

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 262 of 2018**Judgment reserved on : 07.03.2018Judgment delivered on : 26.03.2018

Ashu @ Ashutosh Kunder, S/o. Shri Pradeep Kunder, Aged About 17 Years, R/o. Shastri Market, Near Atta Chakki, Banstal, Raipur, Distt. Raipur, Chhattisgarh.

---- Petitioner**Versus**

State Of Chhattisgarh, Through District Magistrate, Raipur, Chhattisgarh.

---- Respondent

For Petitioner : Smt. Fouzia Mirza, Advocate

For State/Respondent : Shri Adhiraj Surana, Dy. Govt. Advocate

Hon'ble Shri Justice Goutam Bhaduri**CAV ORDER****26/03/2018**

1. This petition is against the order dated 09.01.2018 passed in Criminal Revision No.04/2018 by the VIIth Additional Sessions Judge, Raipur, whereby the revision preferred by the petitioner was dismissed by affirming the order dated 25.11.2017 passed by the Principal Magistrate, Juvenile Justice Board, Raipur. By the original order, the Principal Magistrate, Juvenile Justice Board has dismissed the application filed by the petitioner for ossification test.
2. As per the prosecution case, the petitioner is arrested by the Police Station Tikrapara for commission of offence under Section 376, 450, 342, 506 of I.P.C. and Section 3 & 4 of POCSO Act. Pursuant to the FIR No.375/2017 dated 20.07.2017, he was produced before the Court of J.M.F.C. and was remanded to judicial custody. On 31.07.2017 an application was moved by

the petitioner to send him to Child Observation Home claiming himself to be a juvenile. The said application was dismissed by the Magistrate by an order dated 09.08.2017. Subsequently, another application on behalf of the petitioner was moved before the Additional Sessions Judge on 18.08.2017 for his ossification test. The said application was dismissed by the Court on 25.09.2017 and the charge sheet was filed on 13.10.2017. On 09.11.2017 another application was moved by the petitioner with a prayer to send him to Juvenile Justice Board for ascertaining his age by conducting ossification test. The said application was dismissed by the Sessions Court on 14.11.2017. Thereafter, the petitioner had moved an application before the Juvenile Justice Board, Raipur, for ascertaining his age and prayer was made for ossification test. The said application was dismissed by the Juvenile Justice Board Raipur vide order dated 25.11.2017. The said order was subject of challenge in the revision and the revisional Court of VIIth Additional Sessions Judge Raipur by the impugned order affirmed the dismissal of claim whereby prayer was made to conduct the ossification test.

3. Learned counsel for the petitioner would submit that in the instant case, two documents are on record as the date of birth in the School register has been shown as 10.01.1999 and the birth certificate issued by the Municipal Corporation Raipur shows the date of birth on 10.01.2000. It is contended that since the date of incident in this case is stated to be 19.07.2017, as such, the ambiguity has been created and eventually the date of birth which is issued by the Municipal Corporation which shows it is on 10.01.2000 should have been accepted and in order to fortify the same, the ossification test should have been ordered for. The counsel referred to **(2016) 12 SCC 744** and submits that in view of the ratio laid down in that case in order to

determine the correct age, order for ossification test should have been ordered. It is stated that it was necessary to determine the age of the person i.e. the petitioner who claims to be a juvenile. She further submits that it was the Juvenile Justice Board which is alone empowered to order for ossification test to determine the age of the petitioner, therefore, even if any application was filed before any other Court that would be without any jurisdiction and any order will not affect on merit. It is stated when the application for ossification test was refused by Juvenile Justice Board the validity of the same can always be challenged.

4. Perused the order and the documents filed alongwith this petition. The order dated 14.11.2017 as it stands was earlier passed by the Additional Sessions Judge wherein prayer to conduct ossification test was declined. The said order was not subject of any challenge. The Court of VIIth Additional Sessions Judge by its order dated 14.11.2017 concluded the fact that according to the School register the date of birth of applicant is shown as 10.01.1999, therefore, on the date of incident on 19.07.2017 the petitioner was found to be a major. It was observed such date of birth according to the document of the case was shown to be 10.01.1999, the same was taken to be absolute and prayer for ossification test was dismissed by reference of Section 94(2)(iii) of the Juvenile Justice (Care & Protection of Children) Act, 2015. Thereafter, an application was moved before the Juvenile Justice Board for ossification test. The order sheets dated 20.11.2017 & 25.11.2017 would show that application for ossification test was moved reiterating the ground that the date of birth of the petitioner was wrongly recorded when he was admitted to the School, therefore, as per the Municipal Corporation Raipur since the date of birth is shown as 10.01.2000 the ossification test may be carried out. Therefore, conclusively the application for ossification

test was refused for the reason that date of birth as shown at the time of admission in the school exists as such no necessity was felt to order for ossification test.

5. The case referred by the petitioner of ***Parag Bhati v. State of U.P.*** reported in ***(2016) 12 SCC 744***, at para 32, the Court reiterated the principle of the case of ***Ashwani Kumar Saxena v. State of M.P.*** reported in ***(2012) 9 SCC 750***. The relevant para is reproduced herein under :

“32. While considering a similar question, this Court in Ashwani Kumar held as under :

“32. “Age determination inquiry” contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the abovementioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

33. Once the court, following the abovementioned procedures, passes an order, that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in sub-rule (5) of Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of Rule 12. Further, Section 49 of the JJ Act also draws a presumption of the age of the juvenility on its determination.

34. Age determination inquiry contemplated under the JJ Act and the 2007 Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion, etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. But court, Juvenile Justice Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination.”

6. Perusal of the aforesaid paras would show that judgment was rendered supra in reference to the earlier Act i.e. Juvenile Justice (Care & Protection of Children) Act, 2000 and Juvenile Justice (Care & Protection of Children) Rules, 2007. The principle as has been laid down that in order to determine the age, the Court can obtain the matriculation or equivalent certificate, if available and in absence of any matriculation or equivalent certificate the court needs to obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat. It further clarifies only if the abovementioned documents are unavailable then the ossification test may be ordered for. Therefore, the proposition do not come to rescue to the petitioner as in the instant case the date of birth of school first attended is available, which is shown as 10.01.1999.

7. Now as would be evident that the Juvenile Justice (Care & Protection of Children) Act 2015 (*hereinafter referred to as "the Act of 2015"*) while was promulgated the aforesaid principles laid down by Supreme Court has been codified in Section 94. The Section 94 of the Act of 2015 lays down the procedure for presumption and determination of age, which reads as under :

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 (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.

8. Reading of the aforesaid Section would show chronological order with respect to degree of satisfaction as laid down under Section 94 of the Act of 2015. The Section purports that when a person brought before it, and if found deems to conduct enquiry, it may proceed with the same and may seek evidence. (i) The first requirement and satisfaction would be on birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available. In absence thereof; (ii) birth certificate given by a corporation or a municipal authority or a panchayat; and lastly (iii) in absence of (i) and (ii) above age shall be determined by an ossification test. The section 94 of the Act of 2015 as would show has been framed is in pursuant to the law laid down by the Supreme Court in ***Parag Bhati*** (supra). Therefore, applying the aforesaid test in this petition, since the birth certificate from the school since is already available, therefore, the ossification test by the petitioner as a matter of right cannot be asked for. In view of the aforesaid discussions, the order passed by both the Courts below do not appears to be illegal or unjustifiable, which deserves any interference.
9. Consequently, the petition has no merit and accordingly it is dismissed.

Sd/-
Goutam Bhaduri
Judge