

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Reserved on: 13th May, 2013
pronounced on: 22nd May, 2013*

+ **CRL.REV.P. 6/2013 & CrI.M.A.178/2013 & 179/2013**

RAKHI PANCHAL

..... Petitioner

Through Mr. Ashok Kumar Tiwari, Advocate

versus

STATE & ORS.

..... Respondents

Through Ms. Rajdipa Behura, APP for the
State/Respondent No.1.
Mr. Vishwendra Verma, Advocate for the
Respondent No.7.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. This Revision Petition is directed against an order dated 25.10.2012 passed by the learned Additional Sessions Judge(ASJ) whereby the learned ASJ declared the date of birth of Respondent No.7 Arun Kumar @ Monu to be 10.11.1993. Thus, on the date of the alleged commission of the offence, he was found to be less than 18 years and thus a juvenile. The Respondent No.7 was, therefore, directed to be produced before the Juvenile Justice Board for inquiry in accordance with the Juvenile Justice (Care and Protection of Children) Act, 2000(the Act).

2. The case of the Petitioner who is the Complainant in respect of FIR No.607/2011 recorded in Police Station(P.S.) Jagat Puri is that the Respondent No.7 committed sexual intercourse with her on the false promise of marriage. He also committed carnal intercourse against the order of nature. After completion of the investigation, a report under Section 173 Cr.P.C. was preferred against the Respondent No.7. After the case was committed to the Court of Session, the impugned order (dated 25.10.2012) was passed by the learned ASJ. For the sake of convenience, it will be apposite to extract the order hereunder:

“25.10.2012

Present: Additional P.P. for the State.

Accused in J/C with Ms. Shivani Singh, Advocate.

Recalled CW-3 examined and discharged.

As per the school record produced by CW-1 the date of birth of accused is 10.04.1992 but as per CW-2 Ram Singh, father of the accused, the date of birth of accused is 10.11.93.

CW-3 Devender Singh Bhandari, Sub Registrar Birth and Death has produced the birth record and proved the Birth Certificate of accused. The date of birth as per the said record and the Birth Certificate is 10.11.93. Although there is contradiction of the date of birth as mentioned in the School Record and in the Birth Record of MCD, I am of the view that the Birth Record produced by the MCD is the most authentic record of the proof of birth. I therefore, accept the date of birth of accused as 10.11.93 as contained in the Birth Registration Register.

As per allegations the incident took place in April 2011. The age of accused was therefore less than 18 years on the date of incident. That being so the accused was juvenile at the time of the alleged occurrence and therefore the case has to be tried by J.J. Board.

*Accused be produced before the J.J. Board on 01.11.2012.
Ahlmad to send the complete file immediately.”*

3. The only contention raised by the Petitioner is that since the date of birth of the Respondent No.7 as per the school first attended is 10.04.1992, the learned ASJ erred in accepting the date of birth as 10.11.1993(as per the Birth and Death Register maintained by the Sub-Registrar). It is urged that if the date of birth of the Respondent No.7 is taken to be 10.04.1992, the Respondent No.7 was not a juvenile at the time and the entire proceedings and inquiry before the Juvenile Justice Board in pursuance of the order dated 25.10.2012 are illegal and liable to be set aside.
4. The learned counsel for the Respondent No.7, on the other hand, has urged that the Certificate issued by the Registrar of Birth and Death is an authentic document and has to be preferred to a Certificate of Date of Birth as per the record of the school attended by an accused. Thus, the learned ASJ rightly held the Respondent No.7 to be a juvenile. The learned counsel for the Respondent No.7 urges that in pursuance of the order dated 25.10.2012, the inquiry was completed by the Juvenile Justice Board and the Respondent No.7 had been acquitted of the offence punishable under Section 376/377 IPC. The learned counsel for the Respondent No.7 refers to Section 401 of the Code of Criminal Procedure(Code) to emphasize that since the Respondent No.7 stands acquitted by the Juvenile Justice Board, the only remedy available to the Petitioner was to file an Appeal against acquittal. The Criminal Revision Petition preferred by the Petitioner is, therefore, not maintainable.
5. The learned APP, however, supports the Petitioner. Relying on *Ashwani Kumar Saxena v. State of M.P.(2012) 9 SCC 750*, the learned APP argues

that as per Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007(Rules of 2007), Date of Birth Certificate issued by the school(other than a play school) first attended has to be preferred to the Birth Certificate issued by a Corporation or a Municipal authority. Thus, the learned APP submits that before the learned ASJ preferred the Date of Birth Certificate issued by the Registrar, Birth and Death cannot be preferred to the Date of Birth Certificate issued by the school first attended.

6. It is not in dispute that *dehore*s the order of acquittal a Revision Petition is maintainable against the order dated 25.10.2012, whereby the Respondent No.7 was held to be a juvenile and the inquiry/trial was ordered to be conducted by the Juvenile Justice Board. The instant Revision Petition was filed in this Court in December, 2012. The Revision Petition was listed before the Court for the first time on 08.01.2013 when the learned APP informed the Court that the Respondent No.7 has already been acquitted by the Juvenile Justice Board by an order dated 03.01.2013, that is, after filing of the Revision Petition, but before the same was listed before the Court. Sub-section (4) of Section 401 of the Code bars a Revision Petition in respect of an order against which an Appeal is maintainable. In the instant case, no Appeal was maintainable against the order dated 25.10.2012. If, subsequently, an order of acquittal was passed by the Juvenile Justice Board, that would not take away the right of the Petitioner to file a Revision Petition against the earlier said order. In any case, the Petitioner was not required to file an Appeal against the order of acquittal because if this Court comes to the conclusion that the Respondent No.7 was wrongly held to be a juvenile, the entire proceedings before the Juvenile Justice Board will be illegal.

The contention with regard to the maintainability of the Revision Petition is, therefore, rejected.

7. Now I turn to the question as to which of the Certificates, that is, the certificate issued by the Registrar, Birth and Death, Municipal Corporation of Delhi or the Certificate issued by the school first attended must be accepted to determine the age of the Respondent No.7 on the date of commission of the offence. As per the allegations made in the FIR No.607/2011, the offence was allegedly committed in April, 2011. In *Ashwani Kumar Saxena*, the Hon'ble Supreme Court explained the scope of Section 7A of the Act and Rule 12 of the Rules of 2007. Paras 24 to 26 and 42 to 43 of the report are extracted hereunder:

“24. We may, however, point out that none of the abovementioned judgments referred to earlier had examined the scope, meaning and content of Section 7-A of the Act, Rule 12 of the 2007 Rules and the nature of the inquiry contemplated in those provisions. For easy reference, let us extract Section 7-A of the Act and Rule 12 of the 2007 Rules:

“7-A. Procedure to be followed when claim of juvenility is raised before any court.—(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the Rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward

the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect.” (emphasis supplied)

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

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

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

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. ***(emphasis supplied)***

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.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.” (emphasis added)

25 *Section 7-A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the JJ Act. The criminal courts, Juvenile Justice Board, committees, etc. we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. The statute requires the court or the Board only to make an “inquiry” and in what manner that inquiry has to be conducted is provided in the JJ Rules. Few of the expressions used in Section 7-A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7-A has used the expressions “court shall make an inquiry”, “take such evidence as may be necessary” and “but not an affidavit”. The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates, etc. as evidence, need not be oral evidence.*

26. Rule 12 which has to be read along with Section 7-A has also used certain expressions which are also to be borne in mind. Rule 12(2) uses the expression “prima facie” and “on the basis of physical appearance” or “documents, if available”. Rule 12(3) uses the expression “by seeking evidence by obtaining”. These expressions in our view re-emphasise the fact that what is contemplated in Section 7-A and Rule 12 is only an inquiry. Further, the age determination inquiry has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The word “inquiry” has not been defined under the JJ Act, but Section 2(y) of the JJ Act says that all words and expressions used and not defined in the JJ Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

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42. In Shah Nawaz v. State of U.P (2011) 13 SCC 751 the Court while examining the scope of Rule 12, has reiterated that medical opinion from the Medical Board should be sought only when matriculation certificate or equivalent certificate or the date of birth certificate from the school first attended or any birth certificate issued by a corporation or a municipal authority or a panchayat or municipality is not available. The Court had held that entry related to date of birth entered in the marksheet is a valid evidence for determining the age of the accused person so also the school leaving certificate for determining the age of the appellant.

43. We are of the view that admission register in the school in which the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility.”

8. Thus, from the perusal of Rule 12(3) of the Rules of 2007, it is evident that the certificates as mentioned in this Rule have to be relied in order of

precedence. Thus, if a Matriculation certificate is available the date of birth mentioned in any other certificate cannot be gone into. If a Matriculation certificate is not available then date of birth as mentioned in the birth certificate from the school first attended is to be taken into consideration. If the said certificate is also not available then the date of birth certificate given by the Corporation or a Municipal Authority or Panchayat has to be considered. Clause (b) of Rule 12 (3) of the Rules of 2007 regarding medical evidence comes into operation only when the three certificates as mentioned in Rule 12 (3)(a) are not available.

9. As per the School Leaving Certificate issued by the Principal, Jai Jagdambey Junior High School, Sarai, Meerut, one Arun S/o Smt. Santosh and Sh. Ram Singh was admitted in the School on 08.07.1998. He left the School on 23.08.2000 and was a student of 4th Standard. The learned ASJ has referred to the testimony of CW1, who proved the date of birth as per the school record to be 10.04.1992. The learned ASJ, however, did not give any reason as to why the date of birth, that is, 10.04.1992 was not accepted or otherwise why the Certificate issued by the school first attended was rejected. As stated above, if the Certificate of the School first attended is found to be genuine, it has to be preferred to the Date of Birth Certificate issued by the Corporation or a Municipal authority.
10. In this view of the matter, the order dated 25.10.2012 passed by the learned ASJ cannot be sustained. The same is accordingly set aside and the case is remanded back to the learned ASJ with the direction to decide the question in view of the law laid down by the Supreme Court in *Ashwani Kumar Saxena(supra)*.

11. The parties are directed to appear before the learned ASJ on 07.06.2013.
12. Pending Applications stand disposed of.

(G.P. MITTAL)
JUDGE

MAY 22, 2013
pst