
(2012) 12 AHC CK 0209
In the Allahabad High Court
Case No : Criminal R. No. 4694 of 2011

Jai Prakash Tiwari

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 06-12-2012

Acts Referred:

Constitution of India, 1950 — Article 251
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 68, 68(3),
68(4), 7A
Penal Code, 1860 (IPC) — Section 302, 394

Citation : (2013) 2 ACR 1383

Hon'ble Judges : Mushaffey Ahmad, J

Bench : Single Bench

Advocate : Servesh Kumar Mishra and Amresh Chandra Upadhyay, for the Appellant; Birendra Singh and M.P. Rai, for the Respondent

Final Decision : Allowed

Judgement

Mushaffey Ahmad, J.—We have heard Mr. Servesh Kumar Mishra-learned counsel for the revisionist and Mr. M. P. Rai-learned counsel for the respondents, and perused the record. The revisionist challenges the order dated 29.10.2011 passed by the learned Additional Sessions Judge (Temporary Ex-cadre) Court No. 1, Fatehpur on the application of the accused-respondent No. 2, Subhadra Pathak, u/s 7A of the Juvenile Justice (Care and Protection of Children) Act. 2000 (herein-after referred to as "The Act").

2. This is the second order passed on the application of respondent No. 2 claiming juvenility. The first order was passed by another Additional Sessions Judge rejecting the application. That order was challenged in Criminal Revision No. 2984 of 2012. which was allowed by this Court and the case was sent back to the lower court with the direction that a fresh inquiry be made in accordance with the observations made in the order of the revision, that is, the lower court was to ascertain whether the matriculation certificate and mark-sheet produced by the revisionist (accused) was genuine. and the date of birth shown in the

certificate had any reasonable basis. The learned Additional Sessions Judge passed this order after taking evidence from both the sides and held the respondent No. 2 as juvenile. He adopted the procedure given in the sub-rule (3) of Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (herein-after referred to as "The Central Rules") and rejected the evidence of the prosecution which included the certificates of school first attended. Junior High School, and High School failed.

3. The dispute in this revision is confined to the question whether the procedure provided under the Central Rules should apply to the facts or the procedure provided under U. P: Juvenile Justice (Care and Protection of Children) Rules, 2004 (herein-after to be referred to as the "U.P. Rules"), in determination of the age of the accused.

4. The matrix that brought on the facts of this case with regard to the age of respondent No. 2 discloses that the respondent claimed juvenility before the trial court in Case Crime No. 122 of 2008, under Sections 302 and 394, I.P.C. P.S. Dhata, district Fatehpur. He produced a Junior High School certificate and a High School Certificate which carried the date of birth as 9.8.1991. The documents were got verified by the witnesses. The prosecution on the other hand produced school certificates beginning from Primary School and Junior High School Certificates and a High School Certificate, in which the respondent-accused applied for but did not appear at the examination, and, therefore, failed. In these certificates the date of birth of the accused has been found entered as 1.8.1989. The incident having taken place on 14.9.2008. the accused was not juvenile on the date of occurrence if the age of the accused be calculated from 1.8.1989, and he certainly fell below 18 years if his age were counted from 9.8.1991. The Additional Sessions Judge passing the impugned order went alongwith the procedure given under Rule 12 (3) of the Central Rules, and, therefore, relied on the High School Certificate for determination of the age. Had he followed the U.P. Rules and considered certificates beginning from Primary School till High School (failed) the accused would not have been adjudged a juvenile.

5. Criminality bears heavily upon unbridled adolescence, which harbours both juvenility and adulthood with a fine divide. Judicial solicitude is confronted with endeavours with a vengeance to transgress the divide, and thus in the absence of express provision in the Act or the Rules to hear the other party even in this important matter, necessarily calls for notice to the aggrieved, who could help the Court in cross-verifying the claim of the accused with regard to his age. However In the present case, the matter has been pursued upto this Court by a member of the victim's family.

6. To resolve the question with regard to applicability of Central or State Rules, it is pertinent to reproduce Section 68 of the Act.

68. Power to make rules.--(1) The State Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act:

Provided that the Central Government may frame model rules in respect of all or any of the matters with respect to which the State Government may make rules under this section, and where any such model rules have been framed in respect to any such matter, they shall apply to the State until the rules in respect of the matter are made by the State Government and while making any such rules, so far as is practicable, they conform to such model rules. "(Added by amendment in the year 2006)

From the provisions of the aforesaid Section 68, three postulates emerge :

(I) State Government has been authorised to make rules to carry out the purposes of the Act.

(II) The Central Government may frame model rules in respect of all or any of the matters with respect to which the State Government may make rules under this section.

(III) And the model rules shall apply to the State until the rules in respect of the matter are framed by the State Government.

7. Learned counsel for the revisionist has argued that for determination of age under the Act. the U.P. Rules validly framed u/s 68 of the Act, should have been applied, and the certificate from the institution first attended should have been taken into account before relying on the Matriculation Certificate.

8. The learned counsel for the respondents on the other hand have contended that the rules with regard to the determination of age were required to be framed u/s 7A of the Act and Section 7A having been inserted by the Act of 33 of 2006, the rules made by the State Government were to be recast, and as such the Central Rules shall apply. Learned counsel prayed in aid of *Dharam Singh and Another Vs. State of U.P. and Others*, . Learned counsel for the respondents have also argued that Section 68 of the Act empowers the Central Government to frame model rules which will have effect during the period till the State Government has not framed the Rules. Learned counsel referred to sub-section (3) of Section 68 of the Act to impress that model rules required to have been approved by both the Houses of Parliament have the force of law as contemplated under Article 251 of the Constitution of India and must have precedence over the rules framed by the State Government.

9. Learned counsel also declaim that the revisional court has no power to enter into the facts and findings of the trial court and for this argument they refer to case law *Jabar Singh Vs. Dinesh and Another*, .

10. For the last argument it may be forthwith accepted that the revisional court has jurisdiction limited to looking into correctness, legality or propriety of any finding sentence or order. The revisional court cannot foray facts and capsize consistent conclusions.

11. Now, the first contention which is based on observations of this Court in para

12 of Dharam Singh's case (supra), may be assayed in the crucible of statutory law and its allowances.

Para 12 of the case may be reproduced as follows:

No Doubt in U.P., the Uttar Pradesh Juvenile Justice (Care and Protection of Children) Rules, 2004 have been framed, and Rule 22 (5) of the U.P. Rules provides as to how the juvenility is to be determined. In the U.P. Rules all the certificates referred to in the Central Rules as well as the medical opinion have been made admissible for deciding the question of juvenility but the U.P. Rules are silent with regard to preferences in the event of conflict between two or more certificates. More so the Rule 22 (5) of the U.P. Rules is silent as to how the juvenility is to be determined by the Court. It merely provides the procedure to be adopted by the Board for deciding the juvenility. Another important aspect is that the Act has been materially amended after framing of the U.P. Rules. Consequent thereupon Section 7A providing the procedure to be followed for deciding the question of juvenility has been brought on the Statute Book with effect from 22.8.2006, therefore, the U.P. Rules were required to be recasted keeping in view the provisions of Section 7A of the Act but it has not been done, therefore, the Central Rules providing the procedure as to how the question of juvenility is to be determined by the Court seems to have prevailing effect on the U.P. Rules. Section 68 of the Act empowers the Central Government to frame model rules which will have effect during the period the rules are not framed by the State. In view of the fact that the State of U.P. has not framed any rule keeping in view the provisions of Section 7A of the Act, the Central Rules referred to above would apply for the inquiry held u/s 7A of the Act. until the rule in respect of that matter is made by the State Government of the Uttar Pradesh.

12. Section 7A lays down measures to be taken when claim of juvenility is made. It does not enjoin framing of any Rules, much less the mode or nature of evidence to be taken in regard to age of an accused. So we conclude that the Rules have been framed u/s 68 and not u/s 7A of the Act.

13. Rules have been meant for carrying out the purposes of the Act. Viability of a set of Rules vis-a-vis the purposes of the Act may also be a ground for choice. Rule 12 (3) of the Central Rules is produced as follows:

12. Procedure to be followed in determination of Age : (1)...

(2)...

(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, Clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

The relevant U.P. Rule 22 (5) may be juxtaposed as follows :

22. Procedure to be followed by a Board in holding inquiries and the determination of age- (1)...

(2)...

(3)...

(4)...

(5) in every case concerning a juvenile or child. the Board shall either obtain-

(i) a birth certificate given by a corporation or a Municipal Authority; or

(ii) a date of birth certificate from the school first attended; or

(iii) matriculation or equivalent certificates, if available; and

(iv) in the absence of (i) to (iii) above, the medical-opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board, regarding his age; and when passing orders in such cases 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.

14. A perusal of the Rule 12(3) of the Central Rules shows that it gives precedence to matriculation or equivalent certificates with regard to entry of date of birth over certificates issued by the school (other than a play school) first attended or the date-of-birth certificate given by a Corporation or a Municipal Authority or a Panchayat. Rule 22, sub-rule (5) of the U.P. Rules on the other

hand gives the sequence of certificates to be considered and in the sequence, the birth certificate given by a Corporation or Municipal Authority is placed first and date of birth certificate from school first attended is placed above the matriculation or equivalent certificates, if available, which is placed in the last but before the medical opinion by a duly constituted Medical Board.

15. The determination of application of the Rules has to be made in the light of provisions contained in Section 68 of the Act. This empowers the State Government to frame rules, and the Central Government could also frame model rules in respect of or any of the matters with respect to which the State Government may make rules under this section, but it has been provided that where any such model rules have been framed in respect of any such matter, they shall apply to the State until the rules in respect of that matter are made by the State Government. Rule 96 of the Central Rules ingeminates it. The Act came into force on 1st April, 2001 and the State Government framed the rules u/s 68 which came into force on 1.5.2004. Central Rules inured on 26.10.2007. The Central rules or model rules are meant to apply to the matters in respect of which the State Government has not framed rules. But the U.P. Government having already framed Rules, the model rules cannot have any application unless the State Rules are inconsistent with the model rules.

16. The model rules may serve as guidance for the States that have not framed Rules. They are in the nature of stop-gap arrangement. The Kerala High Court takes the similar view in *Vidya v. Government of India*, 2010 Cri. 364, para 15.

17. If Central Rules were required to be placed before both the houses of Parliament [Section 68(3)], the State rules were also required to be placed before the Legislature of the State (Section 68 (4)). No inconsistency has been shown in the rules with regard to the determination of age except that the model rules give precedence to the entry of date of birth in the matriculation or equivalent certificates over any other certificate, whereas the U.P. Rules lay open choice of the Board to take into account the birth certificate given by a Corporation or a Municipal Authority or date of birth certificate from the school first attended or a matriculation or equivalent certificates. The Central Rules are exclusive in nature. They obligate the Board or Court to necessarily accept preferential documents or evidence leaving little room for the Board or Court to determine consistency. The U.P. Rules on the contrary are inclusive and allow the Board or Court enough opportunity of evaluating facts in their consistency and corroboration. Besides, regarded from pragmatic stand-point the U.P. Rules are better poised to carry out the purposes of the Act. As our view confronts the view of the Court expressed in para 12 of the judgment in *Dharam Singh v. State of U.P.* (supra) in regard to applicability of the U.P. Rules, the matter requires to be referred to a Larger Bench for the determination of the following questions:

1. Whether the U.P. Juvenile Justice (Care and Protection of Children) Rules 2004 need be recast consequent upon addition of Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended by Act No. 33 of 2006).

2. And In case it is found that they need not be recast whether the U.P. Juvenile Justice (Care and Protection of Children) Rules 2004 framed by State Government or The Juvenile Justice (Care and Protection of Children) Rules 2007 framed by the Central Government shall apply to the matter, in Uttar Pradesh.

Let the matter be placed before Hon"ble The Acting Chief Justice for exquisite orders.

Interim order, if any, shall continue till further orders.