

(2001) 05 GAU CK 0027

In the Gauhati High Court

Case No : Criminal Revision (P) No. 31 of 2001

Gulam Ali alias Babu Ali

APPELLANT

Vs

The State of Assam and Another

RESPONDENT

Date of Decision : 25-05-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 438
Penal Code, 1860 (IPC) — Section 366

Citation : (2002) CriLJ 758 : (2001) 3 GLT 79

Hon'ble Judges : N. Surjamani Singh, J

Bench : Single Bench

Advocate : G.N. Sahewalla, A.K. Goswami and P. Bora, for the Appellant; Public Prosecutor (for No. 1), S.C. Biswas and K.N. Bhattacharjee, (for No. 2), for the Respondent

Final Decision : Allowed

Judgement

N.S. Singh, J.—In this revision petition, the petitioner Sri Gulam Ali alias Babu Ali had questioned the validity of the orders dated 3-1-2001, 4-1-2001 and 8-1-2001 passed by the learned Chief Judicial Magistrate, Sibsagar in Sibsagar PS Case No. 208 of 2000 giving the custody of the k/girl, namely, Nazifa Nazneen Rasul to her father namely Md. Eunus Ali, the 2nd respondent herein thus rejecting the prayer of the present petitioner for allowing k/girl to live with him, by contending inter alia, that the petitioner fell in love with Smt. Nazifa Nazneen Rasul, a student of B.A. 2nd Year and she eloped with him and married as per Muslim Rites and customs and also under Special Marriage Act, 1954. But on the complaint by her father, Md. Eunus Ali a case being Dibrugarh PS Case No. 67/2000 was registered and accordingly, they were apprehended by police and they were produced before the learned Chief Judicial Magistrate and the learned Chief Judicial Magistrate after recording the statements of the k/girl u/s 164, Cr. P.C. allowed the petitioner to go on bail and she made statements u/s 164, Cr. P.C. and the kidnapped girl specifically stated that she was not kidnapped by the petitioner, but had gone voluntarily as she is major being 21

years of age and she wanted to live with the petitioner, however, the 2nd respondent forcibly took away the k/girl and subsequently, the petitioner took her again to his residence and started living together since 9-8-2000. But, the 2nd party respondent started lodging another Tejahar before the Sibsagar P.S. stating that his daughter was forcibly taken away by the petitioner and on the basis of it, Sibsagar PS Case No. 208/2000 u/s 366, IPC was registered and that, as there was apprehension of arrest of the petitioner, he moved anticipatory bail u/s 438, Cr. P.C. which was granted by this Court vide order dated 6-9-2000 passed in Bail Application No. 1579 of 2000. It is also the case of the petitioner that on 13-10-2000 the learned Chief Judicial Magistrate directed the Investigating Officer to produce the k/girl for recording her statement and accordingly, she was produced on 19-10-2000 and her statements were recorded by the learned Chief Judicial Magistrate wherein she also stated that her age is 21 years and expressed her desire and willingness to reside and stay with the petitioner and on that day the 2nd respondent also filed an application for custody of the k/girl, but the same was rejected and being aggrieved by the said order dated 19-10-2000 the said 2nd respondent filed a revision petition before this Court and this Court vide order dated 21-12-2000 disposed of the revision petition with a direction to the learned CJM, Sibsagar to direct appearance of the k/girl before him and after considering the medical report take a decision as to the age of the girl and pass appropriate order regarding her custody and this Court further directed that if she is above 18 years she shall be allowed to go to a place of her choice and subsequently, the learned Chief Judicial Magistrate by virtue of the impugned order dated 3-1-2001, 4-1-2001 and 8-1-2001 passed in Sibsagar PS Case No. 203 of 2000 gave custody of the k/girl Nazifa Nazneen Rasul to the 2nd Respondent Md. Eunos Ali and rejected the prayer of the petitioner for allowing her to live with him.

2. Mr. G.N. Sahewalla learned senior counsel appearing for the petitioner contended that the impugned orders are liable to be set aside inasmuch as the learned Chief Judicial Magistrate, Sibsagar committed manifest error of law in giving the custody of the girl to the opp. party No. 2 on the basis of a medical report issued by the Medical and Health Officer, Sibsagar which was obtained by the 2nd respondent by hook or by crook and, without considering the medical certificate issued by the Assam Medical College, Dibrugarh and also the statements of k/girl recorded u/s 164, Cr. P.C. and the Admit Card of the High School Leaving Certificate. It is also argued that the learned Chief Judicial Magistrate had lost the sight of documentary evidence like Admit Card by which the real age of the k/girl is established, but on the basis of a medical report issued by the Medical and Health Officer, Sibsagar, the learned Chief Judicial Magistrate acting upon it gave a wrong decision.

3. Mr. S.C. Biswas, learned counsel for the respondent No. 2 father of the k/girl argued that there is no infirmity or illegality in the impugned order inasmuch as the medical report so far submitted by the Medical and Health Officer, Sibsagar is best evidence and it has more evidentiary value than the admit card. It is also

submitted by Mr. Biswas that no case is made out by the petitioner for interfering with the impugned orders.

3-A. Now, this Court is to see and examine as to whether the impugned orders suffer from illegality, incorrectness or impropriety or any irregularity in the proceeding of the Chief Judicial Magistrate or not. I have perused all the available materials on record and am of the view that the petitioner could made out a case to justify the interference with the impugned orders with the following reasons :

(1) By virtue to the related orders passed by the learned Chief Judicial Magistrate in Dibrugarh PS Case No. 67 of 2000 the petitioner was allowed to go on bail as the learned Chief Judicial Magistrate, Dibrugarh held that the k/girl voluntarily eloped with the petitioner and apart from that the learned Magistrate concerned recorded the statements of the k/girl in connection with the said Dibrugarh PS Case No. 67 of 2000 on 8-3-2000 and the k/girl stated that she was 20 years at the relevant time and she is studying in B.A. 1st year in Menohari Devi Girls College and she likes to go with the petitioner, but not with her parents. This aspect was not examined by the learned Chief Judicial Magistrate, Sibsagar while passing the impugned orders, thus giving the custody of the k/girl to the 2nd respondent.

(2) The date of birth of the k/girl is 15th January, 1980 as per related Admit Card issued by the Board of Secondary Education, Assam, Guwahati as an Annexure-1 to the petition, this could not be controverted or by the 2nd respondent. Generally and ordinarily date of birth is assigned and given rather furnished by the parents of the students to the authority of the educational institute for their words and as such it has evidentiary value. By virtue of the said document marked Annexure-1 the age of the k/girl would be more than 20 years at the time of first elopement of the k/girl with the petitioner i.e. in the month of March, 2000. Secondly, there are two medical reports -- one medical report issued by the Medical and Health Officer, Sibsagar and the another report issued by the Assam Medical College, Dibrugarh, this is the admitted position. In the instant case, the learned Chief Judicial Magistrate, Sibsagar acted upon only with the medical report issued by the Medical and Health Officer, Sibsagar, but not the certificate issued by the Assam Medical College, and apart from it the learned Chief Judicial Magistrate opined that this Court found that the k/girl is above 16 years and below 18 years as seen in the related impugned order dated 3-1-2001 which according to me is not a right finding of the learned Chief Judicial Magistrate as this Court simply opined in the related order dated 21-12-2000 in Criminal Revision (P) No. 667 of 2000 that the certified copy of the medical report produced before the Court on that day shows that the Senior Medical and Health Officer after examining the X-Ray reports opined that the age of the girl is above 16 years and below 18 years and as such, it does not mean that this Court has already opined that the k/girl is below 18 years. For ascertaining the correct age of k/girl this Court directed the Chief Judicial Magistrate to examine into the matter under its wisdom and domine according to law, but the learned Chief

Judicial Magistrate, Sibsagar acting upon a particular medical report, opined that the girl is above 16 years, but below 18 years without considering the existing facts and circumstances of the case.

4. There is a medical report submitted by the Department of Forensic Medicine, Assam Medical College, Dibrugarh in connection with Dibrugarh PS Case No. 67 of 2000 (G.R. Case No. 254 of 2000) as an Annexure-C to the affidavit-in-reply of the petitioner by which the expert opined that the age of the k/girl is above 18 years and such report was made on the basis of Physical, Dental and Radiological examination done on Smt. Nafiza Nazneen Rasul. The existence of this important document was not at all considered by the learned Chief Judicial Magistrate, Sibsagar while passing the impugned order.

4-A. Be that as it may, it is a good commonsense, the k/girl whose date of birth is reflected as 15-1-80 in the related Admit Card as discussed above, which according to me the said date of birth of k/girl was recorded in the said Admit Card on the basis of the information given/laid by the father of the k/girl i.e. the respondent No. 2, and that the k/girl in her confessional statement recorded u/s 164, Cr. P.C. stated that she was 20 years at the relevant time and apart from that there is a medical report issued by a competent authority, namely, Department of Forensic Medicine, Assam Medical College, Dibrugarh as stated above by which the age of the k/girl has been determined as 18 years above, but the medical report of the Medical and Health Officer, Sibsagar speaks that k/girl is above 16 years and below 18 years. In such a circumstance, the learned Chief Judicial Magistrate, Sibsagar ought to have applied his judicial mind and good commonsense to the interpretation of law and fact but the learned Chief Judicial Magistrate, Sibsagar had failed to do it while passing the impugned order. From these existing facts and circumstances one could say particularly a man of reasonable prudence could say that the k/girl is above 18 years as she passed the Board of Secondary Education Examination in the year 1997 and she was reading in B.A. first year in the relevant time which could not be rebutted or controverted by the 2nd respondent i.e. by her father. This Court need not go more into depth as suffice is met to held that the k/girl Nazifa Nazneen Rasul is above 18 years at the time of alleged occurrence. However, this Court recall the words of J.R. Lucas of Merton College, Oxford who adorn Lord Denning for bringing common sense to the interpretation of law and, J.R. Lucas in an article in the Times on 17th September, 1980 said :

Although some think that the law should always be clear, in practice it is not, and we have recourse to Judges for authoritative interpretations. The only question is whether in interpreting what is unclear the law should be guided by common sense and give weight to considerations of expediency, justice and morality. Lord Denning thinks it should, others think not.

Mr. Lucas argued that a non-common sense decision is no more certain than one based on common sense. For the Laymen the law would be more predictable if based on common sense. Since laws apply to Laymen there is a good argument

for the development of the law to be influenced by common sense as well as legal reasoning. In a doubtful case there is a strong case for the use of common sense as it makes the law easier to predict and worthier of respect. A perceptive paragraph appeared in the Sunday Mirror on 16th October, 1966:

It is not that Lord Denning is excessively liberal. It is merely that he always seems to decide a case the way you or I wouldBut an odd man out who has the gift of bending it (the law) in the right direction, is something for which we can be truly grateful.

5. In view of the above position, this petition is disposed of with a direction to the learned Chief Judicial Magistrate, Sibsagar to direct the appearance of the k/girl Nazifa Naznnen Rasul before him and also the petitioner as well as the 2nd respondent and pass appropriate order thus allowing the k/girl to go to her place of choice and this shall be done within a period of 3 weeks from the date of receipt of this order. The parties are at liberty to obtain a certified copy of this order and submit the same to the learned Chief Judicial Magistrate for doing the needful as per this judgment.

6. In the result, the petition is allowed and disposed of finally.