

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 10751 of 2021

**With
CRIMINAL MISC.APPLICATION (FOR VACATING INTERIM RELIEF) NO.
1 of 2022**

In R/SPECIAL CRIMINAL APPLICATION NO. 10751 of 2021

**With
CRIMINAL MISC.APPLICATION (FOR EXTENSION OF INTERIM RELIEF)
NO. 2 of 2022**

In R/SPECIAL CRIMINAL APPLICATION NO. 10751 of 2021

=====

**SUJATA SURAJ BHATIA
Versus
STATE OF GUJARAT**

=====

Appearance:

MR RS SANJANWALA, SENIOR ADVOCATE WITH MR TARAK
DAMANI(6089) for the Applicant(s) No. 1,2,3,4,5
MR PV PATADIYA(5924) for the Respondent(s) No. 2
MS MOXA THAKKAR, APP for the Respondent(s) No. 1

=====

CORAM: HONOURABLE MR. JUSTICE NIRAL R. MEHTA

Date : 08/11/2022

ORAL ORDER

[1] By way of this Special Criminal Application under Articles 226 and 227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (for short, “the Cr.P.C.”), the petitioners – original accused persons sought to quash the proceedings arising from the Criminal Inquiry Case No.2 of 2020 filed before the Special Court (POCSO), Surat as well as the order dated 31st August 2021, by which the learned Additional Sessions Judge (POCSO), Surat issued summons

under Section 204 of the Cr.P.C. for the offence punishable under Sections 323, 354(b) and 114 of the Indian Penal Code read with Sections 7, 8 and 11 of the Protection of Children from Sexual Offences Act (for short, “the POCSO Act”) against the present petitioners.

[2] The translation of the criminal complaint filed by the complainant is as under:

“(1) I- the complainant took admission of our daughter Namely Drumi in standard 5(C) at Mahidharpura Urban Society English Medium School (MUS)” Laldarwaja Surat in the year-2017-18.

(2) On 03/01/2018, at the school, the accused no. 7, the class teacher of the daughter of I- the complainant insulted our daughter and said in the open class, "Why are you showing off your body by lifting your skirt, are you insane or a savage". Therefore, by uttering such words, the daughter of the I- the complainant was insulted in an open class, the daughter of the I- the complainant was very frightened and started crying. Therefore, as the daughter of I- the complainant came home and informed the I- complainant and my wife on 04/01/2018, my wife namely Neha Pranav Mehta went to the school and made oral complaint to the in-charge principal, the accused no.2. The class teacher accused No.7 admitted her mistake and declared in writing that she will not make such mistake against the complainant's daughter or any other student and will not make false comments. As she gave such apology letter, I the complainant and my wife did not lodge any complaint against her.

(3) On 27/01/2018, the accused no.4 asked the daughter of the complainant through the accused No.7 to take her diary and come to the Resource Room and the accused No.4 got furious and scolded saying that, you are complaining about the teachers to your parents and made them to apologize. Are you coming to the school for studying or to do such things? After saying this, he inflicted four slaps on the cheek of the daughter of I- the complainant and thereafter made her to stand outside the Resource Room for half an hour as the part of punishment. Therefore, the daughter of the complainant came home and informed

all these facts to me the complainant and my wife. Therefore, on 29/01/2018 the wife of I- the complainant clearly wrote in the diary that, "If there is any problem due to the complaint of the parent, please inform the parent, do not beat or threaten the child." Such writing was done in the diary and was sent to the school.

(4) On 31/01/2018, the accused no.4 asked my daughter to come out of the classroom and scolded loudly in the public in the lobby saying that, "You were told not to inform at your home, then why have you complained to your parents?" After saying this, the accused No.4 again inflicted two or three slaps on the back area and shoulder area of the daughter of I- the complainant and threatened her saying that " If you want to study in the School, you have to do and act as the teachers say."

(5) On 03/02/2018, 05/02/2018 and 08/02/2018, the accused No.7 drove out daughter of me the complainant from the classroom and pushed her to the lobby and took her to the office of the accused No.2 the I/c Principal. The accused No.2, 4 and 7 started to scold loudly and threaten the daughter of me the complainant and put false allegations and made her sit in the class thereafter.

(6) On 16/02/2018, the wife of the complainant i.e my wife went to the school and made representation regarding all the aforesaid incidents and made written application by the name of I- the complainant for obtaining CCTV footage of the School and classroom. The wife of the complainant i.e my wife went to the school with this written application and submitted to the accused No.4 and made asked for the CCTV footage, but the accused No.4 did not accept the application from the wife of I- the complainant. The accused No.4 angrily told my wife that, you will not get to see the CCTV footage, do whatever you can do and this manner threatened the wife of the I- the complainant and insulted her.

(7) On 07/03/2018, I the complainant lodged written complaint(application) against the accused No.2, 4 and 7 at Mahidharpur Police Station vide application no. LA/202/18. Moreover, a whatsapp group was created by the School for the students and the parents of the class 5/C, I was also made a member of that group. On 09/03/2018, I the complainant was removed from the whatsapp group by the Admin (Creative) Gaytriben Vyas without informing.

(8) On 10/03/2018, the accused No.4 organized a parents meeting, but did not informed I- the complainant regarding the same orally, in writing or by telephone. False allegations were made against I- the

complainant and my daughter in this parents meeting and my daughter was defamed. We came to know about the same when we called and inquired regarding the same to the other parents. On 12/03/2018, I the complainant inquired another parent on a phone number 9537246106, and information was given to me on the condition that, I will not tell anyone else regarding the same. The audio recording of the same is also available with me. The same is produced in a CD vide the additional evidence list along with this complaint.

(9) I was summoned through phone by the P.S.I. Shri M.G. Makwana of the Mahidharpura Police Station to appear at Galemandi Chowki on 20/03/2018 and the accused No. 2, 3, 4, 5 and 7 were also summoned, wherein statement of I- the complainant and the statement of the accused 2, 3, 7 were also recorded. Wherein the accused persons accepted their mistakes and regarding the offense committed by them, they have also given clear written police statement that, they will not commit any mistakes in future nor any misbehavior will be done against the complainant or the daughter of the complainant that damages their interest. Moreover, the accused No.2, 3, 7 have stated in the police statement that, animosity will not be kept against the daughter of the complainant while procedure regarding the School Leaving Certificate of the daughter of I- the complainant. Such police statement have been made by the accused No.2, 3, 7 and they have also affixed school seal and have put their signature. But, the accused No.4 did not come to give his statement. Thereafter, on 27/03/2018, I, the complainant again submitted written application at Mahidaharpura as the accused No.4 did not give his statement. Therefore, on 28/03/2018, the accused No.4 also dictated his statement before the P.S.I. wherein he also accepted his mistake.

(10) Thereafter, my daughter was attending school regularly and was passed in second rank in all the classes in standard 5 in the year 2017-18. Note regarding the same was also done by the school in the school diary.

(11) On 13/08/2018, I- the complainant went to the school and submitted a written application to the accused No.2 for obtaining the CCTV footage of the classroom in order to find out the truth of the false allegations made against my daughter made by the accused No.5 on 11/08/2018 when he called two parents and me and my wife in the parents meeting and made such allegations against my daughter. But, the accused No.2 denied to accept the application and told that, they will not allow to watch the CCTV footage too. He told us to submit the application to the accused No.6 tomorrow. Therefore, on 14/08/2018, I submitted the written application to the accused No.6 for obtaining

CCTV footage and the accused No.6 accepted the application from the I- the complainant. But, we were not given any CCTV footage nor we were allowed to watch any CCTV footage.

(12) On 27/09/2018, the Writer of the P.I. Mahidharpura Police Station Shri Vijaybhai Phone called me the complainant on my mobile phone and informed me that, the accused No.5 has lodged complaint against you and therefore, come to give your statement. Therefore, I, the complainant and my wife went to Mahidharpura Police Station. We were fully read the complaint No. C.A.452/2018 against me, the complaint and my daughter. The complaint was lodged against me and my daughter (11 years) by the accused No.8 to 15, wherein they have made totally false and unacceptable allegations in very dirty and vulgar language in more than 30 pages. Moreover, as the accused No.5 has made allegations in indecent and vulgar language in his statement before the police dated 17/09/2018, therefore, I, the complainant asked for the CCTV footage of allegations against me and my daughter from the P.I. writer Vijaybhai. But, the Writer Vijaybhai got angry and told us that, this complaint has been received from the Joint Commissioner of Police, Shri Harekrishna Patel, therefore, you Pranavbhai and your daughter have to give the written statement that, from now onwards, I and my daughter will not make any trouble in the school. But, I told the Writer Vijaybhai that, any type of CCTV footage of allegations against us has not been given by the police or school authorities, therefore, I will not give any type of statement as requested by you. You can record the statement of the I- the complainant, but, my daughter will not come to the Police Station.

The information of Page No.34 and 35 of the application filed by the accused No.5 in C.A. No.452/2018 was obtained by me through RTI application. In this connection, I further state that, no action under section-107 of CrPC has ever been taken against me – the complainant and no bail as stated in it has been produced and a false action has been shown. I produce herewith the information obtained through RTI application of C.A. No.452/2018 as an evidence for Point No.14 vide further evidence list.

(13) On 04/10/2018, I – the complainant received a phone call from P.I. Writer Vijaybhai of Mahidharpura Police Station and called me to record my statement. Therefore, I – the complainant went to Mahidharpura Police Station and gave my statement and produced the school-diary and notebooks of my daughter as an evidence in favour of my daughter and showed that, there is no complaint in the diary of my daughter and there is no entry of allegations made against my daughter. On 04/10/2018, my wife made an application in writing to

Mahidharpura Police Station to seek CCTV footage from the school in connection with the allegations made against me by the accused No.5.

(14) *Despite the examination was commencing in the school from 05/10/2018, the accused No.2 sent a letter No.52/2018 to me – the complainant on 06/08/2018. It was a notice informing me to collect a school leaving certificate of my daughter from the school by 09/08/2018.*

(15) *I – the complainant made a complaint in writing to District Education Officer, Surat on 06/08/2018. I made the complaint in writing to the Education Officer in connection with the application made by the accused No.5 with false allegations against me – the complainant and my daughter. In this regard, the Officer assured a prompt action.*

(16) *On 06/08/2020, when I – the complainant returned home after giving the complaint in writing to the District Education Officer, the notice from the school informing to collect a school leaving certificate of my daughter by 09/08/2018 had been received and this notice also contained indecent words for my daughter.*

(17) *On 08/10/2018, I – the complainant made an application in writing to the District Education Officer regarding the notice by the school informing to collect a school leaving certificate of my daughter and requested the Officer to revoke the notice with immediate effect, because the examination of my daughter was commencing and she was appearing in examination regularly. Therefore, I made a complaint in this regard in oral as well as writing to the D.E.O.*

(18) *On 22/10/2018, when my daughter was present in the school and climbing down the stairs, the accused No.5 stopped my daughter on the stairs and showed a video in his mobile phone to her. It was video of my daughter adjusting her skirt in the Computer Lab. The accused No.5 showed this video in his mobile phone to my daughter and told her that, “Tell your father to collect your Leaving Certificate from the school, otherwise I will show this video to all the students and parents.” My daughter informed me – the complainant and my wife about the whole incident after returning home and I – the complainant did not send my daughter to the school for two days and thereafter, as the examination was commencing from 25/10/2018, I sent my daughter to the school.*

(19) *The school sent a notice to our house again on 03/11/2018. This notice also informed to collect a School Leaving*

Certificate of my daughter immediately. Therefore, I – the complainant made a complaint in writing to the District Education Officer in this regard again on 06/11/2018. Therefore, the D.E.O. immediately issued a notice to the school and took action.

(20) *As the school did not give me the CCTV footage sought by me earlier, I – the complainant made a complaint in writing to the District Education Officer and Mahidharpura Police Station on 17/11/2018 and sent a complaint to the Police Commissioner of Surat through RPAD on 22/11/2018 for obtaining the CCTV footage.*

(21) *I – the Complainant and my wife along with my friend, we personally met the accused of this case - Praful Shah on 19/11/2018 and have stated the entire facts of the application of C.A. no. 452/2018 and have also stated about the written assurance which was given by him on 20/03/2018. Also it was stated about the behavior done by Kalpesh Gandhi with my daughter – of the Complainant. But the accused person of this case – Praful Shah have state me that, “your daughter is dancing by lifting her petticoat and as she has filed the complaint against us – the teachers, so we have also filed a complaint against you”. The accused no. 3 of this case have threatened me – the Complainant that, “from now if any type of complaint will be filed against the school then I will take such steps that your daughter will not get admission in any of the school and will hand over the (school) leaving certificate and will defame you as well as your daughter.”*

(22) *The accused no. 6 of this case used to visit the class of my – the Complainant's daughter on 30/11/2018 and appreciated and encouraged the students who have increased the glory of school. Regarding this, he stared upon my daughter and said that, on one hand the other students are enhancing the pride of school where as on the other hand my daughter – of the Complainant have been filing false complaints against the Teachers of the school. Also he had demotivated and instigated my daughter in presence of all the children of her class, since that day, my daughter is suffering from severe mental stress. Hence, he have slandered my daughter by making completely false allegations against her.*

(23) *Though I – the Complainant have sought for the Register of Joint Commissioner of Police – Mr. Harekrishna Patel Sir through R.T.I. on 27/11/2018, but no any type of information regarding the said matter have been provided to me – the complaint. Such has not been provided to me till date.*

(24) *I – the Complainant have submitted a written complaint*

on 09/01/2019 to the Child Welfare Officer of the District and have stated to lodge the complaint against the Opponents as well as the responsible persons of this case to file the complaint as per law and to carry out necessary procedure against them. But no any procedure have also been initiated in the said matter.

(25) *On 16/01/2019, my wife – (of the Complainant) had forwarded a written complaint through Whats-App to the Respected Chair Person of Gujarat State Commission for Protection of Child Rights. Regarding which, the summons were issued by the said office on 23/01/2019 to the opponent nos. 2 and 5 of this case to remain present at the said office at Gandhinagar on 28/01/2016. On the date of the said hearing, I – the Complainant and my wife were present with all the evidence, but the opponent nos. 2 and 5 of this case were not present.*

(26) *My wife (of the Complainant) had submitted a reference to file the complaint in the Womens Police Station – Surat, at Umra on 22/01/2019, but no any compliant was entered.*

(27) *On 06/02/2019, the Educational Counselor of school - Accused no. 6 made my daughter (of the Complainant) to stand out side the Class in lobby and forcefully dictated a letter and compelled her to write the same in which a very slang (bad) language was used and my daughter was threatened in a very ungentle manner, the accused no. 6 had made to write (dictated) this letter, also he had threatened my (complainant's) daughter that, not to tell the fact regarding this matter at home or to anyone else. Thereafter, my daughter was took in the office and he spoke with him in abusive language and have threatened her by showing the (said) letter.*

(28) *In reference to the behavior done by accused no. 6 with my (the complainant's) daughter, my wife (of the Complainant) have forwarded a written application through WhatsApp message to Mrs. Jagruti Pandya – the Chair Person of Children Commission on 07/02/2019. Hence, Mr. Jayendra Thakur – Child Welfare Officer of Surat District have immediately visited at our home and have consulted with me (the complainant), my wife as well as inquired to my daughter and have left.*

(29) *I – the Complainant, my wife and my daughter, we together went to school on 08/02/2019 and have personally met the accused no. 6 of this case and have submitted a written demand to get the letter which was forcefully made to be written by my daughter as well the the C.C.T.V. footages of dt. 06/02/2019 – of inside the class*

room and the lobby of outside the class. Also the CCTV footage of the office of accused no. 6 of this case. But, the accused no. 6 of this case got angry upon me – the complainant and have stated to me as well as my wife that, “(only) a letter has been made to be written by your daughter, (I have) not committed rape on her.” On speaking such abusive words, he had pushed out me as well as my wife from the school.

(30) I – the Complainant and my wife went to Mahidharpura Po. Stn. at the afternoon time on 08/02/2019 and have represented the entire facts of the incident of dt. 06/02/2019 and 08/02/2019 before the P.S.I. - Mr. Arya sir. But, the P.S.I. stated that, the complaint shall not be lodged immediately, give a written application with all the incidents in detail. We will enter the complaint after investigating about the said details. So, my wife had submitted a written application (complaint) on 09/02/2019 in Mahidharpura Po. Stn.

(31) As my daughter (of the complainant) was very much shocked due to the incidents which took place on 06/02/2019 and on 08/02/2019, she refused to go to school. Hence, I – the complainant had stopped her to send to school from dt. 07/02/2019. Then after three to four days, my (complainant's) wife went to school to take notebooks and to represent about not sending (my daughter) to school. There, the accused no. 2 of this case have stated to my (complainant's) wife that, “if you will not send your daughter to the school, then we shall have to take action.”

(32) Hence, my (complainant's) wife wrote a letter on 18/02/2019 addressing to the accused no. 2 of this case, in which it was mentioned that, our daughter could not attend school at present due to insecure atmosphere of the school, she will only come to school to give the exams. On writing such, she have gone to hand over to accused no. 2 of this case, but he had not accepted it (the letter). Hence, my (complainant's) wife have forwarded this letter to the school through R.P.A.D. on 19/02/2019. The copies of this letter were also forwarded to The District Educational Officer (D.E.O.), District Child Welfare Officer (D.C.W.O.), to Mahidharpura Po. Stn. And to the Office of The Police Commissioner.

(33) Myself (the Complainant) and my wife were called by the police of Mahidharpura (Po.Stn.) for several times to record the statements. In which P.S.I.- Modhvadiya Madam have called me (the complainant) and my wife (of the the Complainant) on 15/02/2019 at Galemendi Police Choki to record the statements of both of us in reference to the application submitted on 09/02/2019. We both have

recorded the statements in presence of P.S.I. - Modhvadiya Madam and the P.S.I. Madam have stated me (the complainant) that the statement of your daughter will be recorded when it will be said by P.I. sir.

(34) *P.S.I. - Mr. Anjariya have called me (the Complainant) and my wife at Lal Darvaja Police Choki on 12/03/2019 to record our statements in reference to the application submitted to the Police Commissioner on 20/02/2019.*

(35) *P.S.I. - Modhvadiya Madam have informed through phone call to me (the complainant) and my wife on 12/03/2019 to remain present at Mahidharpura Po. Stn. On 13/03/2019 with all the documentary evidences, as we have to lodge the complaint against the school. Hence, I (the complainant) and my wife went to Mahidharpura Po. Stn. At 04:00 o' clock in the afternoon on 13/03/2019. During this time, P.S.I. - Modhvadiya Madam have made us (me- the complainant and my wife) to sit in the Po. Stn. from 04:00 o' clock to 09:00 o' clock till night and have examined all the documentary evidences. Also it was stated to me (the complainant) and my wife to come again at the Po. Stn. on 14/03/2019.*

(36) *I – the Complanant and my wife went to Mahidharpura Po. Stn. at 04:00 o' clock in the evening on 14/03/2019, but we were made to be seated till 10:00 o' clock at night, but the my complain (of the Complainant) was not registered and we were stated to come again at the Po. Stn.*

(37) *I (the Complainant) and my wife went to Mahidharpura Po. Stn. At 10:00 o' clock in the morning as well as in the evening on 15/03/2019. But, in the Po. Stn., we could not meet P.S.I. - Modhvadiya Madam. Then, my (complainant's) wife have made a phone call to P.S.I. - Modhvadiya Madam in the evening on 15/03/2019, in which the P.S.I. madam have accepted that, she has been discussing with her superior Officers regarding to register the complaint. The audio recording of the said conversation has been produced as an evidence.*

(38) *My (complaint's) wife used to frequently in touch (in contact) with P.S.I. - Modhvadiya Madam from dt. 01/03/2019 till dt. 20/03/2019. In which she have clearly admitted that, the complaint has been typewritten, only the signatures are to be obtained. The Audio recording of such facts have been produced in this complaint case. Also the P.S.I. - Modhvadiya Madam has informed that the words of accused no. 6 of the opponents of this case have also been mentioned in which it was said that - only a letter has been obtained, the rape has not been*

committed of your daughter. Such admission (of accused no. 6) is also mentioned. P.S.I. - Modhvadiya Madam called me (the Complainant) and my wife at Mahidharpura Po. Stn. On 20/03/2019 and informed that, the Police Commissioner Sir is refusing to take the complaint, from now you are not needed to come to Po. Stn.

(39) *A letter was posted at my (complainant's) home through Post on 24/03/2019, which I have received on 25/03/2019 from the letter box of my house. In this letter there was an explanation letter from Mahidharpura Police stating that our complaint shall not be registered and our application was filed. Such explanation letter was received.*

(40) *Thereafter, Zinal Jarivala – The Supervisor of School have informed us -the Complainant on writing letters on 11/05/2019 and on 21/05/2019, which were the notices to obtain the School Leaving Certificate.*

(41) *When the new Academic year was starting on 10/06/2019, on the same day, my (complainant's) wife and my daughter wrote a letter addressing to the staff members of School – ie. Zinal Madam as well as accused no. 2 of this case. The said letter was regarding (in reply of) the letters sent by Zinal Madam from the school on 11/05/2019 and on 21/05/2019, and regarding to sent our daughter to school from 10/06/2019. The entry about the said forwarded letter dtd. 10/06/2019 of mine (the Complainant) was done in the School Diary of new semester and noted on 25/06/2019 and the said letter was joint with the page no. 79 of the School Diary and was forwarded (to us).*

(42) *My (complainant's) wife have filed an Application in the Hon'ble High Court on 12/06/2019 vide Spl. Cr. Case no. 19350/2019, its registration no. was 7524/2019, in which an Order was passed by the Hon'ble High Court as follows..*

“The Learned Advocate for the petitioner seek permission to withdraw present petition with a liberty to take appropriate measures under section 36,154, 156(3) and 200 -or- any other provisions of the Code of Criminal Procedure-1973 before the appropriate Competent Court,

Permission as sought for is granted. The Petition stands disposed of as withdrawn with above liberty.

It is clarified that this Court has not examined the merits of the present petition.

Such Order was passed accordingly....

Hence, in this reference, it is prayed that;

- (1) *Request of the Complainant to initiate the procedure against all the accused persons of this case as per law, as well as those who are found out and revealed during the course of investigation of you – sir. As the accused persons of the said case are very rich, having political influence as well as they are famous in the society - whereas, I – the Complainant is a common man, hence the present complaint has been produced before you sir to get justice to my daughter against the accused persons of this case. Kindly initiate proper judicial procedure in this regard.*
- (2) *Request to register my complaint (of the complainant) as per Section 200 of Cr.P.C. as well as u/s. 352, 354(A), 354(D), 500, 504, 506, 509, 120(B) & 114 of I.P.C. - and - u/s. 75 of Juvenile Justice Care and Protection of Children Act -2015 as well as u/s. 11(2)(3)(4) (5), 12,16,20,21,22 of POCSO Act and also adding the sections which deems fit to Your Honour.*
- (3) *Request to grant other appropriate reliefs which deems fit in addition to the said application / complaint.*

<i>Place : Surat</i>	<i>Sd/- illegible</i>
<i>Dt. : 17/01/2020</i>	<i>(signature of the Complainant)</i>

[3] The aforesaid complaint came to be filed by the complainant for the offence punishable under Sections 352, 354(a), 354(c), 354(d), 500, 504, 506, 509, 120(b) and 114 of the Indian Penal Code and Section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and Sections 11(2)(3)(4)(5), 12, 16, 20, 21 and 22 of the POCSO Act against in all 15 accused persons including the officer of the Mahidhar Police Station. In furtherance thereto, the learned Additional Sessions Judge, vide its order dated 17th January 2020, directed the police to inquire and submit its report under Section 202 of the Cr.P.C.

[4] *Apropose* to the aforesaid, the concerned police station submitted its report at Exhibit : 5, and thereafter, the learned Additional Sessions Judge, Surat, after having examined the relevant witnesses and considered the inquiry report, found *prima facie* case for the offence punishable under Sections 323, 354(b) and 114 of the Indian Penal Code and Sections 7, 8 and 11 of the POCSO Act against the present accused persons only, and thereby, the complaint qua the other accused was dismissed by way of an order dated 11th July 2021.

[5] Being aggrieved and dissatisfied with the aforesaid, the present petitioners have approached this Court with the present petition for quashing of the proceedings under Section 482 of the Cr.P.C.

[6] It is pertinent to note that the Coordinate Bench of this Court, at the time of issuance of notice, vide its order dated 28th October 2021, *prima facie*, found that the ingredients under the provisions of the POCSO Act, does not spell out from the complaint, and thereby, the interim relief in terms of staying further implementation and operation of the order dated 31st July 2021 came to be granted.

[7] Before deciding this matter on merits and keeping in mind the

allegations and counter allegations, and more particularly, keeping in mind the interest of child, this Court has requested both the learned advocates appearing for the parties to try and resolve the issues amicably, and for which, time was granted by this Court. However, the learned advocate for the complainant has informed that the respondent No.2 is not ready and willing to settle the matter. Thus, this Court proceeded to decide the present matter on merits.

[8] I have heard Mr. Rashesh Sanjanwala, learned Senior Advocate with Mr. Tarak Damani, learned advocate for the petitioners and Ms. Moxa Thakkar, learned A.P.P. for the respondent No.1 – State of Gujarat and Mr. P. V. Patadiya, learned advocate for the respondent No.2 – complainant.

[9] Mr. Sanjanwala, learned Senior Advocate, at the outset, upon instructions, submitted that he does not press this petition so far as the offence punishable under Sections 323, 354(b) and 114 of the Indian Penal Code is concerned, and thus, the sole grievance raised against the invocation of the provisions under the POCSO Act, which, according to him, is nothing, but an abuse of the process of law, and thereby, if the present petitioners are put on trial for such an offence not only the

petitioners would be agonized, but the entire image of the institute would be jeopardized.

[10] Mr. Sanjanwala, learned Senior Advocate submitted that the provisions of Sections 7, 8 and 11 of the POCSO Act, from the bare reading of the complaint, are not made out nor the ingredients of the aforesaid offence are satisfied. Mr. Sanjanwala submitted that Sections 7, 8 and 11 of the POCSO Act, wherein “sexual intention” is *sine qua non*. Mr. Sanjanwala further submitted that bare reading of the provisions of Sections 7, 8 and 11 of the POCSO Act would make it abundantly clear that there has to be existence of “sexual intention” and in furtherance thereto, the act alleged to have been committed. However, according to Mr. Sanjanwala, in the entire complaint, the allegations of “sexual intention” has not been alleged. Thus, according to Mr. Sanjanwala, the proceedings under the POCSO Act would be not only a futility, but allowing it to continue the same would be nothing, but a sheer abuse of the process of law, and in turn, harassment to the present petitioners.

[11] By making the above submissions, Mr. Sanjanwala, learned Senior Advocate has prayed this Court to quash the proceedings qua the offence punishable under the POCSO Act.

[12] *Per contra*, Mr. P. V. Patadiya, learned advocate for the respondent No.2 – original complainant has vehemently opposed the present petition contending, *inter alia*, that *prima facie* case has been made against the present petitioners and thereby, no interference may be called for. Mr. Patadiya submitted that the allegations made against the petitioners are very serious in nature, and thereby, quashing of the complaint, at this stage, without leading any evidence, would not be justifiable.

[13] Mr. Patadiya has heavily relied upon explanation of Section 11 of the POCSO Act, to contend that “sexual intent” is a question of fact and thereby, the same is required to be proved by leading any evidence. Thus, Mr. Patadiya has prayed this Court to dismiss the present petition. Mr. Patadiya, however, could not be able to point out from the complaint that the averments have been made with regard to any act committed by the accused persons in furtherance of the “sexual intention”.

[14] By making the above submissions, Mr. Patadiya has prayed this Court to dismiss the present petition.

[15] I have heard the learned advocates appearing for the respective

parties and have gone through the materials produced on record. No other and further submissions have been canvassed by the learned advocates appearing for the respective parties, except what are stated hereinabove.

[16] Considering the materials produced on record and the allegations / counter allegations along with the documentary evidence, it emerges that there was a ongoing serious dispute between the school management and the complainant. The sum and substance of the allegations levelled by the complainant against the present petitioners and the entire school management that the child of the complainant, who was a student, was victimized by the management because the proactive nature of the complainant, who often raised voice against the management. Contrary to that, the allegation against the child, at the instance of the management, is that the child is much misbehaved student and series of complaints from the various parents of the other students received against the child of the complainant and pursuant thereto, because some action was proposed, the complainant started alleging against the entire management approaching the various authorities of the State Government.

[17] Be that as it may, the allegations are always subject to the

evidence that may be led before the Trial Court. So, at this stage, this Court would not form any opinion on the aspect of allegations. This Court would only be deciding the question with regard to the application of the provisions of the POCSO Act.

[18] In view of the aforesaid, the question that falls for the consideration of this Court is whether, on bare perusal of the complaint, the offence under the provisions of the POCSO Act can be said to be made out?

[19] So as to consider the aforesaid question, it would be apt to refer to the provisions of Sections 7, 8 and 11 of the POCSO Act as under:

“7. Sexual assault. - Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

“8. Punishment for sexual assault. - Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

“11. Sexual harassment.- A person is said to commit sexual harassment upon a child when such person with sexual intent,--

(i) utters any word or makes any sound, or makes any gesture or

exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or
(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or
(iii) shows any object to a child in any form or media for pornographic purposes; or
(iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or
(v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or
(vi) entices a child for pornographic purposes or gives gratification therefor.

Explanation.--Any question which involves '[sexual intent]' shall be a question of fact."

[20] So far as Sections 7 and 11 of the POCSO Act are concerned, plain reading thereof would reveal that to bring home the charges under Sections 7 and 11 of the POCSO Act, "sexual intention" is the foremost ingredient. In both the sections, offender must have a "sexual intention" and the offence should have been committed in furtherance of such "sexual intention". In both the sections, the legislature has laid much emphasis on the "sexual intention" of the offender. However, in the entire complaint, there is not a whisper about the "sexual intention" on

the part of the present petitioners. Further, if we consider the complaint, there is no allegation whatsoever in nature against the present petitioners that they have extended inappropriate / bad touch to the child of the complainant. The plain reading of the complaint and the allegations made therein would, prima facie, suggest that the management of the school i.e. the petitioners have extended harsh treatment to the child of the complainant under the guise of disciplinary issues. However, although the said conduct on the part of the school management is said to be harsh and disproportionate, but, certainly, cannot be said to be falling within the four corners of the provisions of the POCSO Act. Even if this Court takes the entire complaint as it is, in that event also, this Court has not found any allegation against the petitioners with regard to “sexual intention”. Thus, the basic ingredient i.e. “sexual intention” is completely missing from the entire complaint. Although explanation appended to Section 11 of the POCSO Act clarifies that the “sexual intention” is a question of fact, but, at the same time, in my view, the said fact has to be averred in the complaint so that in trial, the necessary evidence to that effect can be led. In the instant case, there is no such factual allegation made. Thus, in absence of any such factual allegation, it would be highly prejudiced for the petitioners to undergo and face trial for the offence punishable under the provisions of the

POCSO Act. Admittedly, in the entire complaint, there is no averment that the alleged offence said to have been committed in furtherance of any “sexual intention”. Thus, the basic element with regard to “sexual intention” is completely missing from the entire complaint. As explained in Section 11 of the POCSO Act, “sexual intent” is a question of fact, therefore, to bring home the charges of the offence punishable under the POCSO Act, there has to be a specific allegation about the “sexual intent” in the complaint, then and only then, the said fact should be left for the trial, wherein by evidence, the intention could be proved or not proved.

[21] In addition to the aforesaid, I may also take note of the fact that the learned Sessions Judge, while issuing process under the provisions of the POCSO Act, appears to have not applied its judicious mind and issued summons in a mechanical manner. In my view, when the basic ingredients under the provisions of the POCSO Act do not exist, the learned Sessions Judge should not have issued the summons in such a casual manner, which would amount to harassment to the person, who is summoned and put on trial for such a serious offence.

[22] The Hon’ble Supreme Court time and again has emphatically held that even issuance of process / summons, the Magistrate shall have to apply its judicious mind *prima facie* if not in details. The intention of the

Hon'ble Supreme Court behind the aforesaid is loud and clear so that no person shall have to face criminal case of a serious offence casually. [See **Pepsi Foods Ltd and another vs. Special Judicial Magistrate and others reported in 1998(5) SCC 749**].

[23] It would be apt to consider the law declared by the Hon'ble Supreme Court in the case of **State of Gujarat vs. Afroz Mohammed Hasanfatta reported in 2019 (20) SCC 538**, wherein the Hon'ble Supreme Court has laid down the law with regard to issue of process under Section 190(1)(a) of the Cr.P.C. The Hon'ble Supreme Court has quashed and set aside the order passed by the High Court of Gujarat, by which, the issuance of process on the basis of supplementary chargesheet, came to be quashed and set aside on the ground of being passed without recording reasons. The relevant observations of the Hon'ble Supreme Court in the case of **Afroz Mohammed (supra)** read thus:

“15. The first and foremost contention of the respondent-accused is that summoning an accused is a serious matter and the summoning order must reflect that the Magistrate has applied his mind to the facts of the case and the law applicable thereto and in the present case, the order for issue of process without recording reasons was rightly set aside by the High Court. In support of their contention that the summoning order must record reasons showing application of mind, reliance was placed upon Pepsi Foods Ltd. The second limb of submission of the learned senior counsel appearing for the respondent-accused is that there has to be an order indicating the application of mind by the Magistrate as to the satisfaction that there are sufficient grounds to proceed against the accused irrespective of the fact that whether it is a

charge sheet by the police or a private complaint.

16. *It is well-settled that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and the Magistrate is only to be satisfied that there are sufficient grounds for proceeding against the accused. It is fairly well-settled that when issuing summons, the Magistrate need not explicitly state the reasons for his satisfaction that there are sufficient grounds for proceeding against the accused. Reliance was placed upon **Bhushan Kumar and another v. State (NCT of Delhi) and another (2012) 5 SCC 424** wherein it was held as under:-*

*“11. In **Chief Enforcement Officer v. Videocon International Ltd. (2008) 2 SCC 492 (SCC p. 499, para 19)** the expression “cognizance” was explained by this Court as “it merely means ‘become aware of’ and when used with reference to a court or a Judge, it connotes ‘to take notice of judicially’. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.” It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. Under Section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code.*

12. *A “summons” is a process issued by a court calling upon a person to appear before a Magistrate. It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law. In other words, the summons will announce to the person to whom it is directed that a legal proceeding has been started against that person and the date and time on which the person must appear in court. A person who is summoned is legally bound to appear before the court on the given date and time. Wilful disobedience is liable to be punished under Section 174 IPC. It is a ground for contempt of court.*

13. Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a prerequisite for deciding the validity of the summons issued.” [underlining added]

17. After referring to **Bhushan Kumar, Videocon International Limited** and other decisions, in **Mehmood Ul Rehman v. Khazir Mohammad Tunda and others (2015) 12 SCC 420**, it was held as under:-

“20. The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in **Pepsi Foods Ltd. and another v. Special Judicial Magistrate and others (1998) 5 SCC 749** to set in motion the process of criminal law against a person is a serious matter.”

The above observations made in para (20) is in the context of taking cognizance of a complaint. As per definition under Section 2(d) Cr.P.C., complaint does not include a police report.

18. The learned senior counsel appearing for the respondent- accused relied upon various judgments to contend that while taking cognizance, the court has to record the reasons that prima facie case is made out and that there are sufficient grounds for proceeding against the accused for that offence. The learned senior counsel appearing on behalf of the respondent-accused relied upon judgments in the case of **Pepsi Foods Ltd. and Mehmood Ul Rehman** to contend that while taking cognizance, the Court has to record reasons that prima facie case is made out and that there are sufficient grounds for proceeding against the accused for that offence. On the facts and circumstances of those cases, this Court held that the order of the Magistrate summoning the accused must

reflect that he has applied his mind to the facts of the case and the law applicable thereto. However, what needs to be understood is that those cases relate to issuance of process taking cognizance of offences based on the complaint. Be it noted that as per the definition under Section 2(d) Cr.P.C, 'complaint' does not include a police report. Those cases do not relate to taking of cognizance upon a police report under Section 190(1)(b) Cr.P.C. Those cases relate to taking cognizance of offences based on the complaint. In fact, it was also observed in the case of Mehmood Ul Rehman that "under Section 190(1)(b) Cr.P.C., the Magistrate has the advantage of a police report; but under Section 190(1)(a) Cr.P.C., he has only a complaint before him. Hence, the code specifies that "a complaint of facts which constitutes an offence".

19. Section 190(1)(a) Cr.P.C. provides for cognizance of complaint. Section 190(1)(b) Cr.P.C. deals with taking cognizance of any offence on the basis of police report under Section 173(2) Cr.P.C. Complaint is defined in Section 2(d) Cr.P.C. which reads as under:-

"2. Definitions.

.....

(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."

The procedure for taking cognizance upon complaint has been provided under Chapter XV – Complaints to Magistrates under Sections 200 to 203 Cr.P.C. A complaint filed before the Magistrate may be dismissed under Section 203 Cr.P.C. if the Magistrate is of the opinion that there is no sufficient ground for proceeding and in every such case, he shall briefly record his reasons for so doing. If a complaint is not dismissed under Section 203 Cr.P.C., the Magistrate issues process under Section 204 Cr.P.C. Section 204 Cr.P.C. is in a separate chapter i.e. Chapter XVI – Commencement of Proceedings before Magistrates. A combined reading of Section 203 and Section 204 Cr.P.C. shows that for dismissal of a complaint, reasons should be recorded. The procedure for trial of warrant cases is provided in Chapter XIX – Trial of Warrant Cases by the Magistrates. Chapter XIX deals with two types of cases – A – Cases instituted on a police report and B – Cases instituted otherwise than on police report. In the present case, cognizance has been taken on the basis of police report.

20. In a case instituted on a police report, in warrant cases, under Section 239 Cr.P.C., upon considering the police report and the documents filed along with it under Section 173 Cr.P.C., the Magistrate

after affording opportunity of hearing to both the accused and the prosecution, shall discharge the accused, if the Magistrate considers the charge against the accused to be groundless and record his reasons for so doing. Then comes Chapter XIX-C – Conclusion of trial - the Magistrate to rendering final judgment under Section 248 Cr.P.C. considering the various provisions and pointing out three stages of the case. Observing that there is no requirement of recording reasons for issuance of process under Section 204 Cr.P.C., in Raj Kumar Agarwal v. State of U.P. and another 1999 Cr.LJ 4101, Justice B.K. Rathi, the learned Single Judge of the Allahabad High Court held as under:-

“8.....As such there are three stages of a case. The first is under Section 204 Cr. P.C. at the time of issue of process, the second is under Section 239 Cr. P.C. before framing of the charge and the third is after recording the entire evidence of the prosecution and the defence. The question is whether the Magistrate is required to scrutinise the evidence at all the three stages and record reasons of his satisfaction. If this view is taken, it will make speedy disposal a dream. In my opinion the consideration of merits and evidence at all the three stages is different. At the stage of issue of process under Section 204 Cr. P.C. detailed enquiry regarding the merit and demerit of the cases is not required. The fact that after investigation of the case, the police has submitted the charge sheet, may be considered as sufficient ground for proceeding at the stage of issue of process under Section 204 Cr. P.C., however subject to the condition that at this stage the Magistrate should examine whether the complaint is barred under any law, At the stage of Section 204 Cr. P.C. if the complaint is not found barred under any law, the evidence is not required to be considered nor the reasons are required to be recorded. At the stage of charge under Section 239 or 240 Cr. P.C. the evidence may be considered very briefly, though at that stage also, the Magistrate is not required to meticulously examine and to evaluate the evidence and to record detailed reasons.

8. A bare reading of Sections 203 and 204 Cr.P.C. shows that Section 203 Cr.P.C. requires that reasons should be recorded for the dismissal of the complaint. Contrary to it, there is no such' requirement under Section 204 Cr.P.C. Therefore, the order for issue of process in this case without recording reasons, does not suffer from any illegality.” [underlining added]

We fully endorse the above view taken by the learned Judge.

21. In para (21) of **Mehmood Ali Rehman v. Khazir Mohammad Tunda (2015) 12 SCC 420**, this Court has made a fine distinction between taking cognizance based upon charge sheet filed by the police under Section 190(1)(b) Cr.P.C. and a private complaint under Section 190(1)(a) Cr.P.C. and held as under:-

“21. Under Section 190(1)(b) CrPC, the Magistrate has the advantage of a police report and under Section 190(1)(c) CrPC, he has the information or knowledge of commission of an offence. But under Section 190(1)(a) CrPC, he has only a complaint before him. The Code hence specifies that “a complaint of facts which constitute such offence”. Therefore, if the complaint, on the face of it, does not disclose the commission of any offence, the Magistrate shall not take cognizance under Section 190(1)(a) CrPC. The complaint is simply to be rejected.”

22. In summoning the accused, it is not necessary for the Magistrate to examine the merits and demerits of the case and whether the materials collected is adequate for supporting the conviction. The court is not required to evaluate the evidence and its merits. The standard to be adopted for summoning the accused under Section 204 Cr.P.C. is not the same at the time of framing the charge. For issuance of summons under Section 204 Cr.P.C., the expression used is “there is sufficient ground for proceeding....”; whereas for framing the charges, the expression used in Sections 240 and 246 IPC is “there is ground for presuming that the accused has committed an offence....”. At the stage of taking cognizance of the offence based upon a police report and for issuance of summons under Section 204 Cr.P.C., detailed enquiry regarding the merits and demerits of the case is not required. The fact that after investigation of the case, the police has filed charge sheet along with the materials thereon may be considered as sufficient ground for proceeding for issuance of summons under Section 204 Cr.P.C.”

WEB COPY

[24] In view of the aforesaid, the Hon'ble Apex Court has, in no uncertain terms, held that the Court concerned, while issuance of summons, at least, has to give *prima facie* due consideration whether the alleged offence is made out and the ingredients thereof, *prima facie*, are satisfied or not. Admittedly, in the instant case, at the time of issuance of

summons / process against the present petitioners under the provisions of the POCSO Act, the learned Trial Court appears to have failed to apply its mind about applicability of the provisions of the POCSO Act, and thus, according to me, the same has resulted into serious miscarriage of justice.

[25] For the foregoing reasons, the present petition deserves to be partly allowed by quashing and setting aside the criminal proceedings qua the offence punishable under the provisions of the POCSO Act.

[26] Resultantly, the present Special Criminal Application is hereby partly allowed. The criminal proceeding under the provisions of Sections 7, 8 and 11 of the POCSO Act in connection with Criminal Inquiry Case No.2 of 2020 filed before the Special Court (POCSO), Surat is hereby quashed and set aside with a direction to the concerned Trial Court to proceed further against the present petitioners so far as the offences under the Indian Penal Code are concerned.

[27] Consequently, the connected Criminal Miscellaneous Applications also stand disposed of.

(NIRAL R. MEHTA,J)

CHANDRESH