RECENT ENACTMENTS FOR PROTECTION WOMEN AND CHILDREN - ISSUES AND CHALLENGES

One cold December evening last year, the streets of Delhi witnessed a macabre drama. A hapless young female paramedic was subjected to one of the most gruesome sexual assaults in the history of nation, in a moving bus. The monsters who assailed her and her companion, finally dumped her by the wayside, presuming her to be dead. The dastardly attack created a indelible mark on the collective psyche of the society and left the entire nation in a state of shock and horror. The resultant public outrage spilt onto the streets of national capital, paralyzing it for several days. The vociferous outcry literally forced the legislature to come up, post-haste, with a spate of legislative measures in the form of Criminal Law (Amendment) Ordinance, 2013 (hereinafter referred to in this article as "the 2013 Ordinance") followed by the Criminal Law (Amendment) Act, 2013 (hereinafter referred to in this article as "the 2013 Act") which paved the way for crucial amendments to all three major criminal laws, *i.e.* the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act. To be fare to the legislature though, it may be noted that prior to the Delhi incident, it had passed the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to in this article as "the 2012 Act"), which was aimed at providing protection to children including female children. This act was also amended by the Criminal Law (Amendment) Act, 2013. Long before aforesaid legislative measures, the parliament had passed The Commissions for Protection of Child Rights Act, 2005, which is also relevant in the present context.

Even a cursory look at the aforesaid pieces of legislation reveals that they were exercises conducted in haste to meet externally set deadlines. No wonder, they raised several complex issues which cry for resolution as these enactments ostensibly operate in overlapping spheres. However, it has to be kept in mind that these are recent enactments; therefore; not much help by way of judicial pronouncements, is forthcoming, yet these issues are required to be

addressed urgently in view of the difficulties being faced on a daily basis by the Judges of District Judiciary in implementation of the provisions of aforesaid enactments. Following is an attempt on the part of the Institute to address issues thrown up by these enactments and resolve them by resorting to settled judicial principles and recognized tools of interpretation. It goes without saying that the conclusions recorded in the article are not in any manner binding. The readers are advised to kindly go through the relevant provisions of the enactments minutely and exercise their discretion.

Commissions for Protection of Child Rights Act, 2005 (4 of 2006)

Commencement of the Act:

On 15th of February, 2007, the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) (hereinafter referred to in this article as "the 2005 Act") came into force vide notification S.O. 229 (E) dated 15th of February, 2007 published in the Gazette of India, Extra., Pt. II, Sec. 3 (ii), No. 164, 15th of February, 2007.

Constitution and Jurisdiction of Children's Courts:

Chapter V of the 2005 Act relates to Children's Courts. Section 25 thereof provided that the State Government may, with the concurrence of the Chief Justice of High Court, by notification, specify at least a Court in the State or specify, for each district, "a Court of Session" to be the Children's Court to provide speedy trial of offences against children or of violation of child rights. Thus, we find that Section 25 of the 2005 Act placed an obligation on the State Government to specify by notification, at least one Court in the State or one Court of Session in each district to be the Children's Court.

In discharge of aforesaid obligation, the State Government, with concurrence of Chief Justice of the Madhya Pradesh, specified "Court of Session" in each of Sessions Divisions of the State as Children's Court for the purposes of providing speedy trial of offences against or of violation of child rights by Notification No. F. No. 17 (E)./38/2010/21-B (one), dated

07.01.2011. As such, the State Government did not specify a particular Court of Session as Children's Court in each district as envisaged by Section 25 of the Act, but specified entire Court of Session in each Sessions Division of the State as Children's Court.

The Supreme Court, in the case of **Gokaraju Rangaraju v. State of A.P., AIR 1987 SC 1473** and many other cases, has held that a person appointed as Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge, would be exercising jurisdiction in the Court of Session and his judgments and orders would be those of the Court of Session. It follows therefore that any Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge who exercises jurisdiction in the Court of Session of a particular Sessions Division, is competent to try a case under the 2005 Act. It is not incumbent upon the Sessions Judge to try such a case himself. The Sessions Judge is entitled either to try such a case himself or transfer it to any Additional Sessions Judge or Assistant Sessions Judge exercising jurisdiction in the Court of Session of his Sessions Division for trial and disposal in accordance of law.

Special Public Prosecutors:

Section 26 of the 2005 Act provides that the State Government shall, by notification, specify a Public Prosecutor or appoint and Advocate who has been in practice as advocate for not less than 7 years as a Special Public Prosecutor for the purpose of conducting cases in the Children's Court.

It may be noted here that no notification in this regard has so far been issued by the State Government.

Other Issues:

A bare reading of the provisions of the 2005 Act reveals that there are numerous ambiguities and gaps in the Act, which raise several doubts regarding nature and scope of various provisions and exact procedure to be adopted by the Special Courts. For example, the term 'child' has nowhere been

defined in the 2005 Act; therefore, the first question that would arise before the Children's Court is who should be treated as 'a child' for the purposes of this Act? Another crucial question that arises for consideration is whether each and every offence, irrespective of its nature and gravity has to be tried exclusively by the Children's Court simply because a child (alone or with other adult persons), is an aggrieved person or a victim therein? The next question that may arise is whether a Children's Court, being a Special Court, can directly take cognizance of an offence without the case being committed to it by a Magistrate under Section 193 of Code of Criminal Procedure? Another question that may crop up is what is the extent and scope of expression 'offences against child' and 'violation of child rights' and what shall be the nature and scope of trial or proceedings which are required to be carried out in case of 'violation of child rights' which are brought to the notice of children's Court?

Aforementioned set of four questions was referred under Section 395 (2) of Cr.P.C. by the Sessions Judge, Khandwa to the High Court of Madhya Pradesh. The reference was registered as Criminal Reference No. 1/2012 and was answered by a Division Bench of High Court of Madhya Pradesh on 07.08.2012 in the following manner:

Who is a child for the purposes of the 2005 Act?

In order to ascertain real intention of the Legislature, the Bench, referred to Preamble of the Act and considered various International Treaties and Conventions ratified and adopted by the Union of India. It also took into account the relevant provisions of Indian Majority Act, 1875 as well as Juvenile Justice (Care & Protection of Children) Act, 2000, which prescribed that a minor or a juvenile is a person who has not attained the age of 18 years. Consequently, it held that a child, for the purposes of 2005 Act also, is a person who has not completed 18 years of age.

Whether all Offences against children are triable exclusively by the Children's Court?

The Court observed in this regard that if all the offences against a child were to be tried by the Court of Session, it would result in flooding of Sessions Court with such cases and would lead to chaos. In such a scenario even a case u/s 279 of I.P.C. would be triable exclusively by the Children's Court simply because the injured happened to be a child. As a result it held that each and every offence under a penal law in which a child happens to be complainant or a victim will not necessarily be deemed to be an offence exclusively triable under the Act of 2005 by a Children's Court. Only such cases against children, in which the Commission recommends initiation of proceedings on finding violation of child rights of serious nature or contravention of any law for the time being in force and the Government or Authority initiates proceedings on such recommendation, shall be deemed to be cognizable or triable by the Children's Court constituted under Section 25 of the Act. Where there was no recommendation by the Commission constituted under the 2005 Act and the prosecution was initiated by the complainant or police, ordinary procedure prescribed under the Code of Criminal Procedure would have to be followed, regardless of the fact that complainant or victim was a child.

Can there be joint trial where the victims comprise both children and adults?

The Court also answered the question, whether a case in which one or more of the victims is a child and others are adults/majors, would there be a joint trial? The Court observed that it has not been specifically provided by the 2005 Act that the offences against a child or the cases of violation of child rights have to be tried separately, if in the same incident or transaction, some of the victims are adults. It was held that splitting of trials between two different Courts for different sets of aggrieved persons would result in complications and multiplicity; therefore, where the Prosecution has been initiated by concerned Government or Authority on the recommendation of Commission constituted under the Act, if one or more aggrieved persons is a child, the case of such aggrieved child and the case of adult aggrieved person or persons shall be tried jointly by Children's Court.

Committal - Whether necessary?

So far as requirement of committal is concerned, the Bench observed that provisions of Section 25 of the Act of 2005 were in *pari materia* with those of Section 14 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and therefore, relying upon the principle laid down by the Apex Court in the case of **Gangula Ashok v. State of A.P., AIR 2000 SC 740,** the bench held that the Sessions Court could not take cognizance of an offence under the 2005 Act as a Court of original jurisdiction without the case being committed to it by a Magistrate under Section 193 of Cr.P.C.

Accordingly, we may say that most of the ambiguities and doubts in different provision of 2005 Act have been clarified and set at rest by the Division Bench of High Court in the case of In Re. Presiding Officer, Children's Court, East Nimar (Khandwa), M.P.

The Protection of Children from Sexual Offences Act, 2012

In the year 2012, the legislature, with a view to protect children from offences of sexual assault, sexual harassment and pornography, enacted aforesaid act. It *interalia* provides for constitution of Special Courts and prescribes a child friendly procedure for trial of offences defined under the Act. It also introduces some radical presumptions in the statute.

Commencement of the Act:

The 2012 Act came into force w.e.f. 14.11.2012 vide notification of the Government of India No. S.O 2705 (E), dated 09.11.2012 which was published in the Gazette (Extraordinary), Part II, Section 3, sub-section (ii) dated 09.11.2012 of Government of India.

Overview:

Chapters II and III (Sections from 3 to15) define various offences under the Act and prescribe punishment therefor. Chapter IV relates to abetment of, and attempt to commit such offences. Chapter V of the Act lays down the procedure for reporting of cases to police and recording of statement

of victim by the police as well as the Magistrate and also makes provision for medical examination of the child. Chapter VII relates to designation of Special Courts to try offences under the Act and envisages raising of certain presumptions in the trial of offences under the Act. It also provides for appointment of Special Public Prosecutors for prosecution before Special Courts designated under Section 28. Chapter VIII lays down the procedure to be adopted by the Special Courts and also defines its powers. It also delineates rules for recording of evidence. Chapter IX encompasses miscellaneous provisions relating to experts, legal practitioners, alternative punishment, publicity of the Act, monitoring of the implementation of provisions and powers to frame rules etc.

Who is a child?

Unlike the Commissions for Protection of Child Rights Act, 2005, the Act of 2012 contains a specific definition of the term 'child'. Section 2 (d) of the 2012 Act defines 'child' as a person below the age of 18 years. In view of the principles laid down by the Apex Court in the case of **Pratap Singh v. State of Jharkhand, AIR 2005 SC 2731**, the date of reckoning is the date on which the offence was committed. If the age of the victim was below 18 years on the date of commission of offence, the accused may be said to have infringed the provisions of this Act and it would be sufficient to make the offence triable exclusively by the Special Court constituted under Section 28 of the Act, regardless of the fact that the victim had attained the age 18 years on the date on which the child came or was brought before the Court or on the date of presentation of Charge Sheet.

In this connection a question may arise as to what would be the position where the offence is continuing one? For want of any other material, the answer to aforesaid question may have to be searched in statement of object and reasons and preamble of the Act. The 2012 Act has been specifically passed in order to protect children from sexual offences; therefore, in the case of continuing offences, the age of the victim on the date on which the commission

of offence commenced, would be the relevant date and not any date subsequent thereto on which the offence continued to take place. If on that date the victim was a child, the Special Court shall get jurisdiction to try the offence, notwithstanding the fact that offence was a continuing one and it continued to be committed after the victim had attained adulthood.

Designation of Special Court:

Sub-section (i) of Section 28 of the Act provides that for the purpose of enabling speedy trial of the offences under the Act, the State Government shall, in consultation with the Chief Justice of the High Court, by notification in official gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act. It may be noted that the State Government has thus far, not designated any Court in the State to be a Special Court to try the offences under the 2012 Act.

The proviso to Section 28 states that if a Court of Session is notified as a Children's Court under the Commission for Protection of Child Rights Act, 2005, or a Special Court is designated for similar purpose under any other law for the time being in force, such Court shall be deemed to be a Special Court for the purpose of the Protection of Children from Sexual Offences Act, 2012, as well.

As we have seen in the earlier part of the Article, the State Government has by notification designated the Court of Session in every district to be a Special Court for the purpose of the Commission for Protection of Child Rights Act, 2005; therefore, every Sessions Judge has and every Additional Sessions Judge in that Sessions Division, upon the case being transferred to him, acquires jurisdiction to try offences under the 2012 Act.

Committal whether necessary?

In this regard Section 33 of the Act is relevant, which ordains that a Special Court may take cognizance of any offence upon receiving a complaint of facts which constitute such offence or upon a police report of such facts

without the accused being committed to it for trial. Thus, in view of Section 33 (1) of 2012 Act, a Special Court may take cognizance of any offence without the accused being committed to it for trial.

Remand and Bail

As observed earlier in the article, a case under 2012 Act can be filed directly before the Special Court constituted under Section 28 of the Act as a Court of original jurisdiction. So, the question arises whether the Special Court has jurisdiction to remand an accused, who has been arrested for having committed an offence under the 2012 Act? It is true that u/s 167 of the Code of Criminal Procedure, the power to grant remand has been reserved exclusively for a Magistrate. However, the Apex Court in the case of **State of Tamil Nadu v. Krishnaswamy Naidu, AIR 1979 SC 1255** has held that Special Judge, under the Criminal Law (Amendment) Act, 1952, can exercise the power conferred on Magistrate u/s 167 of the Code of Criminal Procedure to authorize detention of the accused in the custody of the police. Hence, the Special Judge will proceed to exercise the powers that are conferred upon a Magistrate having jurisdiction to try the case. Thereafter, a five Judge Bench of Supreme Court in the case of **A.R. Antulay v. Ramdas Srinivas Nayak, AIR 1984 SC 718** has held that the Court of a Special Judge is a Court of original criminal jurisdiction and shall have all the powers of a Magistrate except those specifically excluded by the Statute constituting the Court, to make it functional as a criminal Court.

In aforesaid view of the matter, it is clear that the Special Court constituted under section 28 of the 2012 Act has jurisdiction to remand an accused to custody.

If we revert back to the plain language of Section 167 (2) of the Code, we find that even a Magistrate who does not have jurisdiction either to try the case or commit it for trial, may remand an accused to custody for a period extending up to 15 days. The Supreme Court has also held in the case of **V. Krishnaswamy Naidu** (supra) that a Magistrate, other than a Magistrate having jurisdiction, cannot keep the accused in custody for more than 15 days. So, initially, remand for a period extending up to 15 days may also be granted by a Judicial Magistrate.

Now, the question arises whether a authorizing detention under section 167 of the Code should entertain an application for bail in respect of the offences under 2012 Act. It may be noted here that the 2012 Act contains only one provision regarding bail, *i.e.* Section 31 which reads as follows:

31. Application of Code of Criminal Procedure, 1973, to proceedings before Special Court. - Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.

Thus, we see that a Judicial Magistrate has no jurisdiction either to try a case or commit it for trial in respect of an offence under the 2012 Act. Apart from that, section 31 of the 2012 Act, ordains that the provisions of the Code of Criminal Procedure including those relating to bail and bonds, shall apply to the proceedings before a Special Court. In this light, it appears that it is the Special Court which is expected to deal with matters regarding bail and bonds.

Special Public Prosecutor:

Section 32 of the 2012 Act envisages appointment of a Special Public Prosecutor for every Special Court for conducting cases only under the provisions of this Act by notification in official Gazette.

However, question is, what course should be adopted if such Public Prosecutor is not appointed by the State Government or till such Public Prosecutor is so appointed?

Section 31 of the Act *inter alia* ordains that the Special Court shall be deemed to be a Court of Session and a person conducting prosecution before the Sessions Court shall be deemed to be a Public Prosecutor. In view of provisions of Section 31, it appears that even the Public Prosecutor appointed for Courts of Session may conduct prosecution before the Special Court, till the appointment of Special Public Prosecutors and such Public Prosecutors shall be deemed to be Special Public Prosecutors in view of the deeming provision contained in Section 31 of the Act.

Recording of statement of a child by a Magistrate during investigation u/s 164 of the Code of Criminal Procedure

Sections 25 and 26 of the 2012 Act prescribe procedure for recording of statement of a child u/s 164 of Cr.P.C. by a Magistrate. In this regard, following points have to be kept in mind. The statement of the child has to be recorded in the presence of parents of the child or any other person in whom the child has trust or confidence. Wherever necessary, assistance of a qualified and experienced translator may be requisitioned. In the case of children under any mental or physical disability, assistance of qualified and experienced special educator or any person familiar with the manner of communication of the child or an expert in that field may be sought. If possible, the Magistrate shall ensure that statement of a child is also audio and video-graphed using electronic means. During the recording of statement of the child, the Magistrate shall not permit the presence of accused or his advocate.

After recording of the statement, the Magistrate shall immediately supply a copy of the statement to the child, his parents or his representatives. After submission of charge-sheet u/s 173, such persons shall also be entitled to copies of the final report u/s 173 of Cr.P.C.

At this point, it would not be out of place to mention that sub-section (2) of section 25 requires the Magistrate to furnish to the child and his parents or his representatives, copies of documents specified under section 207 of the Code, upon the final report being filed by the police under section 173 of the code. In this regard it is pertinent to note that under section 33 of the 2012 Act, a final report is not required to be filed before the Magistrate for committal. It may straight away be filed before the Special Court as a Court of original jurisdiction. Thus, the imposition of duty to comply with the provision of section 207 of the Code of Criminal Procedure upon the Magistrate under section 25 (2) of the Act, appears anachronistic. However, no party would suffer any prejudice if this obligation is performed by the Special Judge. Therefore, on filing of Charge Sheet, the duty to supply copies to the child etc. has to be performed by the Special Court.

Period within which the evidence of the child should be recorded and the case should be disposed of:

Section 35 of the Act ordains that evidence of a child shall be recorded within a period of thirty days of the Special Court taking cognizance of an offence. Where there is delay in recording evidence of the child, the Special Court shall record reasons for such delay. Sub-section (2) of Section 35 provides that the trial shall be completed as far as possible within a period of one year from the date of taking cognizance of the of the offence.

Trial to be conducted in camera:

In this regard, Sections 36 and 37 of the 2012 Act are relevant. Section 37 provides for conduct of trail in camera but in the presence of the

parents of the child or any other person in whom the child has trust and confidence. However, where a Special Court is of the opinion that the statement of the child needs to be recorded at a place other than the Court, it shall proceed to issue a commission in accordance with the provisions of Section 284 of the Code of Criminal Procedure.

Section 36 provides that during the recording of statement of child in camera, the Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence but the Special Court will have to ensure that the accused is placed in a position where he can hear the statement of the child clearly and is in a position to communicate with his advocate. For the purpose of obtaining the aforementioned objectives, use of the devises like recording of evidence through video conferencing, use of single visibility (one way) mirrors, strategically placed curtains or any other such devise is not only permissible but advisable.

It may be noted here that the accused may be needed to be shown to the witness for the limited purpose of dock identification. In that situation, the Court will have to ensure that under no circumstance, the accused is able to confront or accost the child.

Procedure for recording of evidence of the child:

Sub-sections 2 to 7 of section 33 of the 2012 Act delineates the precautions to be taken by the Special Court during recording of evidence of the Child. The most important thing that is required to be kept in mind is that neither the Special Public Prosecutor nor the counsel appearing for accused shall be permitted to put questions directly to the child during examination-in-chief, cross-examination or re-examination. The Special Public Prosecutor or the defence counsel shall communicate the questions to be put to the child, to the Special Court which shall thereafter put those questions in proper form and manner to the child. If considered necessary, Special Court shall permit frequent breaks during the statement of child. The Special Court is also required to create child-friendly atmosphere in the Court by allowing a family member or a guardian, a friend or a relative, in whom the child has trust or confidence, to be present during examination.

It shall be the duty of the Special Court to ensure that the child is not called repeatedly to testify in the Court. The Special Court shall also have to block aggressive questions or character assassination of the child and will have to see that the dignity of child is maintained throughout the trial. The Special Court is also required to ensure that the identity of the child is not disclosed at any time during the course of investigation or trial. However, the Special Court may permit the disclosure of identity of child, if in its opinion such disclosure is in the interest of the child but it shall record reasons for such opinion in writing.

Right of child to take assistance of legal practitioner:

Section 40 of the 2012 Act provides that subject to proviso to Section 301 of the Code of Criminal Procedure, 1973, the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice. It may be noted further that there is no proviso appended to Section 301 of Cr.P.C. It appears that by proviso, the Legislature meant sub-section (2) of Section 301. As per sub-section (2) if a private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor. Such instructed Pleader may at the conclusion of the evidence submit written arguments with the permission of the Court.

Where the offender is a juvenile:

Section 34 (1) of the Act provides that where any offence is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care & Protection of Children) Act, 2000. Thus, there can be no doubt that in a case where offender is a child, the procedure as laid down under Juvenile Justice (Care & Protection of Children) Act, 2000, shall apply, notwithstanding the fact that the victim is also a child.

Challenge to the age of victim:

There may arise a situation where during early stages of a trail under this Act, the defence raises an issue regarding the age of the victim and contends that victim was not a child on the date of the offence; therefore, the Special Court has no jurisdiction to entertain the charge-sheet.

We may note here that there is no specific provision in the Act to counter the aforementioned kind of situation. Section 34 of the Act relates exclusively to the procedure to be adopted where the offender is alleged to be a juvenile. In this situation, there is no rationale for allowing the offender to insist on resolution of the issue relating to status of victim as a child as a preliminary issue. An accused may of course take a defence that victim was not a child on the date of the offence; therefore, presumptions u/s 29 and 30 of the Act would not be available to the prosecution but in such case, the prosecution shall be called upon to prove at the trial that the victim was a child on the date of offence and the Special Court shall record its finding thereon in the judgment.

It may be noted in this regard that sub-section (2) of Section 28 of the Act provides that while trying the offence under the Act, a Special Court shall also try offences other than those under this Act, with which the accused may be charged at the same trial.

Section 42 provides that where an act or omission constitutes an offence punishable under this Act and also under any other law for the time being in force, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to

punishment only under such law or this Act, as provides for punishment which is greater in degree.

In view of aforesaid two provision, it would be advisable to frame charges in alternative under both of such provisions so that if ultimately, in the judgment, the victim is not held to be a child on date of offence, the offender may be convicted under general law. In such a case, the benefit of presumptions u/s 29 or 30 may not be available to the prosecution.

It may be noted here that apart from aforesaid two presumptions, all other requirement provided for under the Act are only for protection of children and do not substantially impinge upon any of the vested rights of the accused. Thus, it would not be proper for the Special Court to venture to get into the question of status of victim as a child as a preliminary issue.

Presumptions under the Act:

Sections 29 and 30 enable the Court to raise certain presumptions against the persons accused of commission of offences under the 2012 Act. The scope and extent of the presumption raised u/s 29 with regard to offences under sections 3, 5, 7 and 9 of the Act, have been discussed in detail in an article published in December, 2012 JOTI Journal. Nothing further is required to be said in this article.

Section 30 enables the Court to raise a presumption as to the existence of culpable mental state on part of the accused. It provides that in any prosecution for an offence under this Act, which requires existence of a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state like having intention, motive, knowledge of fact and the belief in or reason to believe a fact on the part of the accused. However, the accused, by way of defence, may be allowed to prove the fact that he had no such mental state at the time of commission of act constituting offence.

Under general law, the prosecution is required to prove the guilt of the accused beyond reasonable doubt but it is sufficient if the accused proves his defence on the touch stone of the theory of preponderance of probability. In other words, it is enough for the accused to probablize his defence in order to defeat the prosecution case. However, sub-section (2) of Section 30 ordains that for the purposes of this section, the accused should be called upon to prove beyond reasonable doubt that he had no such mental state with respect to the act he has been charged with. Thus, it would not be enough if he proves non-existence of such mental state merely by a preponderance of probability.

Procedure to be adopted by the Special Court:

Special Judges shall be deemed to be Court of Session by virtue of Section 31 of the Act. The provisions of Code of Criminal Procedure, 1973 are to be applied to the proceedings before Special Court and for the purposes of the Act the said Court shall be deemed to be a Sessions Court.

Sub-section (9) of Section 33 also provides that subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offences as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 for trail before a Court of Session.

Thus, trial of any of the offences under the Act together with offences under other provisions of law shall be conducted in the same manner as a Sessions Trial and Sections from 225 to 236 of Code of Criminal Procedure shall apply thereto.

Trial of cases involving offences under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and Protection of Children from Sexual Offences Act:

A situation may frequently arise where an offence defined under Protection of Children from Sexual Offences Act, 2012 is committed against a child, who is a member of scheduled castes or scheduled tribes. In such a situation, question would arise as to whether the case would be triable by the Special Court constituted u/s 14 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 or would be triable by a Special Court constituted under section 28 of the Protection of Children from Sexual Offences Act, 2012 or the case would be split leaving two Special Courts to try the case falling under their respective jurisdictions?

To answer the aforesaid question, first of all reference will have to be made to Section 20 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act which reads as under:

> "**Section 20: Act to override other laws. –** Save as otherwise provided in this Act, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law."

Under Section 14 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, the State Government, with concurrence of the Chief Justice of the High Court is required to specify by notification in the Official Gazette, a Court of Sessions to be a Special Court to try the offences under the Act. So, an offence under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, is triable exclusively by the Special Court constituted under section 14 of that Act.

Now we come to the non-obstante clause as given under section 42-A the Protection of Children from Sexual Offences Act, which is reproduced herein below for ready reference:

> "**42A. Act not in derogation of any other law. –** The provisions of this Act shall be in addition to and not in

> derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

It is true that the non-obstante clause in section 42-A has been couched in somewhat different manner, however, a perusal of Section 20 of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act and Section 42-A of the Protection of Children from Sexual Offences Act would reveal that there is a direct conflict between the two non-obstante clauses contained in these Acts in as much as, if Section 20 of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act prevails, a case involving offences under both the Acts would be triable by a Special Court constituted under Section 14 of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act and if provisions of Section 42-A of Protection of Children from Sexual Offences Act prevail, such a case shall be triable by a Special Court constituted under Section 28 of the Protection of Children from Sexual Offences Act.

Principles propounded by the Apex Court in the case of **Swaran Singh v. Kasturi Lal, AIR 1977 SC 265** lay down the guidelines for resolving a direct conflict between two non-obstante clauses contained in two different Statutes. The Apex Court observed that When two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override those of any other law, the cases have to be decided by reference to the object and purpose of the laws under consideration.

If we examine the object and purpose of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, we find that the this Act was passed with a view to prevent the commission of atrocities against the members of the Scheduled Castes and Scheduled Tribes; to provide for Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of thereof. The procedure laid down in this Special Act is almost identical to the one provided under the Code of Criminal Procedure for trial of sessions cases. Apart from provisions of compensation, no procedural safeguards have been incorporated in this Act, which address the vulnerabilities of these weaker sections of the society.

On the other hand, Protection of Children from Sexual Offences Act has been enacted with a view to protect children from offences of sexual assault, sexual harassment and pornography. It professes to protect children of all castes and classes including those belonging to Scheduled Castes and Scheduled Tribes. It provides numerous safeguards to prevent exploitation of children and protect them during various stages of investigation, inquiry and trial. Thus interests of children, including those belonging to Scheduled Castes and Scheduled Tribes, would be protected better if provisions of the Protection of Children from Sexual Offences Act are applied to a case. Thus, there is merit in the argument that full effect should be given to the provisions of Protection of Children from Sexual Offences Act notwithstanding anything contained in the provisions of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act.

In the case of **Swaran Singh** (supra), the Apex Court has also held that for resolving inter se conflicts, one other test is that the latter enactment must prevail over the earlier one. Where the legislature gives overriding effect to the provisions of a latter enactment, being fully aware that an earlier enactment operating in the same sphere, contained a non-obstante clause of equal efficacy, it must be presumed that such the overriding effect in the latter enactment was deliberately given. Therefore the later enactment must prevail over the former.

Even upon applying this chronological test, the Protection of Children from Sexual Offences Act, 2012 prevails. The Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act came into force w.e.f. 31st January, 1990. It was already in operation for more than 20 years when Protection of Children from Sexual Offences Act was brought into force w.e.f. 14th November, 2012. The non-obstante clause in Section 42A was introduced in the Protection of Children from Sexual Offences Act, 2012 on 2nd April, 2013 w.e.f. 3rd February, 2013, yet, the Legislature has given overriding effect to the provisions of the Protection of Children from Sexual Offences Act, being

fully aware that a non-obstante clause having equal efficacy was already a part of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act. In such a situation it must be concluded that the provisions of latter enactment would prevail over the former.

In the aforesaid view of the matter, a case involving offences under both the Acts may directly be filed in the Court of Sessions Judge of a Sessions Division and he may either retain such case or transfer it to any Addl. Sessions Judge working in his Sessions Division, as all Addl. Sessions Judges are empowered to try an offence under the Protection of Children from Sexual Offences Act as Special Judges.

However, to be on safer side, it would be advisable for the Sessions Judge to transfer such cases to the Special Court constituted under Section 14 of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act.

Compensation:

Rule 7 of the Protection of Children from Sexual Offences Rules, 2012, which also came into force on 14th November, 2012, is a complete Code for payment of compensation to the victims of offences under the Protection of Children from Sexual Offences Act, 2012. Under sub-rule (1) of Rule 7 interim compensation may be awarded to meet the immediate needs of the child for relief or rehabilitation. Such compensation may be awarded at any stage of the case after registration of the First Information Report. Such compensation has to be awarded on an application filed by or on behalf of the child. However, in special cases the Special Court can award such compensation *suo motu.* The interim compensation paid under sub-rule (1) of Rule 7 is adjustable against final compensation, if any.

Sub-rule (2) of Rule 7 states that the Special Court may recommend the award of compensation, where the accused is convicted or acquitted or discharged or where the accused is not traceable or is not identified and in the opinion of Special Court the child has suffered loss or injury as a result of that offence.

As per sub-rule (3) of rule 7, the amount of compensation is to be determined with reference to all or any of the twelve points enumerated in that sub-rule. As per sub-rule (4), the compensation is to be paid by the State Government from Victims Compensation Fund or other scheme or fund

established by it for the purposes of compensating and rehabilitating victims under Section 357 A of the Code of Criminal Procedure.

It may be noted here that if no scheme under Section 357A of Cr.P.C. is prepared by the State Government, compensation shall be payable by the State Government, within 30 days of the order.

Criminal Law (Amendment) Ordinance, 2013

In the aftermath of Nirbhaya's case, the Government of India promulgated Criminal Law (Amendment) Ordinance, 2013 w.e.f. 3rd of February, 2013. The Ordinance *inter alia* amended Sections 100, 228A, 354 and 509, inserted new Sections 166A, 166B, 326A, 326B, 354A, 354B, 354C and 354D and substituted new sections for Sections 370, 370A, 375, 376, 376A, 376B, 376C and 376D in the Indian Penal Code. It also amended Sections 26, 54A, 154, 160, 161, 164, 173, 197, 273, 309, 327 and the First Schedule and inserted new Section 198B in the Code of Criminal Procedure, 1973. Thereafter, the Ordinance proceeded to amend Section 146, inserted new Section 53A and substituted new Sections for Sections 114A and 119 in the Indian Evidence Act, 1872.

Criminal Law (Amendment) Act, 2013

The Criminal Law (Amendment) Ordinance, 2013, was repealed retrospectively from the day from which it was promulgated, *i.e.* from 3.2.2013 by Criminal Law (Amendment) Act, 2013, which received the assent of the President on 2nd April, 2013 and was published in the Gazette of India (Extraordinary) Part II Section 1, dated 2.4.2013. Thus, we see the Ordinance remained in force from 3rd February, 2013 to 2nd April, 2013. However, by virtue of sub-section (2) of Section 30 of the Criminal Law (Amendment) Act, 2013, anything done or any action taken under the Indian Penal Code, Code of Criminal Procedure and Indian Evidence Act, as amended by said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of those Acts, as amended by this Act.

Role of Magistrate during investigation:

The 2013 Act has inserted two provisos to Section 54A in the Code of Criminal Procedure, 1973. As per the first proviso, if the person identifying arrested person is mentally or physically disabled, such process of identification shall take place under the supervision of a Judicial Magistrate. A duty has been cast upon such Judicial Magistrate to take appropriate steps to ensure that identification of the arrested person is conducted using methods, that person identifying is comfortable with. Second proviso directs that process of such identification shall be video-graphed.

Further, sub-section (5A) has been inserted after sub-section (5) of Section 164 of the Code of Criminal Procedure. Clause (b) of sub-section (5A) is relevant for our purpose. It enables the Court to use a statement recorded under clause (a) of sub-section (5A) of Section 164 made by a person, who is

temporarily or permanently, mentally or physically disabled, as a statement in lieu of examination-in-chief. Thus, a statement made under section 164 by a temporarily or permanently, mentally or physically disabled person in respect of an offence punishable under Sections 354, 354A, 354B, 354C, 354D, 376 (1) or (2), 376A, 376B, 376C, 376D, 376E or Section 509 of Indian Penal Code may be treated as examination-in-chief of that person in terms of Section 137 of Indian Evidence Act.

Resolution of conflict between Section 354A (M.P. Amendment) and Section 354B of the Indian Penal Code:

Both of the aforesaid provisions carry the same marginal note (heading) i.e. "Assault or use of criminal force to woman with intent to disrobe". Section 354A was inserted in the Indian Penal Code by way of State Amendment vide Section 23 (ii) of the Criminal Procedure Code (Amendment) Act, 2008 w.e.f. 31.12.2009 whereas Section 354B was inserted in the Indian Penal Code vide Criminal Law (Amendment) Act, 2012. For comparative study of both the provisions, they are reproduced herein below in a tabular form:

Section 354-A	Section 354-B
Assault or use of criminal force to woman with intent to disrobe her – Whoever assaults or uses criminal force to any woman or abets or conspires to assault or uses such criminal force at any woman intending to outrage or knowing it to be likely that by such assault, he will thereby outrage or cause to be outraged the modesty of the woman by disrobing or compel her to be naked on any public place, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to ten years and shall also be liable to fine.	**Assault or use of criminal force to woman with intent to disrobe –** Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

A comparative study of both the provisions reveals that they are substantially the same, however, there are some minor differences. For instance, in M.P. Amendment, the disrobing of woman must be with intention or knowledge of likelihood, the offender will thereby outrage the modesty of the woman. Whereas, no such intention or knowledge of likelihood, is required under Section 354-B. Here, the intention should be of disrobing or compelling the woman to be naked. Under Section 354-A (M.P. Amendment),

even a woman can be guilty of the offence, whereas under Section 354B only a man can be guilty of such offence. The punishment for an offence under Section 354-A (M.P. Amendment) is not less than one year but may extend to ten years whereas under Section 354B the punishment shall not be less than three years but may extend to seven years. It may also be noted that offence under Section 354-A (M.P. Amendment) is triable exclusively by a Court of Sessions, whereas an offence under Section 354B may tried by any Magistrate.

Now, a question may arise if an incident involves ingredients, which may constitute an offence under either of the aforesaid two provisions, what sort of charge may be framed and ultimately under which provision an accused may be held guilty and also which Court shall try the offence? To begin with it may be noted that we cannot fall back upon Section 42 of the Protection of Children from Sexual Offences Act, 2012, as that provision applies where an act or omission constitutes an offence punishable under the 2012 Act and also under Sections 166A and 354 B of the Indian Penal Code but in aforementioned case, the Act does not constitute offence under Protection of Children from Sexual Offences Act.

In aforementioned kind of cases, charge in alternative may be framed and the accused may be convicted and sentenced under any of the two provisions but not under both. Further, in view of Section 5 of the Indian Penal Code, the provisions of local/special law i.e. M.P. Amendment with regard to provisions for trial shall prevail. Hence, the case shall be tried by a Court of Session as section 354A is triable exclusively by a Court of Session.

Matrimonial Rape:

Promulgation of Prevention of Children from Sexual Offences Act, 2012 has given rise to one more anomalous situation.

Sections 3 and 7 of the Act define offences of penetrative sexual assault and sexual assault, respectively. These definitions envisage no exceptions. In such a situation, a question arises as to whether an act which falls under the definition of penetrative sexual assault or sexual assault committed by a husband in respect of his wife, who is above fifteen but is below eighteen years of age, would be an offence under aforesaid provisions? It may be noted here that Section 375 of the Indian Penal Code, before being amended by the Criminal Law (Amendment) Ordinance, 2013 and Criminal Law (Amendment) Act, 2013, provided that sexual intercourse by a man with his own wife, who is not under fifteen years of age, is not rape. By 2013 Ordinance and 2013 Act, the scope of definition of ‘rape’ was expanded and

many other sexual acts were included in its definition. However, in 2013 Ordinance, sexual intercourse or sexual act by a man with his own wife, the wife not being under sixteen years of age, was excluded from the purview of rape. By Criminal Law (Amendment) Act, 2013, the threshold was again brought down to 15 years.

Thus, under the Indian Penal Code, sexual intercourse or sexual acts by a man with his own wife, who is not under fifteen years of age, is not an offence. Whereas, sexual intercourse or sexual acts by a man with a child (i.e. a person under eighteen years of age), even if they are husband and wife and the wife is above 15 years of age, is an offence under the Protection of Children from Sexual Offences Act, 2012, as the act does not recognize any distinction between a female child who is wife of the offender and one who is not.

Curiously, the same Act, i.e. Criminal Law (Amendment) Act, 2013, which substituted a new definition of rape in place of old one in Section 375 of IPC including the exception regarding husband, also inserted a non-obstante clause in the Protection of Children from Sexual Offences Act in the form of Section 42-A, which ordained that the provisions of Protection of Children from Sexual Offences Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of 2012 Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.

In this context, the principle laid down by the apex Court in the case of **Indra Kumar Patodia and Anr. v. Reliance Industries Ltd. And Ors.** reported in AIR 2013 SUPREME COURT 426, with regard to interpretation of a non-obstante clause in a statute, may profitably be referred to. The Court observed that where the section containing non-obstante clause does not refer to any particular provision which it intends to override but refers to the provisions of the statute generally, the non obstante clause has to be given restricted meaning. It is not permissible to hold that it excludes the whole Act. While interpreting the non obstante clause, the Court is required to find out the

extent to which the legislature intended to do so and the context in which the non obstante clause is used.

If the second limb of non-obstante clause as contained in Section 42-A, is given full effect to, the exception with regard to husband as contained in Section 375 of Indian Penal Code shall be rendered nugatory and a sexual intercourse or sexual act committed by a man even with his wife, who is between fifteen and eighteen years of age shall be an offence punishable under Section 376 of IPC. It cannot be said that the Legislature would have such an intention. Had the intention of the Legislature been such, it would have safely dropped the exception while adopting the remaining parts of Section 375 but inclusion of the exception by the same Amendment Act, which introduced the non-obstante clause, clearly indicates that the exception is intended by Legislature to be given effect to.

In this scenario, in our opinion, a sexual intercourse or a sexual act as defined in Section 375 of Indian Penal Code shall not be an offence, if committed by a husband against his wife even where the age of the wife is below eighteen years but above fifteen years.

Conclusions:

Commissions for Protection of Child Rights Act, 2005 (4 of 2006)

(1) Any Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge who exercises jurisdiction in the Court of Session of a particular Sessions Division, is competent to try a case under the 2005 Act. It is not incumbent upon the Sessions Judge to try such a case himself. The Sessions Judge is entitled either to try such a case himself or transfer it to any Additional Sessions Judge or Assistant Sessions Judge exercising jurisdiction in the Court of Session of his Sessions Division for trial and disposal in accordance of law.

(2) A child, for the purposes of 2005 Act, is a person, who has not completed 18 years of age.

(3) Each and every offence under a penal law in which a child happens to be complainant or a victim will not necessarily be deemed to be an offence exclusively triable under the Act of 2005, by a Children's Court.

(4) Only such cases against children in which the Commission recommends initiation of proceedings on finding violation of child rights of serious nature or

contravention of any law for the time being in force and the Government or Authority initiates proceedings on such recommendation, shall be deemed to be cognizable or triable by the Children's Court constituted under Section 25 of the Act.

(5) Where there was no recommendation by a Commission constituted under the 2005 Act and the prosecution was initiated by the complainant or police, ordinary procedure prescribed under the Code of Criminal Procedure would have to be followed, regardless of the fact that complainant or victim was a child.

(6) Under the 2005 Act, if one or more aggrieved persons is a child, the case of such child and the case of adult aggrieved person or persons shall be tried jointly by Children's Court.

(7) The Sessions Court could not take cognizance of an offence under the 2005 Act as a Court of original jurisdiction without the case being committed to it by a Magistrate under Section 193 of Cr.P.C.

Protection of Children from Sexual Offences Act, 2012

(8) Section 2 (d) of the 2012 Act defines 'child' as a person below the age of 18 years. The date of reckoning is the date on which the offence was committed. In the case of continuing offences, the age of the victim on the date on which the offence commenced would be the relevant date and not any date subsequent thereto, on which the offence continued to be committed.

(9) Every Sessions Judge has and every Additional Sessions Judge in a Sessions Division upon the case being transferred to him, acquires jurisdiction to try offences under the 2012 Act.

(10) A Special Court may take cognizance of any offence upon receiving a complaint of facts which constitute such offence or upon a police report of such facts without the case being committed to it for trial.

(11) The Special Court constituted under section 28 of the 2012 Act has jurisdiction to remand an accused to custody.

(12) Initially, remand for a period extending up to 15 days may also be granted by a Judicial Magistrate.

(13) The Public Prosecutor appointed for Courts of Session may conduct prosecution before the Special Court, till the appointment of Special Public Prosecutors and such Public Prosecutors shall be deemed to be Special Public Prosecutors in view of the deeming provision contained in Section 31 of the Act.

(14) In a case where offender is child, the procedure as laid down under Juvenile Justice (Care & Protection of Children) Act, 2000 shall apply, notwithstanding the fact that the victim is also a child.

Criminal Law Amendment Act, 2013:

(15) If an incident involves ingredients, which may constitute an offence under both of the aforesaid two provisions *i.e.* S. 354-A (M.P. Amendment) and S. 354-B I.P.C., a charge in the alternative may be framed and the accused may be convicted and sentenced under any of the two provisions but not under both. Further, in view of Section 5 of the Indian Penal Code, the provisions of local law / special law, *i.e.* M.P. Amendment, with regard to provisions for trial, shall prevail. Hence, the case shall be tried by a Court of Session as Section 354A is triable exclusively by a Court of Session.

(16) A sexual intercourse or a sexual act as defined in Section 375 of Indian Penal Code, shall not be an offence, if committed by a husband against his wife even where the age of the wife is below eighteen years but above fifteen years.

Director

Judicial Officers' Training & Research Institute

Jabalpur - 24-5-2013