(b) direct the person or persons to take such steps as may be necessary in the best interests of the child;

(c) [omitted]

(d) refer the matter to any other authority including the Police;”

24.(3) - Only the Children’s Court shall take cognizance of all offences under this Act which are punishable with imprisonment of either description and of any term. Offences under sections 3, 4, 5 and clause (c) of sub-section (5) of section 7 may be taken cognizance of and tried by the Competent Authority.

30.(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.”

26. Mr Desai then referred to Section 2(b) which provides a definition with regard to a”care giver” who is a person, who is responsible for looking after the well being of the child. This person may be a staff member of any residential facility for children, an employee of an educational institution, a nursery, creche, a clinic, a hospital, a sports club, a recreational facility or an employee of any facility which provides services to the children. It is therefore submitted that PW4-Beneditta Pires was a care taker in Navyug Niketan, Kidzee School and was looking after the kids including the victim child. However, the evidence of Appellant/Accused as DW1 shows on page 4 during cross examination as under:-

“I am in-charge of the students/children of playgroup C. my responsibility is to teach them and give them good upbringing and discipline. It is my duty to report an untoward incident, if happens to the superiors.

The caretaker is required to take my permission to take out a child from the classroom or to do anything in respect of a child from my classroom. It is a daily routine to take the children to the toilet.”

27. Thus, only because PW4 was the caretaker appointed by the school, the duty of the Appellant/teacher who was responsible for the upbringing of the children including the victim and was in-charge of the playgroup C, cannot be ignored. The teacher comes under the definition of care giver as found in Section 2(b) above. The submission of Mr Desai, that Accused was not the 'care giver' as defined in Section 2(b) of the Act, has no substance.

28. The combined reading of above-quoted provisions qua the charge-sheet filed before the Children's Court, one thing is clear that the police or the investigating agency did not invoke provisions of Section 8(2) which provide punishment for the child abuse or sexual abuse as defined in Section 2(m) and Section 2(x), (y) as the case may be.

29. Whenever any allegations are made with regard to corporal punishment in the school, which is banned as per Section 4(12) of the said Act, the procedure is to approach a competent authority as provided in Section 4(15) quoted above. The matter in hand clearly goes to show that allegations were made against the Appellant in connection with corporal punishment in the school. In such circumstances, the rights of the child and specifically violation/contravention of such rights of a child in a school are found in Section 14 which reads thus:-

“14. Violation, Contravention and Penalties.– (1)
The following shall be deemed to be contraventions of the Rights of the Child:–

(a) non-adherence to or contravention of the provisions of sections 3, 4 and 5 of this Act and the rules made thereunder.

(b) If the Competent Authority is satisfied, after considering the facts and for reasons to be recorded in writing, that any act of omission or commission constitutes a non-adherence to or contravention of any of the provisions of this Act including those in Section 3.

(2) There shall be a Competent Authority which for the purpose of this Act shall be the Secretary to the Government in charge of the Department of Women and Child Development.

(3) The Competent Authority shall have the power to impose penalties for any contravention ranging from Rs. 100/- to Rs. 50,000/- on every occasion.

(4) If such fine is imposed on any Government servant for violation of the rights of a child, the fine so imposed shall be paid by the defaulting employee or recovered from his salary or wages.

(5) The decision of the Competent Authority as to whether an action or inaction constitutes a violation of the rights of the child shall be final and binding.

(6) [omitted]

(7) The Government may authorize Special Officers to entertain representations or petitions regarding contravention of or non-adherence to the rights of a child. The Special Officer may refer the petitioner to the police or may call for information from any person in Goa regarding such alleged contravention or non-adherence and may conduct inquiry into the representation or petition. The Special Officer shall

submit his report on each violation, with recommendations and justifications for the same, to the Competent Authority through the Director.

(8) The Competent Authority may take action under the provisions of this Act in any case of a child.

(9) Any person may give information as regards contravention of any provision of this Act or the rules made there-under to a Special Officer, Labour Inspector or to the Director or to a Police Officer-in-charge of a Police Station.”

30. Perusal of above Section 14 shows that non-adherence to or contravention of provisions of Sections 3, 4, and 5 of the said Act and the Rules made thereunder are required to be dealt with as provided under the said above provision by approaching the competent authority as defined in Section 2(i) which reads thus:-

“2.(i) “Competent authority” means the Secretary to the Government in charge of the Department of Women and Child Development;”

31. On receipt of such complaint regarding contravention or violation of rights of a child in a school or other institutions such as staff member of any residential facility for children, an employee of an educational institution, a nursery, creche, a clinic, a hospital, a sports club, a recreational facility or an employee of any facility which provides services to the children, as provided in Sections 3, 4 and 5 and if the competent authority is satisfied on considering facts and for reasons to be recorded in writing that any act of omission or commission constitute a non-adherence to or contraventions of any of the provisions of said Act including those mentioned in Section 3,

shall have power to impose penalties for any contravention ranging from ₹100/- to ₹50,000/- on every occasion, amongst others.

32. Similarly, the powers of competent authority are elaborately discussed in Section 15 as quoted earlier which include the decision of the competent authority upon information received of the violation of rights of a child, to issue notice requiring the person or persons who are deemed to be responsible for such violation, to appear before the competent authority and show cause why action should not be taken against him and to take one or more of the steps within a period not exceeding 60 days in any case. Such steps includes rejection/dismissal of the representation or petition of violation of child rights, directing the person or persons to take such steps as may be necessary in the best interest of the child, to refer the matter to any authority including police, etc.

33. Sub-Section 2 of Section 15 casts a duty on the in-charge of a police station within whose area such violation is reported, to provide all possible assistance to the competent authority including removing of a child from such institution and the officer-in-charge of the police station shall be answerable and responsible for non-compliance of the requisition made by the competent authority. Similarly, when the competent authority issues notice under Sub-Section 1 of Section 15 to any person who is deemed to be responsible for violation of the child rights in such institution fails to comply with the direction contained in the show-cause notice, the competent authority is entitled to take cognizance of such failure on the part of alleged violator which shall be cognizable offence

punishable with simple imprisonment for a term which may extend to 30 days or with fine which may extend to ₹5000/- or with both. Thus, the competent authority is empowered even to take recourse for failure to comply with these directions and to punish the person for non-adherence to the notice with simple imprisonment which may extend to 30 days with fine or with both. Sections 16 and 17 of the Act provide penalty for prevention of the entry of the competent authority or the in-charge of the police station and in case of adverse orders, remedy to file appeal is also provided in Section 18 of the Act.

34. Section 20 of the said Act provide cognizance of offences and reads thus:-

“20. Cognizance of offences.— No cognizance of any offence under this Act shall be taken except,—

(a) on a complaint made by the child victim or his or her parent(s), and in their absence, his or her guardians or close relatives, or police or the Competent Authority or the Director or a Special Officer or Labour Inspector or any authority or Officer authorized in this behalf by the Government; or

(b) on a report or charge-sheet made by the police.”

35. This Section specifically deals with the powers of the competent authority to take cognizance of offences on a complaint made by the victim child or his parents or in their absence, by his or her guardian or even close relative. Section 21 deals with compounding of offences wherein it is provided that any offence punishable with fine only under the Act may either before or after

institution of the proceedings be compounded by such officer or authorities and for such amount as the Government may by notification in the Official Gazette specify in that behalf.

36. Thus, on a combined and co-joint reading of above provisions and more specifically the violations of child rights provided under Sections 3, 4 and 5 wherein penalty is only by way of fine and jurisdiction to entertain such violations is with the competent authority, the provision of Section 30(3) as quoted above restrict the jurisdiction of Children's Court. It provides that the powers of the competent authority and the special officers under this Act shall not fall within the jurisdiction of the Children's Court. Similarly, Section 24(3) as quoted above specifically provide that jurisdiction and powers of Children's Court to take cognizance of the offences under the said Act are with regard to all offences which are punishable with imprisonment of either description and of any term. It further provides that offences under Section 3, 4 and 5 and Clause (c) of Sub-Section 5 of Section 7 may be taken cognizance of and tried by the competent authority.

37. Admittedly, Section 8(1) and Section 4(12) do not provide any punishment with imprisonment of either description and of any term and thus, jurisdiction of Children's Court to take cognizance of such violations is clearly excluded and the same is clearly projected from the intention of the Legislature in creating authority in the form of competent authority to deal with specifically the issues cropping up in the school or other institutions and abuse of child rights including corporal punishment in school.

38. It is necessary to note here that the registration of crime by the police on a complaint is only under Section 8(1) and 4(12) of Goa Children's Act and not for the offences of either physical abuse or psychological abuse of child punishable under Section 8(2) of the said Act. When there is a separate authority created to deal with the aspect of corporal punishment in a school or institution, to find out whether there is any substance in such complaint and after recording reasons, such authority is entitled to approach the police, to my mind, taking cognizance of such charge-sheet by the learned Children's Court and specifically of the offences punishable under Section 8(1) and 4(12) of Goa Children's Act 2003 was without any jurisdiction. It is well settled that when there is no jurisdiction initially to take cognizance of the charge-sheet, such jurisdiction cannot be assumed or presumed subsequently by adding the provisions of Section 8(2) of Goa Children's Act which has been purportedly done in the present matter while framing of charge against the Accused/Appellant and that too without giving any opportunity to the Accused to argue on such aspect. Thus, to my mind, when the very jurisdiction of the Children's Court is at stake, the question of subsequently assuming jurisdiction by invoking provisions of Section 8(2) of the said Act while framing charge, needs to be considered as improper. In such circumstances, submissions of Mr Desai that the Children's Court lacked jurisdiction to take cognizance of such charge-sheet needs to be accepted.

39. In the case of *Mohit Chari* (supra), a coordinate Bench of this Court observed in paras 25 and 26 as under:-

“25. At this stage, I would like to deal with one aspect of the matter. The President of Children's Court has convicted both the accused under Section 8(1) of the Goa Children's Act. Section 8(1) of the Goa Children's Act reads as under :

Section 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.

26. From perusal of Section 8(1) of the Goa Children's Act, it is evident that Section 8(1) is not punishing Section. Section 8(1) only provides that the children should be assured safe environment in which he/ she will not be abused in any way and his/ her development will be nurtured. Therefore, the conviction of the accused under Section 8(1) of the Goa Children's Act is absolutely not sustainable in law and is hereby set aside. But as stated above, the conviction of both the accused for the offence punishable under Section 363 of I.P.C. cannot be faulted.”

40. Thus, it is clear that Section 8(1) and Section 4(12) of Goa Children's Act are not punishable sections or providing any punishment. Therefore, registering offences, framing charge and punishing the Appellant/Accused under such sections is not sustainable in the eyes of law.

41. Since the matter was argued on merit, it is necessary to discuss as to whether Prosecution succeeded in proving the charges levelled against Accused beyond all reasonable doubt.

42. Now in this matter, the victim/child was just two and a half years old at the time of alleged incident. Therefore, assessing evidence of such child with the caution of tutoring, need to be taken into consideration.

43. In the case of *Bhagwan Singh* (supra), the Supreme Court in para No.19 and 22 observed that though law recognizes a child as a competent witness, but the child particularly at such tender age of six years, who is unable to form a proper opinion about the nature of incident because of immaturity of understanding, is not considered by the Court to be a witness whose sole testimony cannot be relied without other corroborative evidence. The evidence of child is required to be evaluated carefully because he is an easy prey to tutoring. The Court invariably looks for adequate corroboration from other evidence to testimony of such child witness. It is hazardous to rely on the sole testimony of child witness as it is not available immediately after the occurrence of the incident and before there was any possibility of coaching and tutoring him.

44. In the case of *State of Uttar Pradesh v. Krishna Master* (supra), the Supreme Court was dealing with a child witness who deposed about the alleged incident wherein five members of his family being ruthlessly killed by firing gun shots by the accused persons. In this context, the Supreme Court observed in para 37 as under:-

“This Court is of the firm opinion that it would be doing injustice to a child witness possessing a sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to

abnormal events which take place in his life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future. Therefore, the specious ground on which reliable testimony of PW2 Madan Lal came to be disbelieved can hardly be affirmed by this Court.”

45. With the above background, we have to test evidence of the child witness in this matter.

46. Admittedly, there is no eyewitness to the incident and entire case of the Prosecution is on circumstances, except the child himself being the victim. PW1 is the father of the victim whose testimony is based on information received by him from his mother i.e. the grandmother of the victim. He deposed that on 24 February 2012 at around 12:15 hours, his wife as usual picked up the victim from the school and dropped him at his office at Panaji and then he took the victim home. At that time, he noticed that the victim was very quiet on that day which was unusual as the victim is otherwise very talkative. He was also wearing one woolen cap covering his ears and part of his cheeks. He then stated that the victim was crying a lot while going home from Panaji. He asked the victim the reason for crying but he was not in a position to tell him anything. He then deposed that his mother used to give bath to the victim after coming from the school and on that day also while giving bath, she noticed redness over the right cheek and both the ears of the victim. He along with his wife then reached home and his mother informed them about the redness on the cheek and ears. On asking the victim, he informed PW1's wife that his teacher has slapped him on face and

twisted his ears. During cross examination, he admitted that while dropping the victim, he did not state anything to him.

47. In the present matter, the mother of the victim i.e. wife of PW1 is not examined and there is no reason coming forward from the Prosecution though according to PW1, victim informed his mother as to what happened on that day.

48. Another important witness is PW3-Saraswati being the grandmother of the child. She deposed that on 24 February 2012 at around 12:30 noon, PW1 brought the victim from school. She noticed that the victim was crying. She took the victim to the bathroom to give him wash as usual and at that time the victim screamed in pain while cleaning his face. She noticed the right cheek and ear of the victim being red. On enquiring, the victim told her that he was slapped by the teacher and twisted his ear. She then deposed that PW1 and his wife arrived later and thereafter, she informed them about what the victim told her.

49. The victim was examined as PW2. His testimony was recorded on 16 October 2015 and at that time he was six years old. Admittedly, the incident took place somewhere on 24 February 2012 and at that time victim was two and a half years old. Keeping in mind above facts, testimony of the victim needs to be considered.

50. PW2-victim deposed that his teacher by name Eliza used to beat him, used to pinch him, slap him and pull his ears for small mistakes. First of all, this is a general statement which is neither corroborated by the other witnesses nor by the school authorities.

There is no such complaint lodged against the Accused/Appellant herein about such physical abuse/corporal punishment.

51. Victim/PW2 then deposed that on that day, he was assaulted by his teacher badly, on his cheeks and hands. He then deposed that he did not remember why he was assaulted and whether there was further assault on any other part of the body. He then deposed that his mother picked him from school and was taken by his father on the motorcycle. He then categorically deposed as under:-

“I did not tell them anything because I was very scared.”

52. This shows that the victim though was picked up by his mother and thereafter carried on the motorcycle of his father to his house, he did not disclose about the so-called assault to his parents.

53. PW2/victim then deposed that when he reached home, his grandmother/PW3 took him to the bathroom to give wash and at that time he cried because of pain. He thereafter deposed as under:-

“My grandmother told my mother that I was beaten by the teacher. Then I was again taken back to the school and I was also taken to the Doctor. On that day, the teacher had twisted my ears and had pinched me.”

54. Though there is no cross examination on material aspects, one thing is clear that PW2/victim nowhere stated that on questioning by PW3/grandmother about the pain, he disclosed to her that he was assaulted by his teacher on the face, which is tried to be projected by PW3. The knowledge of PW3 about the alleged assault on the victim by the Accused is only on informing by PW2/victim. However, when

PW2 was examined before the Court, he did not depose that on asking by his grandmother/PW3, he told her about the said incident. It is not the case of PW2/victim that he informed his mother about alleged incident of assault, which is the case of PW1. Thus, the very knowledge of PW1 and PW3 regarding alleged assault on PW2/victim by the Accused is clearly absent and not proved. I say so for the simple reason that PW2 in his deposition nowhere discloses that he informed his grandmother or his mother about the alleged assault on him by the Accused. Then the question arises as to how PW3 or PW1 as the case may be, got such knowledge. Admittedly, both of them were not in the school. PW2/victim is very cryptic in his deposition and did not inform as to where i.e. in the classroom, outside or at Kala Academy, such assault took place. This assumes importance as on that day admittedly, all children from playgroup C were taken to Kala Academy for the rehearsal for the annual day function. They were brought back to the school.

55. PW4-Beneditta Pires who was working as caretaker deposed that on 24 February 2012 there was practice of annual day and initially such practice was performed in the school and then children were taken by bus to Kala Academy. They reported to the school at around 11:30 a.m. and then she took children to the washroom as usual. She then deposed that the victim boy was then collected by his mother at around 12:00 noon. This witness nowhere discloses about the alleged incident. Even though the victim boy was communicating freely with PW4 in Marathi, he did not disclose to her about any such incident. During cross examination, she candidly accepted that there

were no complaints from the parents about the fight of children amongst themselves in the school. She did not witness any incident about Accused beating children at any time.

56. Thus, one thing is clear that the victim/PW2 was examined after more than four years from the date of alleged assault. At the time of such incident, he was just two and a half years old. Therefore, at such immature age, it is quite difficult to accept that the child will remember such incident. Similarly, his deposition was recorded when he was six years old and a gap of around 4 years is sufficient to tutor such child by informing him that such assault took place on him and by the teacher herself. Similarly, there is only one line with regard to the present incident which PW2 deposed which reads thus:-

“One day I was assaulted by my teacher very badly. I was assaulted on my cheeks and hands.”

57. Improvements by PW2 about alleged previous assaults show tutoring and thus, believing his testimony becomes difficult. Similarly, PW4 did not state about the child crying while he was picked up by his mother on that day. Thus, the statements of PW1 that the child was crying while he was taken home is again found to be an improvement. There is no evidence to show that child was crying in the school.

58. PW2/victim tried to state that he was assaulted on both cheeks and both hands and not the ear or even pinching of ear which is tried to be projected by the witnesses. No one from the Prosecution

witnesses tried to depose about the place of incident. The investigating agency even did not rely upon any scene of offence panchanama. Investigating officer examined as PW7 did not utter a single word about conducting of scene of offence panchanama. The list of witnesses produced along with the charge-sheet also did not disclose the name of any pancha witness for the scene of offence panchanama. Thus, Prosecution or the investigating agency is unaware about the place of offence and therefore, no such material has been brought on record. In such circumstances, and when PW2/victim is silent about disclosing either to his parents or to his grandmother, clearly shows that the knowledge of PW3/grandmother and PW1/father is not established on record.

59. Testimony of PW2/victim is sketchy, cryptic and cannot be relied upon to prove the assault on him by the Accused alone and that too in the school premises. The reason is that victim did not inform his parents when he was collected from the school. Similarly, the victim did not inform his grandmother as to who assaulted him, which is clear from the deposition of PW2 himself. Therefore, PW3 presumed that redness on the cheek of the child is due to assault and since he was coming from the school, the allegations were made only on the teacher.

60. Another aspect to it is the so-called identification and pointing finger towards Accused by the victim when he was again taken to the school by the parents for confirming about the assault. This aspect is not part and parcel of the investigation.

61. The complaint at Exh.19 shows that when the parents took the victim child to the school and informed the principal, the Accused was called along with the caretaker and at that time, the child pointed finger directly towards the Accused when asked as to who slapped him. However, PW2/victim while deposing before the Court, though claimed that he was taken back to the school, is silent about pointing finger towards the Accused when asked in presence of the principal that he was assaulted by the teacher. PW4-Beneditta Pires deposed that when the parents of the victim and the principal asked the victim as to who beat him, he raised finger to the Accused. PW5-Bindu was working as Headmistress also deposed that on asking the victim as to who beat him, he pointed finger towards Accused. However, no one tried to find out the place of offence including the investigating officer and in whose presence such incident happened. The confirmation of the alleged assault by the Accused on the victim by the parents in presence of PW4 and PW5, is considered to be weak piece of evidence as this aspect has not been recorded in the statement of the victim or at the time of his deposition before the Court.

62. The Accused stepped into the witness box and deposed that on 24 February 2012 they went to Kala Academy for rehearsal of the annual day function and she was assisted by the caretaker/PW4. They left the school at around 9:30 a.m. to go to Kala Academy for rehearsal and returned at around 11:30 a.m. On reaching school, tiffins were served to the children. After some time, the caretaker started taking children to the toilet one by one. The victim was taken

to the toilet at the end. She was busy in arranging the costumes in the next day annual day function. She saw the caretaker coming with the victim and thereafter at around 12:15 noon, the kids left the school. She then deposed that in the noon time, she was called back to the school and at that time, the caretaker, the parents along with the victim were present in the principal's room. The principal told her that the victim was having some marks on his face. Later on, she heard the parents of the victim blaming her for pulling the ears of the victim which she denied. Apart from other suggestions during cross examination, DW1/Accused denied the suggestion that she slapped the victim child as he messed up his pant.

63. First of all, it is not the case of either Prosecution or the victim child that he was slapped because he messed up his pant. It is also not the case of parents of the victim that alleged assault on him took place because he messed up his pant. There is absolutely no reason coming forward in the entire Prosecution case as to why alleged assault on the victim took place and that too, by the Accused. The contention of PW2/victim that his teacher used to beat him, pinch him, slap him and pull his ears for small mistakes is clearly an exaggeration and amounts to tutoring of the witness. No such incident on the earlier occasion was reported either by the victim or by his parents. It is not the case of Prosecution that the Accused is in the habit of assaulting the kids without any reason or even for the purpose of discipline. No complaints of any of the other parents are reported. Thus, question arose as to why the Accused allegedly assaulted the victim alone.

64. The oral material and specifically deposition of PW2/victim is not convincing and trustworthy in order to prove the so-called assault on him by the Accused.

65. Medical evidence which Prosecution tried to place on record is also doubtful. First of all, PW6-Dr. Wagle did not issue any certificate though he claimed to have examined the victim child on 25 February 2012 i.e. after a day from the date of alleged incident. He claimed that there was reddishness on the right cheek of the victim child when examined on 25 February 2012. In absence of any medical certificate issued by PW6, it is difficult to accept the testimony of an expert witness as he is supposed to issue certificate giving the details of the injury, the age, the reason and by the method by which such injury is caused. Admittedly, PW6-Dr. Wagle is the family doctor wherein he admitted that he is examining the victim child since he was two months old. It is difficult to accept on the basis of photographs produced at Exh.25 to prove any injury. Only because there is some redness on the cheek as seen in the photograph, it cannot be accepted that such redness was due to any injury. Apart from it, such photograph is not having any date or time in print on it. There is no certificate under Section 65-B of Evidence Act attached to it. The endorsement on Exh.25 by the Court shows that such Exhibit is given subject to proof under Section 65-B of Evidence Act. Thus, statement of PW6 cannot be accepted for the above reasons.

66. Hurt certificate is produced at Exh.33 from GMC. However, it shows that victim was examined on 15 March 2012 and at that time there was no evidence of any injuries.

67. Mr Desai would submit that at the most the alleged incident is covered under Section 89 of IPC thereby stating that the act done in good faith for the benefit of child would not form an offence. I am unable to accept such contention for the simple reason that provision of Section 89 operate in completely different circumstance as explained in the proviso appended to it. Secondly, Section 4(12) of Goa Children's Act completely bans any corporal punishment in the school. Thirdly, physical assault on a child of two and a half years old cannot be justified by taking recourse to Section 89 of IPC. Reliance placed in the Case of *G.B. Ghatge* (supra) does not advance the case of the Appellant as there is no similar provision found in the Goa Children's Act 2003 as found in Section 9 of Bombay Children's Act 1924. Even otherwise, any physical assault on a child of such tender age cannot be considered as reasonable punishment as may be necessary for the purposes of school discipline or for correcting the child.

68. Thus, from the overall material placed on record, it is clear that the learned Children's Court committed error in holding the Accused guilty. The material brought on record is not sufficient to prove the charge beyond all reasonable doubt. First of all, the order of taking cognizance is itself bad in law for want of jurisdiction as discussed earlier. Secondly, the evidence brought on record and more specifically deposition of PW2/victim cannot be believed to prove charges levelled against Accused beyond all reasonable doubt. In sum and substance, the appeal must succeed.

69. Hence, the order:-

- i. Appeal stands allowed.
- ii. The impugned Judgment and conviction dated 31 January 2017 - 13 February 2017 in Special Case No.36/2012 passed by the Children's Court is hereby quashed and set aside.
- iii. The Accused/Appellant is acquitted of the offence under Section 8(1), r/w Sections 4(12) and 2(m)(i) punishable under Section 8(2) of Goa Children's Act, 2003 by giving benefit of doubt.
- iv. Parties shall bear their own cost.

BHARAT P. DESHPANDE, J.

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