

(2016) 08 MAD CK 0067

In the Madras High Court

Case No : H.C.P. Nos. 1441 of 2007, 1653 of 2011, 330, 350, 419, 523, 651, 655, 656, 660, 678, 687, 735, 961, 1349, 1449, 1725, 1726, 1743, 1916, 1949, 2583 of 2012 and 184, 2239 and 2553 of 2013, CrI.A. No. 407 of 2013, H.C.P. (MD) Nos. 900 of 2013, 430, 1249, 125

N. Gowthaman @ Babu

APPELLANT

Vs

The Government of Tamil Nadu

RESPONDENT

Date of Decision : 29-08-2016

Acts Referred:

Constitution Of India, 1950 — Article 14, 19(1), 20(1), 21, 161
Tamil Nadu Borstal Schools Act, 1925 — Section 2(1), 7(1), 8, 8(1), 8(2), 10, 10A, 11, 11(1), 13, 51
Indian Penal Code, 1860 — Section 27, 34, 53, 53A, 53A(4), 59, 124A, 132, 194, 302, 305, 396, 491
Prisons Act, 1894 — Section 3(1)
Code Of Criminal Procedure, 1973 — Section 31, 118, 360, 361, 401, 432 Reformatory
Schools Act, 1897 — Section 4(a), 15
Madras Children Act, 1920 — Section 3(3), 23
Juvenile Justice (Care And Protection Of Children) Act, 2015 — Section 2(35), 6, 9(2)
Madras Borstal Schools Act, 1925 — Section 8
General Clauses Act, 1897 — Section 2(27)
Tami Nadu General Clauses Act, 1891 — Section 3(15)
Evidence Act, 1872 — Section 106
Juvenile Justice Act, 2000 — Section 2(1), 7A, 33, 56
Tamil Nadu Prison Rules, 1983 — Rule 818, 828
Tamil Nadu Borstal Schools Rules, 1938 — Rule 5, 20

Citation : (2016) 5 CTC 225 : (2016) 3 MadWNCri 1 : (2016) 4 MLJCriminal 129 : (2016) 4 RCRCriminal 842

Hon'ble Judges : Mr. A. Selvam, Mr. M. Sathyanarayanan, Mr. B. Rajendran, Ms. R. Mala and Mr. P.N. Prakash, JJ.

Bench : Full Bench

Advocate : Mr. Abudu Kumar Rajaratnam, for the Appellant; Mr. A.N. Thambi Durai, Additional Public Prosecutor, for the Respondent

Final Decision : Disposed Off

Judgement

B. Rajendran and P.N. Prakash, JJ.—This Special Bench has been

constituted to untie the Gordian knot and answer the following questions which arose under the Tamil Nadu Borstal Schools Act, 1925 (for brevity "the Borstal Schools Act").

Part-I

(referred by a 3 Judge Bench comprising A. Selvam, B. Rajendran & P.N. Prakash JJ.)

1. Whether a Court is empowered to act under Section 8 of the Tamil Nadu Borstal Schools Act only upon arriving at a finding of conviction?
2. Whether the term "imprisonment" in Section 8 of the Tamil Nadu Borstal Schools Act, would include "imprisonment for life"?
3. Whether the decision rendered by the Full Bench of this Court in K. Thangammal v. State (2008) 1 MLJ (CrL.) 832 requires to be re-considered in view of the decision of the Hon'ble Supreme Court in the case of Kamalanantha and others v. State of Tamil Nadu reported in (2005) 5 SCC 194?

Part-II

(referred by P.N. Prakash, J.)

1. Whether the Tamil Nadu Borstal Schools Act, 1925 casts a duty upon the Court to examine whether an adolescent offender, who is convicted, would be entitled to the benefits of the Act?
2. Would the failure of the Court to examine this aspect at the time of conviction and sentence, give a vested right to the offender to claim the benefits retrospectively, even after crossing the age of 21 years, either before the Appellate Court or before HCP jurisdiction or under Section 10-A of the Act before the Government?
3. Whether under-trial prisoners will be entitled to the benefits of the Tamil Nadu Borstal Schools Act, 1925?
2. Before venturing to answer the aforesaid questions under reference, it may be apposite to trace the circumstances under which the aforesaid references were laid before us.
3. The bone of contention is the interpretation of the expression "sentence of imprisonment" occurring in Section 8 of the Borstal Schools Act qua the expression "imprisonment for life" in Section 53 of the Indian Penal Code.
4. In P. Shanmuganathan v. Secretary to Government, Home Department, Chennai and another [(2007) 1 MLJ (CrL.) 775], (for short "Shanmuganathan's case") a public interest litigation was entertained by a Division Bench of this Court (F.M. Ibrahim Kalifulla and K. Venkataraman, JJ.) and a direction was issued to the jail authorities to detain all adolescent remand prisoners in borstal schools and not to remand them to the regular prisons. Pursuant to the said

decision, the Government of Tamil Nadu issued G.O.(D) No.922, Home (Prisons IV) Department dated 12.08.2008 under Section 3(1) of the Prisons Act and under Section 3(1) of the Borstal Schools Act and declared the sub jails in various districts of the State as borstal schools for the purpose of keeping adolescent remand prisoners. A circular was also issued by the Registry of this Court to all the Magistrates in the State, calling upon them, not to remand adolescent prisoners to the regular jails, but, to remand them to the sub jails that were declared as borstal schools by the aforesaid Government Order.

5. In *Ramasamy v. State* [2000 (1) L.W. (Crl.) 142], (for brevity "Ramasamy's case"), a Division Bench of this Court (N. Dhinakar and K. Natarajan, JJ.) held that if an adolescent offender is convicted for imprisonment for life, he cannot be sent to jail and that he has to be released in terms of Section 10-A of the Borstal Schools Act. So holding, the Division Bench confirmed the conviction of the accused, but, quashed the sentence and set him at liberty. The relevant paragraph of the said judgment reads thus:

"15. Learned counsel appearing for the appellant/accused contends that the learned Sessions Judge was not justified in sentencing the accused to imprisonment for life since admittedly, the accused was an adolescent offender at the time of incident and also on the date of conviction, since he was below 21 years of age. According to him, under Section 10-A of the Tamil Nadu Borstal Schools Act, if an adolescent offender is convicted for capital punishment, he can be detained in a borstal school and he cannot be sentenced to imprisonment for life. We find every force in the contention."

6. Subsequently, in *Palanisamy @ Chinnasamy @ Vakkil and 3 others v. State* represented by Inspector of Police, Veeranam Police Station, Salem District [2006 (2) L.W. (Crl.) 883] (for brevity "Palanisamy's case"), a Division Bench of this Court (R. Balasubramanian and M. Jeyapaul, JJ.) held that the word "imprisonment" occurring in Section 8 of the Borstal Schools Act will not include "imprisonment for life" and that only the State Government will have the power to lodge an adolescent offender in a borstal school under Section 10-A of the Borstal Schools Act. The Division Bench further held that there is no automatic and vested right in an adolescent offender to be sent to a borstal school for detention. It may be relevant to state here that the Division Bench has referred to *Ramasamy's* case and has held as under:

"21.there is no automatic and vested right in an adolescent offender to be sent to a Borstal School for detention....."

22.As already stated, with greatest respect to the learned Judges, we state in all humility that in *Ramasamy's* case, this Court has not laid down any law that any adolescent offender, who is sentenced to imprisonment for life would, as a matter of right, be entitled to the benefit of Section 8 of the Tamil Nadu Borstal Schools Act."

7. Thereafter, one Thangapandi who was convicted and sentenced to

imprisonment for life for offence under Section 302, IPC read with Section 34, IPC by the Sessions Court on 28.03.2003, filed Crl. Appeal No. 754 of 2003 before this Court and a Division Bench of this Court dismissed the appeal on 23.02.2007 and confirmed the conviction and sentence. Thereafter, his mother Thangammal filed H.C.P. No.596 of 2007 contending that her son Thangapandi was aged 19 years 10 months and 18 days as on the date of conviction by the Trial Court i.e., on 28.03.2003 and therefore, he was entitled to invoke the provisions of the Borstal Schools Act. A Division Bench of this Court heard H.C.P. No. 596 of 2007 and found that there was an apparent contradiction between Ramasamy's case and Palanisamy's case and therefore, referred the matter to a Full Bench of this Court.

8. Accordingly, a Full Bench of this Court (Prabha Sridevan, N. Paul Vasanthakumar and S. Nagamuthu, JJ.) answered the reference in A. Thangammal v. State represented by the Home Secretary, the Government of Tamil Nadu and Others, [CDJ 2008 MHC 1123] (for brevity "Thangammal's case") by holding that the word "imprisonment" in Section 2(1) and Section 8(1) of the Borstal Schools Act would include "imprisonment for life". The Full Bench overruled the judgment of the Division Bench in Palanisamy's case and held that Section 8 of the Borstal Schools Act will apply to adolescent offenders sentenced to imprisonment for life. The Full Bench made a passing reference to Shanmuganathan's case and impliedly affirmed it.

9. While dealing with the suspension of sentence and bail application in Ragan @ Ragukumar (M.P. No.1 of 2013 in Crl.A. No.332 of 2013), a Division Bench of this Court (V. Dhanapalan and C.T. Selvam, JJ.) by an order dated 05.08.2013, seriously doubted the correctness of the conclusions in Shanmuganathan's case and Thangammal's case and referred the matter to the Hon'ble Chief Justice for constituting a larger Bench comprising not less than 4 Hon'ble Judges.

10. Pursuant to the said reference, a Full Bench (A. Selvam, B. Rajendran and P.N. Prakash, JJ.) was constituted, which went into the issue and formulated the questions of law enumerated in Part-I, supra, and placed the matter before the Hon'ble Chief Justice for constituting a larger Bench of not less than 4 Hon'ble Judges, inasmuch as Thangammal's case was decided by a Full Bench of 3 Hon'ble Judges.

11. One Gowthaman @ Babu was convicted and sentenced for imprisonment for life on 12.03.1999 in S.C. No.197 of 1998 by the Sessions Court and his appeals to the High Court and the Supreme Court were also dismissed. While so, Gowthaman @ Babu gave a representation dated 08.10.2011 to the Director General of Prisons, contending that as on the date of his conviction and sentence by the Sessions Court, i.e., 12.03.1999, he was 19 years and 9 months old and therefore, being an adolescent offender, he should have been sent to borstal school. The said representation was rejected by the Additional Director General of Prisons on 30.01.2012, challenging which, his mother D. Thilakam filed W.P.No.31209 of 2015, which came up before one of us (P.N. Prakash, J.), who

formulated the three questions in Part-II above and directed the Registry to place the matter before the Hon"ble Chief Justice to be decided by the Full Bench that has been constituted to decide the other issues arising under the Borstal Schools Act. On the orders of the Hon"ble Chief Justice, the 3 questions in Part-II above, have also been placed before us to be answered.

12. Heard Mr. Abudu Kumar Rajaratnam, Mr. R. Sankara Subbu, and Mr. S. Tamilarasan, learned counsel for the petitioners and Mr. Thambi Durai, learned Additional Public Prosecutor for the State.

13. M/s. Sankarasubbu, Abudukumar Rajaratnam and Tamilarasan, learned counsel, submitted that neither Shanmuganathan's case nor Thangammal's case requires re-consideration, because, an adolescent offender has a fundamental right under Articles 14, 20(1) and 21 of the Constitution of India, which cannot be impinged. They also submitted that the *raison d'etre* in Shanmuganathan's case for treating under-trial adolescent offenders on par with convicted adolescent offenders, satisfies the equality test under Article 14 of the Constitution of India. According to them, the Full Bench, in Thangammal's case, has relied upon a Constitution Bench judgment of the Supreme Court in *Pratap Singh v. State of Jharkhand and another* [(2005) 3 SCC 551], wherein, the international convention and object of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for brevity "the Juvenile Justice Act, 2015") has been discussed in detail and those principles have been borne in mind while interpreting the word "imprisonment" in Section 8 of the Borstal Schools Act and hence, the interpretation cannot be faulted.

14. Mr. Abudu Kumar Rajaratnam placed strong reliance on Section 361, Cr.P.C. and the law laid down by the Constitution Bench of the Supreme Court in *Bishnu Deo Shaw v. State of West Bengal* [(1979) 3 SCC 714] and submitted that the provisions of Section 361 Cr.P.C. being mandatory, infringement of the same, would lead to violation of Article 21 of the Constitution of India and hence, the order is judicially reviewable at any time.

History of the Borstal legislation:

15. The social history of the Borstal Schools Act has been vividly set down by the Supreme Court in *State of Andhra Pradesh v. Vallabhapuram Ravi* [(1984) 4 SCC 410] (for short "Vallabhapuram Ravi's case") and it requires no repetition. However, it may be necessary to state the legal evolution of the legislation for better appreciation of the issues at hand.

16. The prisons in the country were established by the Prisons Act, 1894 under which the prisoners were accommodated under warrants or order of Courts. The Reformatory Schools Act, 1897, provided for establishment of reformatory schools for the detention of youthful offenders. As per Section 4(a) of the Reformatory Schools Act, a youthful offender means any boy who has been convicted of any offence punishable with transportation or imprisonment and who, at the time of such conviction, was under the age of fifteen years.

17. Even before 1925, a Borstal School was established at Tanjore in order to bring adolescent offenders under reformatory influences, presumably under the Reformatory Schools Act, 1897. After the coming into force of the Government of India Act, 1915, the Governor of the Fort St. George in Council passed the Madras Children Act, 1920 (Madras Act IV of 1920), which made all the provisions of the Reformatory Schools Act, with the exception of Section 15, inapplicable in the Madras Presidency area. Section 3(3) of the Madras Children Act, 1920, as it then was, at the time of its passing, defined the expression "youthful offender" as follows:

"Youthful offender" means any person who has been convicted of an offence punishable with transportation or imprisonment and who at the time of such conviction was under the age of sixteen years."

18. Under Section 23 of the Madras Children Act, if an youthful offender who is above 12 years but less than 16 years is found to have committed an offence punishable with transportation or imprisonment, the Court may order him to be sent to a senior certified school. The said Act created two schools, viz., senior certified schools for offenders between 12 and 16 years of age and junior certified schools for those below 12 years. It must be remembered that the date of offence was not the criterion, but, the date of conviction was the criterion for sending a youthful offender to the senior or junior certified school.

19. In this background, a need was felt to deal with the offenders in the age group of 16 to 21 years who are capable of being reformed in tune with the Borstal movement that had gained momentum in England, pursuant to the efforts of Sir Evelyn Ruggles-Brise (1857-1937). (See Vallabhapuram Ravi's case).

20. Only in those circumstances, the Madras Legislature passed the Borstal Schools Act (Act 51 of 1926) to make provisions for the establishment and regulation of borstal schools for the detention and training of adolescent offenders. The statement of objects and reasons of the Borstal Schools Act reads as under:

"The object of the Bill is to provide for the detention of adolescent offenders in special institutions in which they will be given industrial training and other instruction and subjected to such disciplinary and moral influences as will be conducive to their reformation. It is now generally recognised that the period of adolescence is the most critical in an individual's life when the mind is specially susceptible to fresh impressions and when it is peculiarly important to prevent habits of immorality and crime from being formed, and that it is undesirable from all points of view to familiarise adolescents with ordinary jail life and bring them into contact with adult prisoners.

The experiment has been made during the last few years of sending adolescent prisoners to the Borstal School at Tanjore in order to bring them under reformatory influences - the main features of the system being the special and

individual training of the inmates and conditional release of such of them as appeared to deserve the privilege to enable them to enter the service of the societies or individuals. The results of the experiment have been satisfactory and the Bill is framed with a view to the expansion and extension of the system.

The chief defect of the existing system is the admission in Borstal cannot profit by the Borstal treatment. The present procedure about releases is also cumbrous as every case has to be dealt with under Section 401 of the Criminal Procedure Code."

21. From a reading of the Statement of Objects and Reasons set down above, it is clear that the borstal school is a special institution, in which adolescent offenders are to be given industrial training and other instructions, and subjected to such disciplinary and moral influences as will be conducive to their reformation. We are placing our emphasis on this because, a person lodged in the borstal school is bound to subject himself to a certain discipline, the relevance of which, will be made clear in the later portion of this order.

22. The expression "adolescent offender" was defined in the Borstal Schools Act, as follows:

"2(1) "Adolescent offender" means any person who has been convicted of any offence punishable with imprisonment or who having been ordered to give security under Section 118 of the Code of Criminal Procedure has failed to do so and who at the time of such conviction or failure to give security is not less than 16 nor more than 21 years of age."

(emphasis supplied)

23. Though the core of the expression "adolescent offender" has not undergone any serious change, yet, on account of the amendments brought to it by the Tamil Nadu Borstal Schools Amendment Act, 1989 (Tamil Nadu Act 13 of 1989), only the age limit has been changed and the present definition of the term "adolescent offender" is as follows:

"2(1) "Adolescent offender" means any person who has been convicted of any offence punishable with imprisonment or who having been ordered to give security under Section 118 of the Code of Criminal Procedure (Central Act V of 1898) has failed to do so and who at the time of such conviction or failure to give security is not less than 16 in the case of a boy and not less than 18 in the case of a girl, but not more than 21 years of age in either case."

(emphasis supplied)

24. Post independence, the Parliament passed the Children Act, 1960 for the Union Territories alone and that Act is still in vogue. The shift from "conviction" to "commission of the offence" was first introduced in the definition of the word "delinquent juvenile" in the Juvenile Justice Act, 1986. In *Arnit Das v. State of Bihar* [(2000) 5 SCC 488], a 2 Judge Bench of the Supreme Court held that the

crucial date to determine whether an accused is a juvenile or not under the 1986 Act is the date on which the accused first appears in the Court in any enquiry or proceedings. An attempt to have this reviewed by a larger Bench failed, inasmuch as a Constitution Bench of the Supreme Court in *Arnit Das v. State of Bihar* [(2001) 7 SCC 657] declined to answer the reference as the Constitution Bench found that the matter was only of academic interest.

25. In the Juvenile Justice Act, 2000, the expression "delinquent juvenile" was dropped and in its place, the expression "juvenile in conflict with law" was substituted. Section 2(l) of the Juvenile Justice Act, 2000, defined the expression "juvenile in conflict with law" as "a juvenile who is alleged to have committed an offence."

26. In *Pratap Singh's* case, a Constitution Bench of the Supreme Court reconsidered the decision in *Arnit Das v. State of Bihar* [(2000) 5 SCC 488] and held that the age of the offender must be reckoned from the date when the alleged offence was committed and overruled *Arnit Das's* case.

27. Following *Pratap Singh's* case, the Parliament amended the expression "juvenile in conflict with law" in the Juvenile Justice Act, 2000, by Central Act 33 of 2006 with effect from 22.08.2006 and made it clearer and explicit in the following terms:

"2(1) "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence."

28. In the Juvenile Justice Act, 2015, the expression "juvenile in conflict with law" has been dropped and in its place, the expression "child in conflict with law" has been introduced which reads as follows:

"2(13) "child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence."

29. The Juvenile Justice Act, 2015 defines a "juvenile" in Section 2(35) as follows:

"juvenile" means a child below the age of eighteen years."

30. By virtue of Section 6 of the Juvenile Justice Act, the age of the juvenile at the time of date of commission of the offence is relevant and not the date on which he was apprehended or the date of his conviction.

31. The Juvenile Justice Act is very sympathetic to a juvenile below the age of 16 years, but, while dealing with a juvenile above the age of 16 years as on the date of commission of a heinous offence, the Juvenile Justice Act empowers the Juvenile Justice Board to conduct a preliminary assessment and if it is satisfied that he should be tried before the regular court, de hors the fact that he was a juvenile on the date of commission of the offence, the Board can send him to a Children's court at the level of a Sessions Judge.

32. The Madras Children Act, 1920, was repealed after the Parliament passed the Juvenile Justice Act, 1986 (Central Act 53 of 1986), which was repealed by Act 56 of 2000 and now, the Central Act 56 of 2000 has been repealed by the Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) with effect from 01.01.2016.

33. We have extracted the provisions of the Juvenile Justice Act only to drive home the point that there is a paradigm shift in the thinking of the Parliament after Nirbhaya's case (2012) for dealing with juveniles above the age of 16 years who are involved in the commission of heinous offences.

Shanmuganathan's Case:

34. As stated above, in a Public Interest Litigation, the Division Bench in Shanmuganathan's case directed that under-trial prisoners in the age group of 18 to 21 years should also be lodged in the borstal school. The reason for coming to this conclusion can be found in paragraph 6 of the order, which reads thus:

"6. If after conviction of an adolescent offender it has been thought of by the legislature to order such detention only in a borstal school, it will have to be held that at the pre-conviction stage also the same principle should be applied and the Judicial Magistrate concerned, while ordering the detention of an adolescent offender, should ensure that such detention is entrusted with the custody of the borstal school and not in a regular jail. If any other course is adopted by the Judicial Magistrate, it would run counter to the object and purport of the enactment, namely, the Madras Borstal Schools Act and the same cannot be permitted to be continued."

35. Though the direction of the Division Bench was made with a noble objective, yet, the Division Bench failed to see the legal characteristics attached to a remand prisoner and a convicted prisoner. An under-trial prisoner cannot be categorised as an offender, because, his guilt has not yet been established in a Court of law and he has been directed by the order of a Court to be kept in judicial custody, pending decision by a Court about his culpability. An under-trial prisoner is a temporary guest in a gaol and can, at any time, be released on bail by the order of a Court.

36. Chapter XXXVIII titled "Under-trial and Remand Prisoners" in Tamil Nadu Prison Rules, 1983, envisages the treatment of under-trial prisoners. Rules 818 and 828 of the Tamil Nadu Prison Rules may be relevant and the same read thus:

"818 Under-trial prisoners exempt from labour :No under-trial prisoner shall be required to labour and nothing in Chapter XXIV shall apply to such prisoners.

828 General discipline.-

(1) Under-trial prisoners shall not be subjected to more restraint than is necessary for their safe custody, the maintenance of discipline and the enforcement of prison rules. They may be permitted to work in their yard if they

desire it, but shall not be employed outside it.

(2) They shall not be kept in their cells by day, but any under-trial prisoner who wishes to remain in his cell shall be allowed to do so."

37. From a reading of the above, it is self evident that unlike a convicted prisoner, an under-trial prisoner cannot be required to labour, because, he is in the custodia legis of a Court. He will have to be produced before the Court for extension of remand from time to time, whereas, borstal school was constituted for the purpose of giving sustained industrial training and other instructions to convicted prisoners in the age group of 18 to 21 years and they will be subjected to such disciplinary and moral influences as will be conducive for their reformation. This discipline cannot be imposed on an under-trial prisoner.

38. After the Borstal Schools Act was passed, the Government established a borstal school in Pudukkottai after closing down the borstal school at Tanjore. The rules framed under the Borstal Schools Act mandated certain minimum requirements for running a borstal school. For example, a borstal school is required to have a Psychologist, Physical Education Teachers, Band Masters, Secondary Grade teachers, Carpenters, Instructors, et al. Rules 5 and 20 of the Tamil Nadu Borstal Schools Rules, 1938, are worth extracting.

"Classification and Treatment of Inmates

5. Each school shall be divided into houses, each of which shall contain approximately the same number of inmates, care being taken to ensure that neither the best nor the worst inmates are concentrated in one house. Each house shall have a house-master who shall be selected by the Superintendent from the teachers and instructors of the school. A petty officer shall be appointed to assist each house-masters.

Daily Routine

20. All inmates, provided they are medically fit, shall be required to engage in drill, study and labour for eight hours every working day. The following daily routine shall be observed in the school:

5.30 a.m.

Unlocking

5.45 a.m.

Morning prayer, visit to latrine and ablutions 6 to 7 a.m. Parade and Physical Training

7 to 7.30 a.m.

Morning Meal

7.30 to 11 a.m.

Workshops, Schools, Agricultural Training, etc.

11 a.m. to 12.30 p.m.

Midday meal, prayer and rest

12.30 to 4 p.m.

Workshops, School and Agricultural Training, etc.

4 to 5 p.m.

Recreation and games 5 to 5.30 p.m. Bath

5.30 to 6 p.m.

Meals

6 to 7 p.m.

Lock-up

From 16 March to 15th June, inclusive, the recreation and games period shall start at such times between 4.30 p.m. and 5 p.m. as the Superintendent may determine, and the Superintendent may modify the latter part of the daily routine to such extent as he considers necessary."

39. The Division Bench of this Court failed to take note of the above essential requirements for establishment of a Borstal school and by a judicial fiat, directed the Magistrates in Tamil Nadu to send all under-trial prisoners in the age group of 18 to 21 years of age to borstal school, without being aware of the fact that there was only one borstal school at Pudukkottai. Had it been brought to the notice of the Division Bench that there was only one borstal school in the whole State of Tamil Nadu and that is at Pudukkottai, we doubt whether the Division Bench would have passed such an omnibus direction. The State Government could not brace itself to handle the sudden inflow of under-trial prisoners in the borstal school and by a knee-jerk reaction, the State Government notified all the sub jails as borstal schools in order to meet the exigency. A borstal school is not akin to proliferating nursery schools that are mushrooming in every locality these days.

40. The definition clause of the term "adolescent offender" unambiguously states that conviction is a pre-condition for detention in the borstal school. It does not admit of any other interpretation. It is trite that the words employed in a statute should be given their literal meaning, when there is no ambiguity. We quote Viscount Simon, L.C. in *Nokes v. Doncaster Amalgamated Collieries Ltd.* (1940) AC 1014 : (1940) 3 All ER 549.

"The golden rule is that the words of a statute must prima facie be given their ordinary meaning".

41. In *D.R. Venkatachalam and others v. Deputy Transport Commissioner and*

others [AIR 1977 SC 842], the Supreme Court has cautioned that Courts must avoid the danger of a priori determination of the meaning of a provision based on their own pre-conceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted.

42. The Division Bench, in its anxiety to accommodate under-trial prisoners in the age group of 18 to 21 years in the Borstal Schools has, expanded the very scope and object of the Borstal Schools Act, which is impermissible. The support drawn by the Division Bench in Shanmuganathan's case and by the Full Bench in Thangammal's case, from the provisions of the Juvenile Justice Act, in our view, is misplaced. At the risk of repetition, the Juvenile Justice Act deals with a child in conflict with law, who is below the age of 18 years at the time of commission of the offence irrespective of the age at the time of conviction, whereas, the Borstal Schools Act deals with convicted persons, who, on the date of conviction, is not less than 16 years in the case of a boy and not less than 18 years in the case of a girl, but, not more than 21 years of age in either case. Since the Juvenile Justice Act is a special enactment for dealing with juveniles in conflict with law, it will eclipse a certain portion of the Borstal Schools Act. In other words, a boy or a girl who is in conflict with law and who is below the age of 18 years, can never fall within the purview of the Borstal Schools Act, because, he or she will automatically come under the protective umbrella of the Juvenile Justice Act. To this extent, the Tamil Nadu Borstal Schools Act stands impliedly repealed by the Juvenile Justice Act. The Supreme Court noticed this anomaly in *Nagoor Pichai @ Badusha v. State, through Sub-Inspector of Police*, [(2013) 10 SCC 668] and observed as under:

"2. The age of a juvenile prior to the present Act was 16 years and a legal anachronism palpably exists requiring an amendment to the Borstal Schools Act substituting the age of 16 years by 18 years for a boy..."

43. The Tamil Nadu Borstal Schools Act will come into play only when the person, be it a boy or a girl, who is 18 years and above, commits an offence and gets convicted before he or she reaches 21 years of age. In the light of the above, there cannot be a complaint of violation of Article 14 of the Constitution of India, because, only when equals are treated differently, can one complain of discrimination. "A child in conflict with law" as defined by the Juvenile Justice Act, 2015 and an adolescent offender, who is 18 years of age and above, who suffers conviction before he reaches the age of 21 years are two different and distinct classes and they cannot be treated equally. For these reasons, we hold that the judgment of the Division Bench in Shanmuganathan's case does not lay down the correct proposition of law and is, ergo, overruled.

44. Now, let us resume our discussion on the Borstal Schools Act as it stood in the year 1925. Section 8 of the Madras Borstal Schools Act, 1925, as it stood in 1925, read as under:

"8. Power of Court to pass sentence of detention in Borstal school: Where it

appears to a Court having jurisdiction under this Act that an adolescent offender should, by reason of his criminal habits or tendencies, or association with persons of bad character, be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime, it shall be lawful for the Court, in lieu of passing a sentence of imprisonment, to pass a sentence of detention in a Borstal school for a term which shall not be less than two years and shall not exceed five years:

Provided that, before passing such sentence, the Court shall consider any report or representations which may be made to it as to the suitability of the case for treatment in a Borstal school and shall be satisfied that the character, state of health and mental condition of the offender and other circumstances of the case are such that the offender is likely to profit by such instruction and discipline as aforesaid."

45. The word "imprisonment" is not defined in the Borstal Schools Act. But, it is defined in the General Clauses Act, 1897 (Central Act) and the Tamil Nadu General Clauses Act, 1891.

46. Section 2(27) of the General Clauses Act, 1897 (Central Act) defines the expression "imprisonment" as under:

"Imprisonment" shall mean imprisonment of either description as defined in the Indian Penal Code."

47. Section 3(15) of the Tamil Nadu General Clauses Act, 1891, defines the expression "imprisonment" as under:

"(15) Imprisonment:

Imprisonment shall mean imprisonment of either description as defined in the Indian Penal Code, (Central Act XLV of 1860)."

48. The Indian Penal Code only describes the word "imprisonment" and this description has been declared as a definition by Section 2(27) of the General Clauses Act (Central Act) and Section 3(15) of the Tamil Nadu General Clauses Act, as stated above.

49. When the Madras Borstal Schools Act was passed in 1925, Section 53 of the Indian Penal Code provided the following punishments:

"53. Punishments: The punishments to which offenders are liable under the provisions of this Code are-

First,-death;

Secondly,-Transportation;

Thirdly,-Penal servitude;

Fourthly,-Imprisonment, which is of two descriptions, namely:-

(1) Rigorous, that is, with hard labour;

(2) Simple;

Fifthly,-Forfeiture of property Sixthly,-Fine"

50. The Indian Penal Code, 1861, did not envisage imprisonment for life nor transportation for a fixed period when it was first introduced on 01.01.1862. Sections 132, 194, 305 and 396 of the Indian Penal Code envisaged death or transportation for life or rigorous imprisonment for a term, which may extend to 10 years.

51. Section 59 of the Indian Penal Code, which was repealed in 1955, read as under:

"59. In what cases transportation may be awarded instead of imprisonment: In every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment."

52. Though transportation for a fixed period was not a form of punishment for any of the offences defined under the Indian Penal Code at the inception, subsequently, there were amendments which provided for transportation for a shorter term. For example, Section 124-A - "Sedition" was inserted by the Indian Penal Code Amendment Act 27 of 1870 and the punishment for sedition was "transportation for life or any shorter term to which fine may be added, or with imprisonment, which may extend to three years, to which fine may be added, or with fine."

53. As was pointed out In Re, Ganapati [1982 LW (Crl.) 217], it was on the basis of this amendment, Bal Gangadhar Tilak and V.O. Chidambaram Pillai were convicted under Section 124-A of the Indian Penal Code and were sentenced to transportation for fixed terms.

54. In 1955, Section 53 of the Indian Penal Code was amended, Section 53-A was introduced and Section 59 was deleted by the Code of Criminal Procedure Amendment Act, 1955 (Central Act 26 of 1955). Section 53, as it stands now, reads as under:

"53 Punishments: The punishments to which offenders are liable under the provisions of this Code are-

First-Death;

Secondly,-Imprisonment for life;

Thirdly,-Deleted

Fourthly,-Imprisonment, which is of two descriptions, namely, --

(1) Rigorous, that is, with hard labour;

(2) Simple;

Fifthly,-Forfeiture of property;

Sixthly,-Fine"

55. On a comparison of the present Section 53 of the Indian Penal Code with the erstwhile one, one can see that instead of "transportation", "imprisonment for life" has been substituted under the heading "Secondly"; penal servitude in "Thirdly" has been deleted and "Fourthly", "Fifthly" and "Sixthly" remain untouched.

56. The Full Bench, in Thangammal's case, had not appreciated these cardinal changes in the right perspective. The Full Bench, in Thangammal's case, had not only failed to notice the definition of the word "imprisonment" set down in the General Clauses Acts but also did not notice the fact that Section 53 of the Indian Penal Code had always categorised "transportation" (present "imprisonment for life") as distinct and different from "imprisonment".

57. If the expression "imprisonment" appearing in Sections 8 and 10 of the Borstal Schools Act is viewed through the prism of the definition of the expression "imprisonment" in the General Clauses Acts and Section 53 of the Indian Penal Code, it is limpid that the word "imprisonment" means "imprisonment other than imprisonment for life" and it falls within the category "Fourthly" of Section 53 of the Indian Penal Code.

58. The Full Bench had not noticed the definition of the word "imprisonment" in the two General Clauses Acts (supra) and had proceeded to draw inspiration from the judgment of the Supreme Court in Kamalanantha and others v. State of Tamil Nadu [(2005) 5 SCC 194], where, the expression "imprisonment" used in Section 31 of the Code of Criminal Procedure was the subject matter of discussion. In S. Mohan Lal v. R. Kondiah, [(1979) 2 SCC 616], the Supreme Court has very clearly held as under:

"It is not a sound principle of construction to interpret expressions used in one Act with reference to their use in another Act; more so, if the two Acts in which the same word is used are not cognate Acts. Neither the meaning, nor the definition of the term in one statute affords a guide to the construction of the same term in another statute and the sense in which the term has been understood in the several statutes does not necessarily throw any light on the manner in which the term should be understood generally. On the other hand it is a sound, and, indeed, a well known principle of construction that meaning of words and expressions used in an Act must take their colour from the content in which they appear."

59. Therefore, we overrule the decision in Thangammal's case and hold that the term "imprisonment" employed in Sections 8 and 10 of the Borstal Schools Act

will not include "imprisonment for life".

60. Now, we may incidentally have to give an answer to an important issue, the relevance of which is indeed seminal, i.e., at what stage, can the Court invoke Section 8 of the Borstal Schools Act?

61. A person can be convicted either by a Trial Court or by an appellate Court in an appeal against acquittal. At the time of conviction, he should be an adolescent offender. Section 8 of the Borstal Schools Act says "in lieu of passing a sentence of imprisonment" which means "instead of passing a sentence of imprisonment."

62. Section 11 of the Borstal Schools Act provides a complete answer to this question and the said provision reads as under:

"11. Preliminary inquiry and finding as to age of adolescent offender:

(1) Before passing a sentence under Section 8, the Court shall inquire into the age of the offenders and, after taking such evidence (if any) as may be deemed necessary, shall record a finding thereon stating his age as nearly as may be;

(2) A similar inquiry shall be made and finding recorded by every Magistrate not empowered to pass sentence under Section 8 before submitting his proceedings and forwarding an adolescent offender to the Chief Metropolitan Magistrate or other salaried Presidency Magistrate or the District or Sub-Divisional Magistrate as required by sub-section (1) of Section 7."

63. From a conjoint reading of Sections 8 and 11 of the Borstal Schools Act, it is clear that after pronouncing the judgment of conviction and before passing sentence, the decision as to send or not to send an adolescent offender to borstal school should be passed and not thereafter. When once a sentence of imprisonment is pronounced, the Court becomes functus officio and it cannot substitute that sentence of imprisonment with detention in a borstal school. Therefore, after the accused is convicted, when the accused is questioned by the Court with regard to sentence, it is open for him to plead that he may be detained in a borstal school in lieu of passing a sentence of imprisonment. The factors like age, character, etc. of the accused are factors, which are exclusively to the knowledge of the accused and it is for him to prima facie show to the Court under Section 106 of the Evidence Act, at the time of questioning of sentence, that he is an adolescent offender as defined by the Borstal Schools Act and that there are possibilities for him to reform, if sent to borstal school.

64. Section 8 of the Borstal Schools Act begins with the expression "when it appears to a Court", which means that the Court may also suo motu decide to exercise the powers under Section 8 or the attention of the Court may also be drawn by the accused for exercise of the powers under Section 8. Section 8 does not cast a duty upon the convicting court to make a roving enquiry in all the cases, where, the accused are convicted to first find out about the desirability of sending them to a borstal school and thereafter, pass a sentence. In cases, where, several accused stand in the dock, the convicting court cannot be

expected to conduct enquiry in respect of each of the accused to find out whether it will be desirable for the Court to send them to borstal school. Where the convicting court does not suo motu decide to exercise the power under Section 8 and the convict also does not invite the attention of the Court, no grievance can be made of it in a collateral proceedings like habeas corpus petitions and writ petitions. It does not mean that the appellate court or the revisional court is denuded of power to send a convict prisoner to borstal school under Section 8 of the Borstal Schools Act. However, the prisoner should not have crossed the age of 21 years when the appellate Court or the revisional court, as the case may be, is passing the judgment or order. Those Courts should also conduct the enquiry contemplated under Sections 8(2) and 11(1) of the Borstal Schools Act before passing an order in that regard.

65. Mr. Abudu Kumar Rajaratnam placed reliance upon Section 361, Cr.P.C. and the Constitution Bench judgment of the Supreme Court in Bishnu Deo Shaw's case and submitted that a duty is cast upon the Trial Court to give special reasons in the judgment for not giving the benefits to an adolescent offender under the Borstal Schools Act.

66. Section 361 Cr.P.C. reads as under:

"361. Special reasons to be recorded in certain cases: Where in any case the Court could have dealt with,--

(a) an accused person under section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or

(b) a youthful offender under the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders, but has not done so, it shall record in its judgment the special reasons for not having done so.

67. Section 361 can never apply to an adolescent offender and it can apply only to a youthful offender as defined under the Children Act, 1960 or for the similar expression in cognate Acts. The cognate of the Children Act, 1960 is the Juvenile Justice Act, 2015 and definitely, not the Borstal Schools Act for the simple reason that, the Children Act, 1960 and the Juvenile Justice Act, 2015, deal with persons below 18 years of age and the Borstal Schools Act will apply only to those who are between the age group of 18 and 21 years, notwithstanding the inclusion of boys in the age group of 16 to 18 years in the definition of the expression "adolescent offender".

68. We have already extracted the definition of the word "Youthful offender" used in the Children Act, 1960 and expressions similar to it have been used in the various Juvenile Justice Acts, which we have extracted above. In other words, Section 361 Cr.P.C. will come into force only in respect of an offender below the age of 18 years. Whereas, the Borstal Schools Act, would apply to a person who is aged 18 years and above. The determinative factor in an enactment relating to

children, is the date of commission of the offence, but, the determinative factor under the Borstal Schools Act is the date of conviction of the offender. That apart, in *Chhanni v. State of U.P.* [(2006) 5 SCC 396], the Supreme Court has considered the provisions of Sections 360 and 361, Cr.P.C. and has held as follows:

"8. Enforcement of the Probation Act in some particular area excludes the applicability of the provisions of Sections 360 and 361 of the Code in that area."

69. In the State of Tamil Nadu, the Probation of Offenders Act applies in all its fours and by virtue of the above judgment, the provisions of Sections 360 and 361 Cr.P.C. cannot be pressed into service. In *Bishnu Deo Shaw's case* (supra), the Supreme Court was dealing with a regular appeal in which the accused was sentenced to death. While discussing the death sentence, the Constitution Bench has emphasised the importance of Section 361 Cr.P.C. and the death sentence was converted to imprisonment for life.

70. Coming to Section 10-A of the Borstal Schools Act as to the power of the Government, it may be necessary to extract the provision as amended by Act 13 of 1989:

"10-A Power of State Government to transfer offenders sentenced to transportation to Borstal Schools: "State Government may, if satisfied that any offender who has been sentenced to transportation either before or after the passing of the Madras Borstal Schools (Amendment) Act, 1939 (Madras Act XIII of 1939), and who at the time of conviction was not less than 16 in the case of a boy and not less than 18 in the case of a girl, but not more than 21 years of age in either case might with advantage to be detained in a Borstal School, direct that such offender shall be transferred to a Borstal School, there to serve the whole or any part of the unexpired residue of the sentence. The provisions of this Act shall apply to such offender as if he had been originally sentenced to detention in a Borstal School."

71. It is pertinent to point out at this juncture that the Tamil Nadu Act 13 of 1989 did not touch the expression "transportation", but, it only altered the age in Section 10-A pursuant to the coming into force of the Juvenile Justice Act, 1986.

72. The Legislature did not choose to amend Section 8 of the Borstal Schools Act either in 1939 when Section 10-A was introduced nor subsequently in 1989, when the age was changed, because, the Legislature did not want to empower the Court under Section 8 of the Borstal Schools Act to send an adolescent offender liable to be sentenced for transportation to the borstal school. The Legislature wanted that power to be given only to the Government and that is why Section 10-A was inserted in 1939, empowering the Government to send an offender who has been sentenced to transportation and who, at the time of conviction, was not less than 18 years of age nor more than 21 years of age.

73. Section 53-A(4) of the Indian Penal Code, inserted vide the Criminal

Procedure Amendment Act, 1955, reads thus:

"53-A Construction of reference to transportation:

(4) Any reference to "transportation" in any other law for the time being in force shall,--

(a) if the expression means transportation for life, be construed as a reference to imprisonment for life;

(b) if the expression means transportation for any shorter term, be deemed to have been omitted."

74. Sub-section (4) of Section 53-A of the Indian Penal Code, extracted above, provides the complete answer for the meaning of the term "transportation" in Section 10-A of the Borstal Schools Act. The word "transportation" in the Borstal Schools Act simply means "imprisonment for life".

75. In *Kishori Lal v. Emperor*, [AIR (32) 1945 PC 64], the Board had to deal with a case of a prisoner who was sentenced to transportation for life and who was kept in a jail in India and he pleaded that he would be entitled to remand like any other ordinary prisoner. The following passage from the said judgment of the Privy Council, is worth extracting:

".Learned commentators on the criminal law of India, in particular Lord Macaulay, in the introduction to the Penal Code to which reference has already been made, have pointed out that a sentence of transportation is one likely to be regarded with particular terror by Hindoos, largely because of their dread of crossing "the black water", the loss of caste which a journey overseas entails and of the uncertainty whether they will ever see their homes again. No doubt therefore the sentence has been preserved for its deterrent effect and because in certain cases it may be both useful and desirable to send convicts to the islands. But, at the present day transportation is in truth but a name given in India to a sentence for life and, in a few special cases, for a lesser period, just as in England the term imprisonment is applied to all sentences which do not exceed two years and penal servitude to those of three years and upwards. A convict sent to penal servitude may nowadays serve his sentence either in a prison known as a convict establishment or in an ordinary local prison and in the latter, he will be subject to exactly the same discipline, conditions of labour and treatment generally as those sentenced to imprisonment. So, in India, a prisoner sentenced to transportation may be sent to the Andamans or may be kept in one of the jails in India appointed for transportation prisoners where he will be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment....."

76. The aforesaid judgment was quoted with approval by a Constitution Bench of the Supreme Court in *Gopal Vinayak Godse v. State of Maharashtra and others* [AIR 1961 SC 600].

77. In fine, we hold that the expression "transportation" in Section 10-A of the

Borstal Schools Act shall mean "imprisonment for life" and only the Government has the power under Section 10-A of the Act and not the Court.

Vested Right:

78. The next question that falls for our consideration is whether a person has a vested right to claim the privilege under the Borstal Schools Act by contending that as on the date of his conviction, he was only 21 years and therefore, he should have been lodged in the borstal school by the convicting court.

79. The expression "vested right" has been lucidly explained by a Full Bench of this Court in *G. Narayanaswamy Naidu and Others v. the Inspector of Police, Mayavaram and another* [AIR (36) 1949 Madras 307] in the following terms:

"132.In order that a right might become vested, there must be an antecedent act or omission with an intention to avail of or take advantage of the privilege; otherwise, as is well known the right is only contingent. A mere right to take advantage of a certain privilege cannot be styled as a vested right....

"134.The whole question is whether the petitioners have a vested right to avail themselves of Section 491 even if they do not move their little finger or take any steps in that direction. Certain observations in the judgment of Fazl Ali, J. in *Banwari Gope v. King Emperor*, 22 Pat. 175 : (AIR (30) 1943 Pat. 18 : 44 Cr. L.J. 273 (F.B.)) tend to show that in the case of criminal proceedings instituted against a person, he is deemed to have a right of appeal vested in him in accordance with the law existing on the date when the criminal proceedings were instituted. By implication it can be inferred from this decision, that in order that a right might be vested in an individual there must be some overt action taken by him or some proceeding instituted against him. As the learned Judge observes, as soon as a Magistrate takes cognisance of an offence there is a criminal case against the accused person and at that point of time he acquires such a right of appeal or revision as the case may be as the law confers upon him. The right of appeal being a right incidental to and continuing from an accusation alleged against a person is not exactly the same as the right to apply for writ of habeas corpus for any illegal detention. Probably a person arrested and detained under the Public Safety Act (I (1) of 1947) may have a right vested in him from the moment of his arrest to have recourse to the provisions of Madras Act (I [1] of 1947) regarding the service of the reasons for the detention on him and the right to have his case sent before the Advisory Board constituted by the Act. In one sense, these advantages may be said to be rights vested in him. But I find it impossible to hold that a person detained under the Public Safety Act has got a vested right of applying for a writ of habeas corpus under Section 491 by mere inaction....."

The provisions of the Borstal Schools Act are a privilege and they do not confer any vested right on an adolescent offender. As pointed out by the Full Bench, *supra*, an adult cannot, remain dormant and after missing the bus, be heard to complain later that he has been denied the benefits under the Borstal Schools

Act. Such a privilege is available to a juvenile under the Juvenile Justice Act, since the "juvenile in conflict with law" has the vested right to claim all the protection under the Act at any time, in the light of the judgment of the Supreme Court in *Abuzar Hossain @ Gulam Hossain v. State of West Bengal* [(2012) 10 SCC 489], wherein, the Supreme Court considered Section 7-A of the J.J. Act, 2000 and held that the plea of juvenility can be raised at any time and in any stage of the proceedings. Section 9(2) of the J.J. Act, 2015 which is in pari materia with Section 7-A of the J.J. Act, 2000, clinches the issue and the same reads thus:

"(2) In case a person alleged to have committed an offence claims before a court other than a Board, that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence, the said court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly as may be:

Provided that such a claim may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such a claim shall be determined in accordance with the provisions contained in this Act and the rules made thereunder even if the person has ceased to be a child on or before the date of commencement of this Act."

Such a provision is not available in the Borstal Schools Act, because, one cannot be certain as to when the trial in a case will get over. Whereas, under the Juvenile Justice Act, there are two fixed factors, viz., the age of the victim, vis-a-vis, the date of commission of the offence. These two are not uncertain variables and they are two fixed factors which can be determined by a post hoc enquiry. If, in such an enquiry, whenever conducted, it is found that the person was a juvenile on the date of the commission of the offence, it is presumed that he would not have committed the offence with the same mens rea as that of an adult. Consequently, he will be automatically entitled to the benefits under the Juvenile Justice Act in the light of Section 9, *ibid*.

80. On the contrary, under the Borstal Schools Act, the uncertain variable factor is the date of culmination of a criminal trial. Even assuming for a moment that the criminal trial culminates before the person crosses the age of 21, yet, the Act does not say that he would be automatically entitled to the benefits of the Borstal Schools Act. In the Borstal Schools Act, only after due enquiry under Sections 8(2) and 11(1), can the Court either grant or refuse the privilege. No Court is under a compulsion to send an adolescent offender to the borstal school. Hence, the comparison between the provisions of the J.J. Act and Borstal School Act on this aspect, is indeed misconceived. In fact, out of 29 States in our country, there are only 10 States which have the Borstal Schools Act. The State Legislature can, at any time, repeal the Borstal Schools Act and none can complain of it. We are in entire agreement with the reasoning of the Division

Bench in Palanisamy's case on this aspect. We, therefore, hold that no Habeas Corpus Petitions can be maintained by a prisoner on the premise that he was not sent to borstal school by the convicting Court, though he was an adolescent offender at the time of conviction. Similarly, a prisoner cannot make a petition to the Government under Section 10-A of the Borstal Schools Act, after he has crossed 21 years of age, for sending him to borstal school under Section 10-A of the Borstal Schools Act on the ground that he was an adolescent offender at the time of his conviction.

81. The contention of Mr. Abudu Kumar Rajaratnam that trials may get prolonged for no fault of the offender and therefore, the provisions of the Borstal Schools Act should be applied at any time, deserves to be stated only to be rejected. Under the Old Codes, the High Court had original criminal jurisdiction and jury trials were in vogue. A Criminal trial was a serious and solemn affair then. It may be interesting to trace the genesis of the expression "Sessions Court". Like Parliament holding its Winter Session, Budget Session, Summer Session, etc., the High Court used to hold Criminal Session every year for a fixed period as notified by the Registrar. The Criminal Session itself began with the Portfolio Judge coming in a procession from his chambers with mace bearers, Sherif of Madras, Commissioner of Police and members of the public. The dates for various trials were made known in advance and the jurymen intimated. Before the end of the session, the pending trials were completed. Thus, the word "Sessions" had its origin there and we continue to use it to denote territorial divisions and refer to the Judge in charge of the specified territory as "Sessions Judge." We may give here the dates and events of a sensational murder case, popularly called, the "Lakshmikanthan murder case" that rocked the Madras Presidency in the first half of the last century, as the accused were popular thespians, to show how quickly criminal cases used to get disposed then. Lakshmikanthan was attacked on 8th November, 1944; he died on 9th November, 1944; FIR was registered immediately; Matinee idol M.K.Thyagaraja Bagavathar and Humour King N.S. Krishnan were arrested on 27th December, 1944; after completion of investigation, the case was committed to the Madras High Court Sessions on 13th March 1945; jury trial began on 2nd April, 1945; and the verdict convicting them was delivered on 3rd May, 1945. In that scenario, the Borstal Schools Act was effective. But, today, the situation is different. This has been best explained by the Supreme Court in Ganesh Narayan Hedge v. S. Bangarappa and others [(1995) 4 SCC 41], where, the Court has poignantly remarked thus:

"18. We do not know who is responsible for this delay. As observed by Krishna Iyer, J. in Special Courts Bill, 1978, [(1979) 1 SCC 380] at p.442: (SCC para 15)

"It is common knowledge that currently in our country criminal courts excel in slow motion.

The procedure is dilatory, the dockets are heavy, even the service of process is delayed and, still more exasperating, there are appeals upon appeals and

revisions and supervisory jurisdictions, baffling and baulking speedy termination of prosecutions...."

(emphasis supplied).

The slow motion becomes much slower motion when politically powerful or rich and influential persons figure as accused. FIRs are quashed. Charges are quashed. Interlocutory orders are interfered with. At every step, there will be revisions and applications for quashing and writ petitions. In short, no progress is ever allowed to be made. And if ever the case reaches the stage of trial after all these interruptions, the time would have taken its own toll: the witnesses are won over; evidence disappears; the prosecution loses interest-the result is an all too familiar one."

It is the order of the day for the accused to resort to all tricks to prolong the trial and a privilege cannot be given as an additional bounty for adopting dilatory tactics. The resultant judgment of the convicting court not extending the privilege under the Borstal Schools Act at the time of conviction and sentence cannot be the subject matter of challenge in writ proceedings on the ground of violation of fundamental rights guaranteed by Part III of the Constitution of India in the light of the Constitution Bench judgment of the Supreme Court in AIR 1967 SC 1, Naresh Shridhar Mirajkar and 3 others v. State of Maharashtra and another. It may be relevant to extract the relevant portion in paragraph 38 of the said judgment as under:

"38 When a Judge deals with matters brought before him for his adjudication, he first decides questions, of fact on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes the matter up before the appellate Court. But it is singularly inappropriate to assume that a judicial decision pronounced by a Judge of competent jurisdiction in or in relation to a matter brought before him for adjudication can affect the fundamental rights of the citizens under Article 19(1). What the judicial decision purports to do is to decide the controversy between the parties brought before the court and nothing more. If this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by court in or in relation to a matter brought before it for its decision cannot be said to affect the fundamental rights of citizens under Article 19(1)."

The ratio decidendi of the above decision is that judicial orders are subject to appeal and revision and consequently, cannot be assailed as violative of fundamental rights in collateral proceedings.

82. Thus, on a harmonious reading of Sections 8, 10 and 10-A of the Borstal Schools Act, the following propositions emerge:

i. Under Section 8 of the Borstal Schools Act, the convicting Court (be it original or appellate) can send an adolescent offender to the borstal school prior to the passing of sentence.

ii. He can be detained in the borstal school only upto the age of 23 years.

iii. Where the minimum sentence is imprisonment for life, the convicting court cannot send an adolescent offender to the borstal school.

iv. Even if the convicting court had failed to send an adolescent offender to the borstal school, the Inspector General of Prisons has got the power under Section 10 of the Borstal Schools Act, to send him to the borstal school. This power can be exercised by the Inspector General of Prisons only, in case, where, the adolescent offender has not been sentenced to imprisonment for life.

v. The State Government has the power to send an offender who has been convicted and sentenced to imprisonment for life to the borstal school, if, at the time of conviction, the offender is not less than 16 years of age in the case of a boy and not less than 18 years of age in the case of a girl, but, not more than 21 years of age in either case.

83. Until Vallabhapuram Ravi's case was decided, the State was following the law laid down by a Division Bench of this Court In Re Ganapati's case. In other words, if an adolescent offender was convicted and sentenced to imprisonment for life, the State Government would exercise its powers under Section 10-A of the Borstal Schools Act and send him to borstal school in deserving cases until the age of 23 and thereafter, return to the prisoner and undergo the remaining period of sentence. This was happening routinely, until the verdict of the Supreme Court in Vallabhapuram Ravi's case. In Vallabhapuram Ravi's case, the Supreme Court held that if once a person is sent to the borstal school under Section 10-A of the Borstal Schools Act, he should not be sent back to the prison after he completes the age of 23 years. The Supreme Court arrived at this conclusion on the strength of the following expression occurring in Section 10 and 10-A of the Borstal Schools Act.

"10. Power of Inspector-General to transfer prisoners to Borstal School:

.....The provisions of this Act shall, thereupon, apply to such person as if he had been originally sentenced to detention in a Borstal School.

10-A Power of State Government to transfer offenders sentenced to transportation to Borstal Schools:

.....The provisions of this Act shall apply to such offender as if he had been originally sentenced to detention in a Borstal School."

84. Following Vallabhapuram Ravi's case, in C. Elumalai v. State of Tamil Nadu [(1984) 4 SCC 539], the Supreme Court directed the State of Tamil Nadu to release all the inmates of the Borstal School in Tamil Nadu who have attained the age of 23 years. This judgment came as a thunderbolt to the State authorities

and has resulted in a self-imposed moratorium for exercise of powers under Section 10 and 10-A of the Borstal Schools Act, because, the family of victims and witnesses who gave evidence against the accused will be demoralised on seeing the offender going scot-free on completion of 23 years of age. Vallabhapuram Ravi's case had only overruled that portion of In Re. Ganapati's case, whereby, the offender was directed to be put back in prison after the age of 23 years.

85. A report called for from the Prison authorities shows that from 2000 to 2016, the Government has not passed any order either under Section 10 or 10-A of the Borstal Schools Act. So long as the State authorities believed that a prisoner sent to the borstal school can be put back to the prison after 23 years of age, they were invoking their powers under Section 10 and 10-A of the Borstal Schools Act. Training and conduct in the borstal school was considered as additional qualification for premature release either under Section 432, Cr.P.C. or under Article 161 of the Constitution of India. After Vallabhapuram Ravi's case and Elumalai's case, the State became wary of using Section 10 and Section 10-A of the Borstal Schools Act as a short cut to release prisoners as that may send wrong signals to the family of victims and may further embolden criminals to take to crime as a profession. The following passage from Essays on Constitutional Law by R.F.V. Heuston (Universal Law Publishing Company: Second Indian Re-print-2011: page 115) aptly describes the State's predicament, as under:

"No doubt it is reasonable to favour the liberty of the subject, but it is also reasonable to ask what will be the effect on "the law"s repute when the public see a man walking the streets whom the highest court has held should be in gaol?"

We are conscious of the fact that modern penology does not approve of retributive justice. However, the judicial function of sentencing a convicted person must be consistent with the principle of proportionality. In this context, the following observations of the Supreme Court in Raj Bala v. State of Haryana and others [(2016) 1 SCC 463] seem apposite and the same run as under:

"16. A court, while imposing sentence, has a duty to respond to the collective cry of the society. The legislature in its wisdom has conferred discretion on the court but the duty of the court in such a situation becomes more difficult and complex. It has to exercise the discretion on reasonable and rational parameters. The discretion cannot be allowed to yield to fancy or notion. A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the

society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked. It is the duty of the court not to exercise the discretion in such a manner as a consequence of which the expectation inherent in patience, which is the "finest part of fortitude" is destroyed. A Judge should never feel that the individuals who constitute the society as a whole is imperceptible to the exercise of discretion. He should always bear in mind that erroneous and fallacious exercise of discretion is perceived by a visible collective."

86. In the result, the answer to the questions under references in Part I and Part II, *supra*, are as under:

Part-I

1. The convicting court (be it original or appellate) is vested with jurisdiction to act under Section 8 of the Borstal Schools Act only upon convicting the accused and before passing its sentence. An order under Section 8 of the Borstal Schools Act can be passed by the Appellate/Revisional Court, if the person has not crossed the age of 21 years on the date of the judgment/order, subject to conduct of enquiry under Sections 8(2) and 11 of the Borstal Schools Act.
2. The term "imprisonment" in Section 8 of the Borstal Schools Act does not include "imprisonment for life".
3. The judgment of the Full Bench in Thangammal's case does not lay down the correct law and accordingly, stands overruled.

Part-II

- (a) Sections 8 and 11 of the Borstal Schools Act do not cast a duty upon the Court to examine whether an adolescent offender who is convicted would be entitled to the benefit of the Act and it is for the offender to avail of the privilege after his conviction and before the passing of sentence.
- (b) The convicted person does not have a vested right to claim the benefits of the Borstal Schools Act retrospectively after crossing the age of 21 years.
- (c) The under-trial prisoners will not be entitled to the benefits of the Borstal Schools Act.

87. Ex consequenti, the decision of the Division Bench of this Court in Shanmuganathan's case extending the provisions of the Borstal Schools Act to remand prisoners is over-ruled and the consequent G.O. (D) No.922, Home (Prisons IV) Department dated 12.08.2008, declaring all the sub jails as borstal schools is hereby quashed. It is open to the Magistrates to remand the accused between the age group of 18 and 21 years to prisons and not to borstal schools. Further, the judgment of the Full Bench of this Court in Thangammal's case holding that the word "imprisonment" in Section 8 of the Borstal Schools Act, includes "imprisonment for life", does not lay down the correct law and is accordingly overruled.

88. While parting with the case, we suggest to the State Government to repeal the Borstal Schools Act since it has outlived its purpose.

89. The individual cases will now be placed before the respective Benches for disposal in the light of the answers set down by us in these references.