

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.307 of 2023

Arising Out of PS. Case No.-160 Year-2022 Thana- PARAIYA District- Gaya

Nitish Kumar, Son of Amresh Mistri R/o Village- Bagahi, P.S.- Paraiya,
District- Gaya.

... .. Petitioner/S

Versus

1. The State of Bihar, through Dome Secretary, Department of Home, Bihar, Patna.
2. The Home Secretary, Department of Home, Bihar, Patna.
3. The Director General of Police, Bihar, Patna.
4. The District Magistrate, Gaya Bihar.
5. The Inspector General Of Police, Magadh Division, Gaya.
6. The Senior Superintendent Of Police, Gaya.
7. The Officer In-Charge, Paraiya Police Station, Gaya.
8. Beauty Kumari D/O Santosh Kumar Resident Of Village- Bagahi, P.S.- Paraiya, District- Gaya, Presently At Child Care Home (Balika Grih), P.S.- Bodhgaya, District- Gaya.
9. Santosh Kumar S/o Lakshmi Sao R/o Village- Bagahi, P.S.-Paraiya, District- Gaya.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Sanjeev Kumar, Advocate
For the Respondent/s	:	Mr. Gyan Prakash Ojha, G.A. 7
		Mr. Abhishekh Singh, AC to GA 7
For the Respondent No. 9:		Mr. Abhay Kumar Thakur, Advocate

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL ORDER

(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

10 21-08-2023 The present petition has been filed by the petitioner,

 husband of the corpus i.e. respondent no. 8, namely, Beauty

 Kumari, daughter of Santosh Kumar by contending that his wife

 i.e. respondent no. 8 is in illegal custody in remand home and



therefore the respondent authorities be directed to hand over the custody of the corpus to the present petitioner.

2. Heard Mr. Sanjeev Kumar, learned counsel for the petitioner, Mr. Abhay Kumar Thakur, learned counsel for the respondent no. 9 i.e. father of the corpus and learned Government Advocate for the respondent authorities.

3. Learned advocate for petitioner has referred the averment made in the memo of the petition and thereafter mainly submitted that the age of the respondent no. 8 i.e. corpus is more than 18 years. It is submitted that father of the corpus i.e. respondent no. 9 herein has filed FIR bearing Paraiya P.S. Case No. 160 of 2022 for the alleged offence punishable under Sections 363 and 366-A of the Indian Penal Code, the said FIR was lodged on 26.05.2022. Learned counsel has referred the FIR which is placed on record at Annexure -1 with the compilation. It is submitted that during the course of investigation, the respondent no. 8 corpus was found and therefore she was brought to the concerned Magistrate, the statement of the girl i.e. corpus was recorded under Section 164 of the Code of Criminal Procedure, 1973 wherein the girl has stated that her age is 18 years and she had voluntarily left her house and gone to Calcutta and thereafter her marriage is



solemnized with the present petitioner on 29.05.2022. Learned counsel has referred the statement of the respondent no. 8 which was recorded under Section 164 of the Code of Criminal Procedure.

4. Learned counsel for the petitioner thereafter referred the certificate issued by the concerned doctor, copy of which is placed on record at page 18 of the compilation. It is submitted that as per the said certificate issued by the concerned doctor, the age of the respondent no. 8 is above 19 years.

5. At this stage, learned counsel for the petitioner has also referred the deposition given by the respondent no. 8/victim before the concerned court at the time of trial. It is submitted that trial of the present case has been commenced wherein the respondent no. 8/victim has specifically stated that her age is 18 years and at the time of her admission in the school, her father has wrongly given her date of birth as 01.01.2007 and therefore the same has been reflected in the matriculation certificate.

6. After referring to the aforesaid documents, learned counsel for the petitioner submitted that when the age of the respondent no. 8 corpus is more than 18 years, she cannot be detained against her wish and will in remand home. He therefore urged that the corpus be produced before this Court



and her wish be ascertained and thereafter this Court may pass appropriate order.

7. On the other hand, learned counsel appearing for the respondents has opposed this petition. Learned Government counsel has referred the affidavit reply filed on behalf of the respondent no. 6. Learned counsel has submitted that as per the report given by the concerned police officer, copy of which is placed on record at page 36 of the compilation, the age of the respondent no. 8/victim is less than 18 years. Her date of birth is specifically stated as 01.01.2007 on the basis of matriculation certificate of respondent no. 8. Learned counsel therefore submitted that the age of the victim as on today is approx 16 years and 04 months i.e. less than 18 years and therefore her consent is immaterial. It is also submitted that though the FIR was initially registered under Section 363 and 366A of Indian Penal Code, after investigation charge sheet has been filed under Section 376 of the Indian Penal Code, Section 4 and 6 of POCSO Act and under Section 9 of the Child Marriage Act.

8. Learned counsel for the respondents have also placed reliance upon Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as “the Act of 2015”). It is submitted that as per the aforesaid



provision when the matriculation certificate of the respondent no. 8/victim is available, this Court may not rely upon the medical opinion given by the concerned doctor with regard to the age of the victim. Learned counsel therefore urged that the present petition may not be entertain as the respondent no. 8 is not in illegal custody of the remand home.

9. We have considered the submission canvassed by learned counsel appearing for the parties, we have also gone through the materials produced on record and the provisions of the Act of 2015.

10. It would emerge from the record that the respondent no. 9 has filed FIR against present petitioner under Section 363 and 366-A of the Indian Penal Code, during course of investigation, the victim was found and she was produced before the concerned magistrate, the magistrate has recorded the statement of the girl/victim under Section 164 of the Code of Criminal Procedure. It is true that in the said statement the respondent no. 8/victim has stated that her age is 18 years, it is also true that while giving the opinion by the concerned doctor after examining the physical and mental condition of the victim, it has been observed that her age is above 19 years, however, it is pertinent to note that in the present case, matriculation



certificate of the victim i.e. respondent no. 8 is available with the Investigating Agency. From the said certificate which is referred in the report given by the Police Officer to his superior officer, copy of which is placed on record at page 36 of the compilation, her birth date is 01.01.2007. The said aspect is also reflected from the deposition given by the victim i.e. respondent no. 8 herein before the concerned trial court during her examination-in-chief, she specifically stated that in her matriculation certificate her birth date is shown as 01.01.2007, however, at the time of her admission in the school her father has wrongly shown her date of birth as 01.01.2007. Thus, the fact remains that the matriculation certificate of the respondent no. 8/girl is available.

11. At this stage, we would like to refer the provisions containing Section 94 of the Act of 2015 which provides 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 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”.

12. From the aforesaid provision, it is revealed that while considering the age of the child in conflict with law, the concerned Committee or the Board has to consider the date of birth certificate issued from the school or the matriculation or



equivalent certificate issued by the concerned examination board if available. It is further revealed from the aforesaid provisions that if the same is not available, the birth certificate given by the corporation or the municipal authority or panchayat is to be considered and if both the aforesaid documents are not available, then and then only the age shall be determined by ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board.

13. It is pertinent to note at this stage that the Hon'ble Supreme Court in the case of ***Jarnail Singh Vs State of Haryana*** reported in (2013)7 SCC 263 has observed in paragraph nos. 22 and 23 as under:

“22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 2007 Rules). The aforesaid 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:

“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.

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 off 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.”

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW6. The manner of determining age conclusively, has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a



child is ascertained, by adopting the first available basis, out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available, would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the concerned child, is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3), envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the concerned child, on the basis of medical



opinion”.

14. From the aforesaid observation made by Hon’ble Supreme Court, it is clear that even though Rule 12 of the 2007 Rules, strictly applicable only to determine the age of a child in conflict with law. The said statutory provision should be the basis for determining age even for a child, who is a victim of crime. The Hon’ble Supreme Court has therefore further observed that it would be just and appropriate to apply Rule 12 of the 2007 Rules to determine the age of prosecutrix.

15. Thus, as discussed hereinabove in the present case when matriculation certificate of the respondent no. 8/victim is available wherein her date of birth is specifically recorded as 01.01.2007. This Court has to believe the said age as a correct age of the victim/respondent no. 8 herein. Though she had time and again stated that she is aged about 18 years. It is also pertinent to note that the petitioner is facing charge for commission of offence punishable under Sections 4 and 6 of POCSO Act as well as Section 9 of the Child Marriage Act alongwith other provisions of Indian Penal Code, we are not inclined to entertain the request made by the petitioner.

16. In view of the aforesaid discussion, we are of the view that the respondent no. 8 is not in illegal confinement of



the remand home as alleged by the petitioner. Further, as the victim is minor, her consent is immaterial. The present petition which is filed for issuance of writ of habeas corpus is misconceived and accordingly, we are not inclined to entertain the same.

17. Accordingly, this petition is dismissed.

(Vipul M. Pancholi, J)

(Chandra Shekhar Jha, J)

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