

Court No. - 90

Case :- APPLICATION U/S 482 No. - 21672 of 2023

Applicant :- Apsar Ali

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Purushottam Mani Tripathi

Counsel for Opposite Party :- G.A., Ankita Pandey

Hon'ble Dinesh Pathak, J.

1. Heard learned counsel for the applicant, learned counsel for Opposite Party No. 2, learned AGA and perused the record.

2. The present applicant has invoked the inherent power of this Court under Section 482 CrPC assailing the order dated 6.5.2023 passed by the Special Judge (POCSO) Act, Kushinagar at Padrauna in Session Trial No. 101 of 2014 (State Vs. Apsar Ali) arising out of Case Crime No. 107 of 2014, under Sections 363, 366, 376 of I.P.C. and Sections 4, 6, 8 & 12 of POCSO Act, Police Station Sevrahi, District Kushinagar.

3. Facts culled out from the record are that Opposite Party No. 2 (father of the prosecutrix) has lodged an FIR, being Case Crime No. 107 of 2014 dated 26.1.2014, against unknown persons levelling allegation of abduction with an averment that on the date of occurrence of offence dated 22.1.2014, his minor daughter aged about 15 years went to her school, however, till 6 pm, she did not return. After due investigation, the Investigating Officer has submitted the charge sheet No. 25/14 dated 28.2.2014 arraigning the present applicant under Sections 363, 366, 376 IPC and Sections 4, 6, 8 & 12 of POCSO Act. During pendency of trial, the present applicant (accused) has moved an application dated 6.5.2023 (paper No. 51 kha1) along with a list of witness (paper No. 51Kha2) under Section 233 (3) CrPC with a prayer that Witness No. 1, who is Chief Medical Officer, and Witness No. 2, who is Principal of Darul Ishayat Purva Madhyamic Vidhyalay, Sevrahi, Kushinagar, may be called upon as witnesses. Learned trial court, vide order impugned dated 6.5.2023, has rejected the said application on the ground that High School Certificate of the victim has been proved, therefore, date of birth of the victim

cannot be changed, which is under challenge before this Court.

4. It has been submitted by the learned counsel for the applicant that during investigation, mark sheet of the Class Vth issued by Kishan Samaj Kalyan Prathmik Vidhyalaya, Gauri Jagdish, Dudhi, Kushinagar was filed, however, same was discarded inasmuch as Principal of the said college has refused issuance of the aforesaid documents. During trial, prosecution has filed Transfer Certificate dated 13.7.2015 issued from school, namely, National Public Inter College, Tamkuhiraj, Kushinagar along with High School Certificate to prove the date of birth of the victim to be 7.7.2000. Learned counsel for the applicant has raised question with respect to the genuineness of the aforesaid document attributing to the victim on the ground that in the Transfer Certificate, name of the last institution attended by the scholar has been shown as Darul Ishayat Purva Madhyamic Vidhyalay, Sevrahi, Kushinagar, however, as per record of Darul Ishayat Purva Madhyamic Vidhyalay, Sevrahi, Kushinagar, there is no entry in the name of the victim. On this backdrop of the fact, the applicant wants to get the Principal of Darul Ishayat Purva Madhyamic Vidhyalay, Sevrahi, Kushinagar examined to prove as to whether the victim had ever attended said school as a student. It has further been submitted that in the medical report i.e. Ossification Test, the Chief Medical Officer has opined the age of the victim to be about 18 years, therefore, Chief Medical Officer is also required to be examined to prove the medical certificate date 17.2.2014. It is next submitted that the application filed under Section 233(3) CrPC has illegally been rejected by the learned trial court without assigning any cogent reasons as enunciated under Section 233(3) CrPC. It is further submitted that there are a discrepancy in the statements of the victim and the first informant with respect to the schooling of the victim and her date of birth.

5. Per contra, learned counsel for Opposite Party No. 2 has contended that considering the deposition of PW-1 (victim) and the statement of the teacher namely Shatrughan Tiwari (PW-8) of National Public Intermediate College, Tamkuhiraj, Kushinagar, there is no doubt with respect to the education of the present victim, particularly the High School Certificate wherein the name of school has been shown as National Public Intermediate College,

Tamkuhiraj, Kushinagar and the date of birth of the student (victim) has been shown as 7.7.2000 which has already been proved in the eye of law, therefore, at this stage, there is no need to summon the Chief Medical Officer and the Principal of Darul Ishayat Purva Madhyamic Vidhyalay, Sevrachi, Kushinagar. It is sheer wastage of time and delaying tactics to hamper the trial which is pending since long with respect to the incident took place in the year 2014.

6. Having considered the rival submissions advanced by the learned counsel for the parties and perusal of record, it is manifested that police case has been registered with respect to the crime against minor. The accused (applicant herein) is trying to challenge the age of the victim being a minor. To prove the minor status of the victim, the prosecution has produced High School Certificate, which has been proved in the eye of law. Apart from that, transfer certificate issued by National Public Inter College, Tamkuhiraj, Kushinagar has been proved as well from where the victim has completed her matriculation (High School). The learned counsel for the applicant is attempting to cast doubt on the authenticity of the victim's initial schooling/last attended school and the High School Certificate filed during trial. In this respect, he has tried to point out discrepancy in the statement of the victim as well as the first informant. He has also impressed upon the ossification test wherein Chief Medical Officer has opined the age of the victim to be 18 years. For the purpose of deciding the age of the juvenile in conflict with law, the legislation has summarized the guidelines under Section 94 of Juvenile Justice (Care and Protection of Children) Act 2015 (in brevity, 'JJ Act'), which is quoted hereinbelow:

"Presumption and determination of age.-(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

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

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

7. A bare perusal of the provisions as enunciated under Section 94 of JJ Act evince that legislation has employed three parameters to determine the age of minor that is; (i) the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination board, if available; in case of absence thereof; (ii) the birth certificate given by a corporation or a municipal authority or a panchayat; (iii) ossification test or any other latest medical age determination test conducted on the orders of the Committee or Board, in case, previous two conditions are not fulfilled. Applying the conditions as denoted under Section 94 of the JJ Act, in the given circumstances of the present case wherein High School Certificate of the victim has been proved in the eye of law, in my considered opinion, there is no justification to rely upon the ossification test of the victim to determine her age for the purpose of occurrence of offence committed against her. Ossification test or any other latest medical age determination test conducted on the order of the Committee or the Board pale into insignificance in the light of the High School Certificate, which is available on record fulfilling the first condition to determine the age of the victim as intended by the legislation under Section 94 of the JJ Act. Therefore, on the premise of availability of High School Certificate, summoning the Chief Medical Officer in the witness box to testify would be futile for substantiating the medical report. Such an endeavour would amount to a sheer wastage of time, without any consequence on the merits of the case.

8. So far as the discrepancy in the statements of the victim and the first informant relating to the initial schooling/last attended school, as is being tried to be put forward by the learned counsel for the applicant, is concerned, I am of the view that these discrepancies, if any, are not having much relevance and they have no significant effect on the date of birth of the victim, which is relevant for the purpose of deciding the occurrence of crime under the POCSO Act. In the FIR, date of occurrence of offence has been shown to be 22.1.2014. Thereafter, victim has appeared/passed matriculation in the year 2015 and, accordingly, matriculation certificate has been filed before the trial court. Thus, High School Certificate is the main document as per law to decide the date of birth of the victim. On availability of the High School Certificate, other circumstances of fact or attending circumstances or minor discrepancies, if any, in the statement of victim and the first informant relating to schooling of the victim pale into insignificance and they have no direct bearing upon the decision making process qua age of the victim.

9. Last submission advanced by the learned counsel for the applicant, with respect to the rejection of application moved by the applicant without properly appreciating the law laid down under Section 233 (3) of CrPC, is also of no avail to bolster his submission. Section 233 (3) CrPC does not entrust mandatory duty upon the court concerned to issue process to any of the witness which have been sought to be summoned by the accused. Under the said section, the court concerned has got discretionary power to summon any witness or the document on the request made on behalf of the accused. Thus, it can refuse the request made on behalf of the accused, for reason to be recorded, that such application is made for the purpose of vexation, delay or defeating the ends of justice. In the given circumstances of the present case, the High School Certificate has already been got proved by the prosecution which is the first and foremost condition for the purpose of deciding the age of the child as enunciated under Section 94 of the JJ Act. The learned trial court has rightly found it to be a fit case to refuse the request made on behalf of the accused to issue process against the Chief Medical Officer to prove the medical examination and the Principal of Darul Ishayat Purva Madhyamic Vidhyalay, Sevrachi, Kushinagar to question the last

attended school of the victim. Having considered the High School Certificate, which has been proved by the prosecution, the learned trial court has rightly negated the request made on behalf of the accused by moving a miscellaneous application dated 6.5.2023 to summon the witnesses as mentioned above. The date of birth as mentioned in the matriculation certificate has attained finality in the eye of law and the same cannot be changed by pointing out any discrepancies in the statements of the victim and the first informant or by summoning the witnesses, as has been sought for by the accused, to prove the ossification test and initial schooling of the victim. Moving an application to call upon the witnesses, as has been sought for, is nothing but appears sheer wastage of time on the premise of the High School Certificate. There is no justification to kill time by allowing the examination of the witnesses who have been sought to be called upon by the accused.

10. In this conspectus, as above, I am of the considered opinion that the learned trial court has not committed any irregularity, perversity or infirmity in rejecting the application dated 6.5.2223 under Section 233(3) CrPC to examine the witnesses, who are not much relevant for the purposes to prove the date of birth of the victim at the time of occurrence of offence. Having considered the instant matter carefully, I found neither any abuse of the process of law in rejection of the application dated 6.5.2023 moved by the present applicant, which is under challenge before this Court, nor any justifiable ground to pass an order for the purpose of securing the ends of justice.

11. Resultantly, instant application, being misconceived and devoid of merits, is dismissed with no order as to the cost.

Order Date :- 29.11.2023

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