

Court No. - 12

Case :- APPLICATION U/S 482 No. - 10804 of 2023

Applicant :- Dilip Yadav Alias Dileep Kumar Yadav

Opposite Party :- State Of U.P. Thru. Prin Secy (Home) Civil Sectt. Lko And 4 Others

Counsel for Applicant :- Arun Sinha, Siddhartha Sinha, Umang Agarwal, Vineesh Bhalla

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Singh, J.

1. Heard Mr. Arun Sinha, learned counsel for the applicant assisted by Mr. Umang Agarwal, Advocate and Mr. Rao Narendra Singh, learned AGA and perused the record.

2. Present application under Section 482 has been filed with the following prayer:-

"Order dated 10-08-2023 (contained as Annexure No.15 to this petition), passed by the Special Judge (POCSO Act)/ Additional Sessions Judge, Lucknow in a case registered at Crime No.136/2023, U/s - 363, 366, 376, 506 IPC & Section 3/4 POCSO Act, PS - Krishna Nagar, Lucknow may be rejected and the Investigating Officer/prosecution may be directed to send the prosecutrix for her X-ray and other relevant tests to obtain the radiological age of the prosecutrix, in view of the pronouncement of an order dated 15-12-2016 (contained as Annexure No.11 to this petition), passed by this Hon'ble Court in Bail Application No.10677 of 2016."

3. Learned counsel for the applicant submitted that after the death of her father, respondent no.3 was being victimized by her step-mother/maternal-aunt and since the victim was major, she left her house and went to the applicant. Thereafter, they entered into marriage at Delhi and started enjoying their matrimonial life. Learned counsel for the applicant also submitted that the prosecutrix has denied to go to her step mother/maternal aunt and expressed that her life was under threat there, as a result of which, she was confined in Rajkiya Balika Balgrah, Sindhi Kheda, Para, Lucknow. It is further submitted that on the basis of fabricated school leaving certificate of class- III, FIR of case in question has been lodged. Learned counsel for the applicant submitted that the victim has categorically stated that she was aged about 18 years and as per her AADHAR card she is major. During the course of

investigation, Investigating Officer has not collected the details of the *Kutumb* register etc. for considering her date of birth. The victim was also not sent for ossification test for determination of her age.

4. Learned counsel for the applicant submitted that as per the provision of Section 14 (2) of Right of Children to Free and Compulsory Education- 2009, no child shall be denied admission in a school for lack of proof of age and normally the admission in the school at the primary stage is being given on the basis of birth certificates, but as per the aforesaid provisions, admission cannot be denied, and in case, guardian has mentioned any date of birth in the school form, the same shall be treated as truth subject to any dispute. However, in the present case birth certificate was not collected by the Investigating Officer, as admittedly parents of the victim are no more and she was residing with her step mother/maternal aunt, and therefore, it was obligatory on the part of the Investigating Officer to send the victim for ossification test for determination of her age. An application was also moved before the trial Court, but the same was rejected in the most mechanical manner without considering the provisions of Section 164A CrPC and learned counsel for the applicant also submitted that Section 94 of Juvenile Justice (Care and Protection of Children Act-2015) also provides that in case there is a contradiction in the age then ossification test for determination of the age is necessary and he also submitted that earlier vide order dated 15.12.2016 passed in Bail Application No. 10677 of 2016, a direction was issued that in every case related to sexual abuse or outraging the modesty of a lady, the ossification test for determination of age is necessary. A copy of the order was also sent to the Principal Secretary Health, Government of U.P., Lucknow but the same is also not being complied with.

5. Relying on the decision of Hon'ble Apex Court in the case of **(P. Yuvaprakash Vs. State Rep. by Inspector of Police)**, Criminal Appeal No. 1898 of 2023, learned counsel for the applicant submitted that in our society normally at the time of sending a child to the school, there is a tendency to mention the date of birth in the admission form after reducing the age of the child and, therefore, in the determination of the age of the victim, substantial justice will not be available, to the accused as well as the victim of sexual offenses, and offenses related to outraging the modesty of a lady, if ossification test of the victim is not carried out. He also relied on the decision of Hon'ble Apex Court in the **Manak Chand @ Mani vs The State Of Haryana (decided on 30.10.2023 in Criminal Appeal 2276 of 2014)**, therefore kind indulgence of this Court is necessary.

6. Learned AGA opposed the prayer of the applicant and submitted that on the basis of school leaving certificate of class-III, chargesheet was filed by the Investigating Officer, but he does not dispute this fact that the victim has not supported the prosecution version. It is also undisputed fact that the parents of the victim are no more and she was residing with her step mother/maternal aunt and was allegedly being victimised by her.

7. Considering the submissions of learned counsel for the parties and going through the contents of petition as well as the impugned order and other relevant record it is evident from the provision of Section 14 of Children to Free and Compulsory Education Act- 2009, that at the time of admission of a child, birth certificate is required, but, in case, if any child does not have a birth certificate then he/she shall not be denied admission in the school for the lack of age proof. Rule 13 of Right of Children to Free and compulsory Education Rules 2010 also provides that the declaration of parents or guardian is sufficient for mentioning the date of birth in the school. Admittedly, now-a-days, it is observed by the Court that cases related to the POCSO and rape are being lodged in very frequent manner and in many of those cases, after sometime, the parties are coming to the Court for order on the basis of settlement. The victims are also admitting that at the time of incident, the victim was, in fact, major but on the advise of others she initiated the prosecution. Section 94 of Juvenile Justice Act-2015 also provides for determination of age, in case, there is some controversy related to the age of victim or juvenile and the ossification test is necessary for the same.

8. In such circumstances, this Court is of the view that in every offense related to outraging the modesty of a lady or of sexual assault, ossification test is necessary. In view of the above, the impugned order is hereby **set aside**. Application stands allowed. Investigating officer of case in question is directed to ensure the ossification test of the victim and obtain certificate related to the age from Chief Medical Officer, Lucknow within a period of six weeks from today.

9. Office is directed to communicate this order to Principal Secretary, Department of Home, Govt. of U.P.; Principal Secretary, Department of Medical Health; Director General of Police, U.P. as well as Director General Prosecution.

Order Date :- 3.11.2023

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