

(2016) 03 UK CK 0012

In the Uttarakhand High Court

Case No : Writ Petition No. 131 of 2016 (M/S)

Abhay Chaudhary (Minor)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 01-03-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) AIR(Uttaranchal) 68

Hon'ble Judges : U.C. Dhyani, J.

Bench : Single Bench

Advocate : Mr. Pradeep Chamyal, Advocate, for the Appellant; Mr. Rakesh Thapaliyal, Asstt. Solicitor General and Mr. Vikas Pandey, Advocate, for the Respondent

Final Decision : Allowed

Judgement

U.C. Dhyani, J. (Oral) - By means of present writ petition, the petitioner seeks following reliefs, among others:

"(i) Issue a writ, order or direction in the nature of mandamus commanding the respondents to include the name of the petitioner in the list of selected students of class 6th admission (session 2015-16), declared by the Principal, Jawahar Navodaya Vidyalaya, Rudrapur.

(ii) Issue a writ, order or direction in the nature of mandamus commanding the respondents to give admission to the petitioner in class 6th standard for the session 2015-16."

2. According to the petitioner, his date of birth is 07.12.2004. A birth certificate issued by Registrar (Births & Deaths), Rudrapur (Annexure-3 to the writ petition) affirms the same. The petitioner applied for admission in Class VI in the Jawahar Navodaya Vidyalaya, Rudrapur, District Udham Singh Nagar. When a medical fitness test of the petitioner was conducted, the medical officer had some doubt about the age of the petitioner and informed the Principal, JNV, who, in turn,

referred the petitioner for determination of age before the Chief Medical Officer, Udham Singh Nagar.

3. The Chief Medical Officer, Udham Singh Nagar, on the recommendation of the Medical Board, certified that the age of the petitioner is approximately about 13 to 15 years as on 22.07.2015. Thereafter, the admission committee recommended cancellation of the admission of the petitioner and forwarded the same to the Chairman of the School Management Committee/District Magistrate concerned, who, in turn, accepted the cancellation proposal sent by the admission committee.

4. Learned counsel for the respondent Nos. 2 & 3 vehemently opposed the writ petition by submitting that the Chairman of the School Management Committee is not a party in present writ petition. Further, Shri Bhanju Ram Amar Primary School, Bhura Rani, Rudrapur, from where the petitioner obtained scholar's register & transfer certificate is also not a party. Bhanju Ram Amar Inter College, from where the petitioner obtained his date of birth certificate, is also not a party. The birth certificate of the petitioner issued by the Registrar (births/deaths), Rudrapur was issued only on 22.7.2015 just after the report of the medical board was obtained.

5. Learned counsel for the respondents further submits that there was a stipulation in the admission form that in case of doubt about the age of the applicant, the matter shall be referred to the Medical Board. It was further contended on behalf of the respondents that the writ petition is belated, inasmuch as the application of the petitioner regarding his admission was dismissed on 28.02.2015 and the present writ petition was filed in January, 2016.

6. Learned counsel for the petitioner placed a judgment rendered by Hon'ble High Court of Allahabad in Smt. Meenu v. IIIrd Addl. District & Sessions Judge, Kanpur Dehat & others, (2001) 92 R.D. 551, wherein it was held that:

"4. It is an indubitable fact that the date of birth of the petitioner as incorporated in the High School certificate is 05.3.1981. Nomination papers were filed on 16.6.2000. Only those persons who have completed 21 years of age on the date of nomination are entitled to contest the election. On 16.6.2000, the petitioner, according to her date of birth as recorded in the High School certificate was less than 21 years of age. The petitioner does not rely on the date of birth as recorded in the High School certificate as its correctness was challenged. The petitioner, therefore, got herself medically examined by the Chief Medical Officer who had issued a certificate on 04.8.2000 putting the estimated age of the petitioner as 23 years. On the strength of the medical opinion, the petitioner claims that her age on the date of filing of nomination paper was above 21 years. It would not be out of place to mention that the medical opinion can never be precise or exact. It gives approximate idea of the age based on the ossification test. In such opinion, there is always a variation of 2-3 years on both sides. On the face of the date of birth as recorded in the High School Certificate, the

medical opinion cannot prevail. There is a decision of this court on the point reported in *Kubernath Tewari v. Additional District Judge Ballia and others*, in which it was held that the date of birth given in the High School certificate has to be accepted as correct date of birth for the purpose of deciding a election petition. If the date of birth of the petitioner as recorded in the High School certificate is accepted in that event she was undoubtedly less than 21 years of age on the date of filing of the nomination paper and accordingly, she was not eligible to contest the election. Her election, therefore, has been rightly held to be void."

[emphasis supplied]

7. Learned counsel for the petitioner also placed reliance upon a decision of Hon"ble Apex Court in *Bhoop Ram v. State of U.P.*, (1989) 3 SCC 1), paras 6 & 7 of which are important and are being reproduced herein below for reference:

"6. The Learned counsel for the appellant argued that the Chief Medical Officer's certificate and the Sessions Judge's report regarding the age of the appellant are based only on their respective opinions whereas the school certificate produced by the appellant contains definite information regarding the date of birth of the appellant and hence the school certificate should prevail over the certificate of the doctor and the report of the Sessions Judge especially in the absence of any material to raise doubts about the truth of the entries in the certificate. The learned counsel further stated that the reason given by the Sessions Judge for rejecting the school certificate is merely based on his assumption that parents very often understate the age of their children at the time of their admission in schools in order to secure benefits for the children in their future years. On the other hand, the learned counsel for the State laid stress upon the report of the Chief Medical Officer since it was based upon the fusion of bones etc., and argued that the appellant should have been about 18 years of age on the date of the occurrence and hence the appellant is not entitled to invoke the provisions of the U.P. Children Act.

7. On a consideration of the matter, we are of the opinion that the appellant could not have completed 16 years of age on October 3, 1975 when the occurrence took place and as such he ought to have been treated as a "child" within the meaning of Section 2 (4) of the U.P. Children Act, 1951 and dealt with under Section 29 of the Act. We are persuaded to take this view because of three factors. The first is that the appellant has produced a school certificate which carries the date June 24, 1960 against the column "date of birth". There is no material before us to hold that the school certificate does not relate to the appellant or that the entries therein are not correct in their particulars. The Sessions Judge has failed to notice this aspect of the matter and appears to have been carried away by the opinion of the Chief Medical Officer that the appellant appeared to be about 30 years of age as on April 30, 1987. Even in the absence of any material to throw doubts about the entries in the school certificate, the Sessions Judge has brushed it aside merely on the surmise that is not unusual

for parents to understate the age of their children by one or two years at the time of their admission in schools for securing benefits to the children in their future years. The second factor is that the Sessions Judge has failed to bear in mind that even the trial Judge had thought it fit to award the lesser sentence of imprisonment for life to the appellant instead of capital punishment when he delivered judgment on September 12, 1977 on the ground the appellant was a boy of 17 years of age. The observation of the trial Judge would lend credence to the appellant's case that he was less than 10 (sic 16) years of age on October 3, 1975 when the offences were committed. The third factor is that though the doctor has certified that the appellant appeared to be 30 years of age as on April 30, 1987, his opinion is based only on an estimate and the possibility of an error of estimate creeping into the opinion cannot be ruled out. As regards the opinion of the Sessions Judge, it is mainly based upon the report of the Chief Medical Officer and not on any independent material. On account of all these factors, we are of the view that the appellant would not have completed 16 years of age on the date the offences were committed. It therefore follows that the appellant should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment when he was convicted by the Sessions Judge under various counts."

[emphasis supplied]

8. Hon"ble Supreme Court in *Ashwini Kumar Saxena v. State of Madhya Pradesh*, (2012) 9 SCC 750, has observed as follows:

"32. "Age determination inquiry" contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates. If available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a Panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year."

9. The decision rendered by Hon"ble Apex Court in *State of Madhya Pradesh v. Anoop Singh*, (2015) 7 SCC 773 clinches the issue in favour of the petitioner. Para 17 of the aforesaid decision is important in this context and is being reproduced herein below:

"17. The High Court also relied on the statement of PW-11 Dr. A.K. Saraf who took the X-ray of the prosecutrix and on the basis of the ossification test, came

to the conclusion that the age of the prosecutrix was more than 15 years but less than 18 years. Considering this the High Court presumed that the girl was more than 18 years of age at the time of the incident. With respect to this finding of the High Court, we are of the opinion that the High Court should have relied firstly on the documents as stipulated under Rule 12(3)(b) and only in the absence, the medical opinion should have been sought. We find that the Trial Court has also dealt with this aspect of the ossification test. The Trial Court noted that the respondent had cited *Lakhan Lal v. State of M.P.*, 2004 Cri. L.J. 3962, wherein the High Court of Madhya Pradesh said that where the doctor having examined the prosecutrix and found her to be below 18-1/2 years, then keeping in mind the variation of two years, the accused should be given the benefit of doubt. Thereafter, the Trial Court rightly held that in the present case the ossification test is not the sole criteria for determination of the date of birth of the prosecutrix as her certificate of birth and also the certificate of her medical examination had been enclosed."

[emphasis supplied]

10. It will also be worthwhile to reproduce Rule 12 of the Juvenile Justice (Care and Protection of Children) Act, 2000 herein below:

"12. Procedure to be followed in determination of Age. ? (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat; (b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such

evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i),(ii),(iii) or in the absence whereof, cause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

[emphasis supplied]

11. According to Annexure-1, which is an Admit Card of Jawahar Navodaya Vidyalaya Selection Test and which was issued by the Principal of Jawahar Navodaya Vidyalaya, the date of birth of the petitioner is 07.12.2004.

12. According to the birth certificate (Annexure-3 to the writ petition) issued by the Registrar, Births & Deaths, Rudrapur and the document (Annexure-4 to the writ petition) which is a Scholar's Register & Transfer Certificate issued by the Principal of Shri Bhanju Ram Amar Primary School, Bhura Rani, Rudarpur, the date of birth of the petitioner is the same, i.e., 07.12.2004.

13. Moreover, the Principal of Bhanju Ram Amar Inter College, Rudrapur has issued a certificate dated 17.04.2015 (Annexure-5 to the writ petition) to the effect that the date of birth of the petitioner is 07.12.2004.

14. According to the extract of family register (Annexure-10 to the writ petition), the petitioner was born in the year 2004. 15. There is no inconsistency in the aforesaid documents.

16. It is stated that the petitioner appeared before the medical officer, who, in turn, informed the Principal, JNV. Thereafter, the Principal, JNV referred the matter to the medical board for determination of age of the petitioner. Certain documents have been filed with the counter affidavit to show discrepancies in the documents filed by the petitioner and the respondents. Finally, the Chief Medical Officer, Udham Singh Nagar, on the basis of report of the medical board, opined that the age of the petitioner is about 13 to 15 years as on 22.07.2015.

17. According to learned counsel for the respondents, the petitioner's age is approximately between 13-15 years, whereas the petitioner contends that his age is less than 13 years. If the date of birth of the petitioner is reckoned as 07.12.2004, he was certainly below 13 years of age, which is the perfect age for admission in Class VI in Jawahar Navodaya Vidyalaya, Rudrapur.

18. Thus, this Court has no hesitation in coming to the conclusion that the date of birth of the petitioner is 07.12.2004. Even if the said age of the petitioner is disputed, the petitioner was certainly below 13 years at the time of admission.

19. One seat has already been left vacant in Class VI, vide interim order dated 12.01.2016 of this Court. The petitioner shall step into that vacant seat. 20. The writ petition is allowed. A mandamus is issued directing the respondents to give admission to the petitioner in Class VI (session 2015-2016) in Jawahar Navodaya Vidyalaya, Rudrapur without further loss of time.