

Neutral Citation No. - 2024:AHC:173543

Court No. - 86

Case :- CRIMINAL REVISION No. - 1501 of 2024

Revisionist :- Vasudev @ Vasu

Opposite Party :- State Of U.P. And 4 Others

Counsel for Revisionist :- Pramod Kumar Pandey

Counsel for Opposite Party :- G.A.

Hon'ble Ram Manohar Narayan Mishra,J.

1. Heard learned counsel for the revisionist, learned AGA for the State-respondents and perused the material placed on record.
2. Notice has already been served on opposite party No.5, the first informant and father of the victim but none appeared on his behalf to contest the present criminal revision.
3. Instant criminal revision has been preferred against the impugned order dated 05.03.2024, passed by Additional District and Sessions Judge, Court No.4, Bijnor, in Criminal Appeal No.171 of 2023 (Vasudev @ Vasu vs. state of UP and others), arising out of impugned order dated 25.7.2023, passed by Chairman/Adhyaksh Board of Child Welfare Committee, Bijnor in Matter No.867/2023-24, District Bijnor. By the impugned order, Appellate Court has dismissed the appeal against order passed by the CWC where the application filed by the revisionist for getting custody of victim has been dismissed, whereby she has been directed to be kept in custody of Balgrih, Moradabad on ground that she is minor.
4. For the purpose of present criminal revision, the relevant facts of the case are that opposite party No.5 had lodged an FIR on 17.6.2023, at police station Kotwali Shahar, District Bijnor under Sections 363, 504, 506 IPC against revisionist Vasudev, his mother Sarvesh and one unknown person with averment that on 15.6.2023, the accused Vasudev, who was having evil eye on her minor daughter, aged about 14 years, had seduced and enticed away her and since then she was missing. The mother

and relatives of Vasudev had also assisted him in kidnapping of his daughter. She was subsequently recovered by police and Vasudev and his family members had assured the informant and his family members that he would stay away from the victim but he again seduced and kidnapped her with assistance of his family members. When the informant made a complaint before the family members and relatives of Vasudev, they abused him and threatened him with life.

5. Learned counsel for the revisionist submits that there are contradictory documents in respect of date of birth of the victim in birth certificate issued by Principal of Rainbow Public Higher Secondary School, wherein her date of birth is mentioned as 29.3.2009 and according to this, she was aged around 14 years, 3 months and 16 days on 21.6.2023 i.e. the date of issuance of certificate. In another birth certificate issued by Saraswati Shishu Mandir School, her date of birth is mentioned as 29.3.2007 and accordingly, she is 16 years, 3 months and 21 days, on date of issuance of birth certificate i.e. 19.7.2023. However, she was medically examined on 21.7.2023 by Chief Medical Officer, Bijnor for the purpose of her age determination and in medical report, her age has been determined as 18 years. The victim had herself filed an application under Section 156(3) Cr.P.C. before CJM, Bijnor on 2.2.2023 against her parents wherein she has stated that she is adult and she has been victimized by her parents and relatives. She has also stated she had solemnized marriage with Vasudev at Arya Samaj Mandir, Prayagraj on 20.6.2023, out of her free will and volition and after attaining age of majority. They have also applied online for registration of their marriage. However, the Child Welfare Committee, Bijnor vide order dated 25.7.2023 had recorded her age as 14 years as on 25.7.2023 and directed that she be kept in custody of Bal Grih, Moradabad, which is contrary to law and against the wishes of the victim. He further submitted that the order of Child Welfare Committee was assailed by the revisionist before the Court of session by filing Criminal Appeal No.174 of 2023, however, the criminal appeal was

dismissed vide impugned order of Additional District and Sessions Judge, Court No.4, Bijnor on premise that on perusal of record, it appears that the victim has not been impleaded as a party in criminal appeal and a criminal case is pending against the accused/appellant, who is stated to be enlarged on anticipatory bail. The victim has been deprived of her right to participate in criminal appeal. No sufficient reason has been assigned by the court to dismiss the criminal appeal which has been filed by the revisionist to set aside the impugned order dated 25.7.2022, passed by Child Welfare Committee. He next submitted that no finding has been recorded by learned appellate court regarding grounds taken in appeal and the appeal has been dismissed mainly on the ground that the victim has not been impleaded as a party in the criminal appeal and criminal case instituted against the revisionist under Section 363, 504, 506 IPC is pending. He lastly submitted that there is no iota of evidence to connect the revisionist with the offence as the victim has herself stated in her statement recorded under Section 164 Cr.P.C. before the Magistrate that she had gone out of the home without telling anyone as her parents were trying to fix her marriage with some person forcefully. She has stated that she has married with Vasudev at Arya Samaj Mandir on her own volition. The revisionist had filed an application for custody of the victim before CWC but same was wrongly rejected by CWC. She had filed an application under Section 156(3) Cr.P.C. against her parents for registration of case and investigation.

6. Per contra, learned AGA submitted that there is no illegality, irregularity or perversity in the order passed by the Child Welfare Committee as well as the appellate order passed by Court of Session as the victim appears to be minor on the basis of both the academic certificates issued regarding her date of birth. The revisionist has shown her as major in joint application for registration of marriage on the basis of her date of birth mentioned in Aadhar Card. The law is settled on this

score that Aadhar card is not a document for proof of age or date of birth, it is in fact a document of identity proof of a person.

7. A Full Bench of this Court in **Kumari Rachna vs. State of UP, Habeas Corpus Petition No.362 of 2020**, vide judgement dated 17.3.2021, considered a similar issue wherein an FIR was lodged by the mother of the victim alleging that her minor daughter left the house on 15.2.2020 with the help of one Arjun. The petitioner corpus was recovered on 04.3.2020 and on the same day, her statement under Section 161 Cr. P.C. was recorded, wherein she alleged that she left the house out of frustration as she was beaten by her mother and had then gone to the house of her friend Arjun. It was also alleged that she did so out of her own free will. Her statement under Section 164 Cr.P.C. was also recorded, wherein she reiterated her previous statement made under Section 161 Cr.P.C. The Judicial Magistrate directed that the petitioner/corpus be produced before the Child Welfare Committee and order was passed by the Committee for keeping her in Children Home (Girl). Pursuant to the said order, the petitioner/corpus was sent to Children Home (girl), Saharanpur. Aggrieved with the said order, the petition for issuance of writ of habeas corpus was preferred by the victim before this Court. Once the custody of hte petitioner/corpus has been denied by her parents, the petitioner corpus wanted to go with the first petitioner (the accused) and, therefore, she pleaded that she could not be sent to Children Home (Girl) against her wishes. A plea was raised that even if the petitioner/corpus is minor, she cannot be kept in Children Home (Girl) against her wishes. When she was produced before CJM, Saharanpur on 13.3.2020, the police submitted that as per her High School Certificate, her age was 17 years and 20 days and, therefore, suitable order must be passed in regard to her custody.

8. Full Bench of this Court held while deciding the reference made by Division Bench held that the order passed by Judicial Magistrate or Child Welfare Committee sending victim to Women Protection Home/Nari

Niketan/Juvenile Home/Child Care Home cannot be challenged or set aside in writ of habeas corpus. The Bench also observed that the detention of a corpus in such child care homes cannot be treated as illegal detention. The Court also held that the detention of the corpus cannot be said to be illegal if the same is affected by orders of Judicial Magistrate or Child Welfare Committee and in case, the petitioner is aggrieved by the order of Child Welfare Committee or the Magistrate, the petitioner is at liberty to take recourse of remedy of an appeal or revision under Section 101 and 102 of Juvenile Justice (Care and Protection of Children) Act, 2015. An illegal or improper exercise of jurisdiction by a Magistrate or by the Child Welfare Committee appointed under [Section 27](#) of the J.J. Act, sending the victim to Women Protection Home/Nari Niketan/Juvenile Home/Child Care Home cannot be treated an illegal detention.

9. In the present case, in birth certificate of which reliance has been placed by the informant, who is father of the victim, her date of birth is mentioned as 29.3.2009 and her parents' name is shown as mother- Kaushal and father- Harvendra Kumar, place of birth Mohalla Jatan, B-4, Near outpost Gokulpur, District Bijnor. Date of registration is 20.5.2013 and accordingly, she was around 14 years and 3 months at the time of incident dated 15.6.2023. In another birth certificate issued by Saraswati Shishu Mandir School, her date of birth is mentioned as 23.9.2007 and accordingly, she was around 16 years and 3 months of age at the time of incident. Her medical examination was done by Medical Board and on the basis of ossification test, CMO reported on 21.7.2023 that the victim was about 18 years of age. This is settled law that parameters provided for ascertainment of age of a juvenile in conflict of law will also be applicable for determination of age of a victim of an offence under Sections 366, 363 and 376 IPC or an offence under various provisions of POCSO Act. Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 provides as under:-

“Section 94. 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.”*

10. A bare perusal of the aforesaid provision manifests that the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination board, if available will have primacy over all other evidence to be adduced in support of age of the juvenile. If in absence of date of birth certificate from the concerned examination board, the birth certificate given by a corporation or a municipal authority or a Panchayat will be taken into consideration and only in absence of the two certificates, described as above, which shall be determined by ossification test or any other latest medical age determination test conducted on the orders of the Child Welfare Committee or the Juvenile Justice Board.

11. In present case, although, in medical age determination report, the victim has been found aged around 18 years but in both school certificates, she has been found minor. In the date of birth mentioned in one school certificate, she is shown to be aged around 14 years and 3 months and in other school certificate, she is shown to be aged around 16 years and 3 months on the date of alleged incident. Therefore, it cannot be held that on the date of incident or even up till now, she has attained the age of majority. Her date of birth is shown as 1.3.2002 in her marriage certificate issued by Arya Samaj, Chauk Prayagraj dated 20.6.2023, which is based on her date of birth mentioned in her Aadhar Card as the law is well settled that the Aadhar Card is not a document of proof of age or a date of birth of a person, in fact, it is a document of identity proof of a person. A perusal of the order of Child Welfare Committee, by which she was directed to be lodged at Children Home (Girl), Moradabad dated 25.7.2023 reveals that she had refused to go with her parents in her statement under Section 164 Cr.P.C. recorded by the Magistrate. As she apprehend danger to her life from her father. She has also expressed desire to live with the revisionist with whom she has solemnized marriage at Arya Samaj. However, this fact cannot be lost sight that the revisionist is an accused under Sections 363, 504, 506 IPC lodged at the instance of the father of the victim wherein an allegation has been made against him that he kidnapped the victim who is a minor from lawful guardianship of her parents. Although Section 12 of the Prohibition of Child Marriage Act, 2006 provides that child marriage will be voidable at the option of contracting party, who was a child (below 18 years of age) at the time of marriage, yet Section 10 provides for punishment for solemnizing a child marriage and Section 11 provides punishment for promoting or permitting solemnization of child marriage. POCSO Act prohibits and analyses any sort of sexual relationship by a person with a minor or a child and no exception has been made therein on issue that whether the person is spouse of the victim or in any manner related to her/his. The act is gender

neutral. Marital relationship pre supposes cohabitation between couple, spouse or partner which comes within the purview of offence of penetrative sexual assault and aggravated penetrative sexual assault, which is punishable with a term which may extend to life imprisonment. Various short of sexual offences against children are defined and made punishable under the Act, which includes sexual harassment, sexual assault, penetrative sexual assault and aggravated sexual assault. Victim appears to be minor on the basis of her date of birth recorded in school records, which will have primacy over her medical determination of age in terms of Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015, the victim has rightly been treated as minor by both the courts below and permitting the victim to be released from Government Children Home (Balgrih) to join the company of the revisionist, who is an accused in a case under Sections 366, 504, 506 IPC and is stated to be released on anticipatory bail, will amount to perpetuating the illegality which is made punishable with exorbitant punishment under POCSO Act. In POCSO Act, there is no exception like that provided under Exception (2) to proviso underlying Explanation- 2 of Section 375 IPC, which provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

12. Hon'ble Supreme Court in **Independent Thought vs. Union of India (Writ Petition (Civil) No.382 of 2013)** vide judgment dated 11.10.2017 held that exception 2 to Section 375 IPC will be read down as follows:- *“Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape”*. However, it is clarified that the judgment will have prospective effect. Meaning thereby, in view of the judgement of Hon'ble Supreme Court in Independent Thought (supra), the man can only have exemption from marital rape only when wife is not below 18 years of age. Hon'ble Court also clarified that Section 198(6) of the Code will apply to cases of rape of “wives” below 18 years, and

cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code. Hon'ble Court also observed in Independent Thought (supra) that exception 2 to Section 375 IPC where a man is granted exemption from marital rape, the wife is not being under 15 years of age is inconsistent with the provisions of POCSO Act. As provided in [Section 42A](#), in case of such an inconsistency, POCSO will prevail. Moreover, POCSO is a special Act, dealing with the children whereas [IPC](#) is the general criminal law. Therefore, POCSO will prevail over [IPC](#) and Exception 2 in so far as it relates to children, is inconsistent with POCSO.

13. With foregoing discussions, I am of the considered opinion that there is no illegality, irregularity or perversity in the impugned order passed by the C.W.C. while directing custody of the victim whom the revisionist claims to be his legally wedded wife in interim custody of Balgrih, Moradabad on the ground of her minority as well as the order of Additional District and Sessions Judge, Court No.4, Bijnor, whereby the criminal appeal preferred by the revisionist against the order dated 25.7.2023 passed by the CWC has been dismissed. The revision is devoid of merits and deserves to be dismissed.

14. However, it is clarified that the victim, who is lodged in Balgrih, Moradabad, will have opportunity to file an application for her release on the ground that she has attained age of majority at present, if she thinks it fit or she will have opportunity to apply before the court concerned where the criminal case pertaining to her kidnapping is pending expressing her desire to be sent to the custody of either of her parents and if any application is moved, the court concerned will decide the same in accordance with law, keeping in view the paramount concept of welfare of the child victim.

15. Accordingly, present revision is **dismissed** with above observations.

Order Date :- 6.11.2024

Kamarjahan

