

220 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRR No.2771 of 2019
Date of decision : 29.01.2024

LALIT TANWARPetitioner

Versus

STATE OF HARYANARespondent

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. Keshav Pratap Singh, Advocate for
Mr. Rajat Singh, Advocate and
Mr. Rahul Sangwan, Advocate for the petitioner.

Mr. Gaurav Bansal, DAG, Haryana.

PANKAJ JAIN, J.

Present petition involves challenge to the order dated 22nd of August, 2019 passed by Additional Sessions Judge, Faridabad upholding the order dated 6th of July, 2019 passed by Principal Magistrate Juvenile Justice Board, Faridabad holding that the petitioner be tried as adult in FIR No.187 dated 22nd of July, 2019 registered for the offences punishable under Section 302 IPC and Section 25 of Arms Act, at Police Station Sector-58, Faridabad.

2. Ld. Counsel for the petitioner has relied upon Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (herein after referred to as 'the Act') to submit that the preliminary assessment as contemplated under the Act was required to be conducted with the

assistance of the experienced psychologists or psycho-social workers or other experts. Contention raised is that as per mandate of Section 15 it is incumbent upon the Board to assess the child in conflict with the aid of an expert in psychology. He submits that where the Board does not have any expert in psychology as its member, proviso attached to Section 15(1) of the 2015 Act has to be resorted to mandatorily. The impugned order having been passed without such assistance militates against the mandate of the Act and thus would be bad in the eyes of law. Reliance is being placed upon the law laid down by Apex Court in **Barun Chandra Thakur vs. Master Bholu and another, 2023(2) R.C.R. (Criminal) 686** and that by the Gujarat High Court in **Child in Conflict with Law vs. State of Gujarat, 2023 NCGUJHC 47956**.

3. State Counsel submits that from the bare reading of the allegations against the petitioner it is evident that the petitioner acted as a fully grown adult and was well aware of the consequence of his act.

4. In order to appreciate the precise plea being raised by the counsel for the petitioner it will be apt to peruse Section 15 of the Act which reads as under :

“Section 15. Preliminary assessment into heinous offences by Board. (1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the

offence, and may pass an order in accordance with the provisions of subsection (3) of section 18:

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Explanation- For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973:

Provided that the order of the Board to dispose of the matter shall be appealable under subsection (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14.”

5. The entire emphasis is on the word “may” as used in proviso appended to Section 15(1). The argument is that word “may” has to be read as “shall” where the Board does not have an expert in psychology as its member.

6. The issue is no more *res integra* and has been answered by the Supreme Court in the case of **Barun Chandra Thakur (supra)** wherein the Apex Court held as under :

“62. The obligation of the Board in making the preliminary assessment on the four counts mentioned in section 15 of the Act is largely dependent upon the wisdom of the Board without there

being any guidelines as to how the Board would conduct such preliminary assessment. In the absence of any such framework or guidelines, the Board has to use its discretion in taking into consideration whatever material it deems fit for assessing the four attributes.

(a) In the present case, the Board and the Children's Court, relying upon the statement given by the child at the time of first appearance before the Board, the second statement given by the child at a later stage, the SIR and the report of the psychologist indicating an IQ level of 95, have held that the respondent had the mental capacity to commit the offence.

(b) Insofar as the physical capacity is concerned, the Board and the Children's Court have taken into consideration the built of the child and his age to hold that he had the physical capacity to commit the nature of the alleged assault.

(c) The Board relied upon the fact that the respondent was studying in class 11th; he had stated that he is physically and mentally fit and not suffering from any disease; his IQ level shows that he is mentally fit and as such it cannot be said that he did not know the consequences of the alleged offence to be committed by him. From the statement of the respondent recorded during his personal assessment, it was indicated that he was mature enough. All these facts satisfied the Board that the respondent was having sufficient maturity and ability to understand the consequences of his action.

(d) The order of the Board does not anywhere refer to its assessment regarding the circumstances in which the respondent allegedly committed the offence. However, what appears is that the Board relied upon the SIR.

63. In the present case, the Board and the Children's Court

relied heavily on the psychologist's report which only reflected the IQ of the respondent to be of average level bearing a score of 95 to hold that the respondent had the mental capacity to commit the offence and also ability to know the consequences of the offence. The Board and the Children's Court both have also recorded that the recommendation of the psychologist to send the respondent for further assessment to the Institute of Mental Health, University of Health Sciences, Rohtak was not necessary as, according to them, the IQ findings were sufficient for them to arrive at the preliminary assessment.

64. Section 15 and rule 10A provide that the Board may take the assistance of psychologists, psychosocial workers, or other experts who had experience of working with children in difficult circumstances. According to the learned counsel for the appellants, the word 'may' should be read as 'may' only i.e., the Board in its discretion may or may not take the assistance of such experts whereas on behalf of the respondent, it has been strenuously contended that the word 'may' should be read as 'shall' and it should be mandatory for the Board to take opinion or assistance from such experts before passing an order of preliminary assessment. This aspect is dealt with at a later stage.

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74. The world acknowledges that children in conflict with law should be treated differently than adults in conflict with law. The reason is that the mind of the child has not attained maturity and it is still developing. Therefore, the child should be tested on different parameters and should be given an opportunity of being brought into the main stream if, during his juvenility, has acted in conflict with law. To understand psychology of the child, huge rounds of studies have been made not only recently but from age old times and child psychology is a subject which is being studied world over and there are institutes specifically dealing with the developments and research on the said subject. The

enactments dealing with children are enacted world over.

75. It is to be noted that child psychology is a specialised branch of development psychology, its genesis is based on the premise that children and adults have a different thought process. The individualised assessment of adolescent mental capacity and ability to understand the consequences of the offence is one of the most crucial determinants of the preliminary assessment mandated by section 15 of the Act, 2015. The report of the preliminary assessment decides the germane question of transferring the case of a child between 16 to 18 years of age to the Children's Court. This evaluation of 'mental capacity and ability to understand the consequences' of the child in conflict with law can, in no way, be relegated to the status of a perfunctory and a routine task. The process of taking a decision on which the fate of the child in conflict with law precariously rests, should not be taken without conducting a meticulous psychological evaluation.

76. As already noticed, the Board consists of three members, one is a Judicial Officer First Class and two social workers, one being a woman. The social worker appointed as a member could be having a degree in child psychology or psychiatry but it is not necessary. As such, the constitution of the Board may not necessarily be having an expert child psychologist. It is for all the above reasons that it has been provided not only in sections 15 and 101(2) but also under the Model Rules that assistance may be taken from an expert psychologist. Having regard to the framework of the Act, 2015 and the Model Rules and the purpose of preliminary assessment in terms of Section 15 as also looking to the varied composition of the Board, we are of the view that where the Board is not comprising of a practicing professional with a degree in child psychology or child psychiatry, the expression "may" in the proviso to section 15(1) would operate in mandatory form and the Board would be

obliged to take assistance of experienced psychologists or psycho-social workers or other experts. However, in case the Board comprises of at least one such member, who has been a practicing professional with a degree in child psychology or child psychiatry, the Board may take such assistance as may be considered proper by it; and in case the Board chooses not to take such assistance, it would be required of the Board to state specific reasons therefor.

77. It is a well settled principle of interpretation that the word 'may' when used in a legislation by itself does not connote a directory meaning. If in a particular case, in the interests of equity and justice it appears to the court that the intent of the legislature is to convey a statutory duty, then the use of the word "may" will not prevent the Court from giving it a mandatory colour. This Court in ***Bachahan Devi v. Nagar Nigam, Gorakhpur, (2008) 12 SCC 372***, held as under:

"18. It is well settled that the use of the word "may" in a statutory provision would not by itself show that the provision is directory in nature. In some cases, the legislature may use the word "may" as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word "may", the court has to consider various factors, namely, the object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like. It is equally well settled that where the word "may" involves a discretion coupled with an obligation or where it confers a positive benefit to a general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief, or where giving the words directory significance would defeat the very object of the Act, the word "may" should be interpreted to convey a mandatory force. As a general rule, the word "may" is permissive and operative to confer discretion and especially so, where it is used in juxtaposition to the word

"shall", which ordinarily is imperative as it imposes a duty. Cases, however, are not wanting where the words "may", "shall" and "must" are used interchangeably. In order to find out whether these words are being used in a directory or in a mandatory sense, the intent of the legislature should be looked into along with the pertinent circumstances."

78. Similarly, this Court in *Dhampur Sugar Mills Ltd. v. State of U.P.*, (2007) 8 SCC 338, held:

"36....In our judgment, mere use of word "may" or "shall" is not conclusive. The question whether a particular provision of a statute is directory or mandatory cannot be resolved by laying down any general rule of universal application. Such controversy has to be decided by ascertaining the intention of the legislature and not by looking at the language in which the provision is clothed. And for finding out the legislative intent, the court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant to the issue."

79. Therefore, looking to the purpose of the Act, 2015 and its legislative intent, particularly to ensure the protection of best interest of the child, the expression "may" in the proviso to Section 15(1) thereof and the requirement of taking assistance of experienced psychologists or psycho-social workers or other experts would operate as mandatory unless the Board itself comprises of at least one member who is a practicing professional with a degree in child psychology or child psychiatry. Moreover, in case the Board, in view of its own composition with at least one member, who is a practicing professional with a degree in child psychology or child psychiatry, chooses not to take such assistance, it would record specific reasons therefor."

7. The issue thus stands settled now. The Apex Court has held that the task of preliminary assessment of the child in conflict of law under Section 15 of the 2015 Act being a delicate one requires expertise. The same has to be accomplished by an expert in psychology.

8. State Counsel is not in position to dispute that the Board in the present case did not have assistance of an expert in psychology as its member or as an associate.

9. The question that now arises is : “*where the impugned order is being set aside how the petitioner can be tested as by now he has already crossed the age and cannot be said to be a juvenile?*”.

10. The precise issue has also been dealt by the Apex Court in **Barun Chandra Thakur (supra)** holding as under :

“84. The mental age as per the applicable formula based on the IQ of the child would be less than 16 years. The Board, provided only 30 minutes time to the child, his lawyer, his father and also to the counsel for CBI to peruse the 35 pages of the report, which was too little to peruse and comprehend and give any evidence in rebuttal. The CBI counsel had admitted that it did not have officers or the required infrastructure to conduct the investigation under the Act, 2015. For all the above reasons, the High Court remitted the matter to the Board after setting aside both the orders of the Board and the Children's Court to consider afresh and assess the intelligence, maturity, physical fitness and as to how the child in conflict with law was in a position to know the consequences of the offence. The exercise was to be undertaken within a period of six weeks. The High Court further directed that while conducting the preliminary assessment afresh, opinion of the psychologist of the Government Hospital (Institute of Mental Health, University of

Health Sciences, Rohtak) be obtained. This Court may not agree with the reasoning given by the High Court on all counts and also the direction given for conducting further tests. However, we have no hesitation in agreeing with the ultimate result of the High Court in remanding the matter for a fresh consideration after rectifying the errors on lack of adequate opportunity.

85. The High court taking into consideration all these aspects set aside the order of the Board, and remanded the matter and also directed for getting further examination of the child, and this exercise was to be undertaken within 6 weeks. Today, after 3² years, we are not in a position to give an opinion as to whether any further test can be carried out at this stage as the age of the child is now more than 21 years. However, we leave it to the discretion of the Board or the psychologist who may be consulted as to whether any fresh examination would be of any relevance/assistance or not. We have already referred to in detail the kind of analysis or assessment required to be made under section 15. The Act, 2015 or the Model Rules do not lay down any guidelines or framework to facilitate the Board in making a proper preliminary assessment on the relevant aspects. The only liberty given to the Board is to obtain assistance of an experienced psychologist or a psychosocial worker or other expert. In the present case, the only assistance taken is to get the mental IQ of the child. Beyond that, regarding the ability to understand the consequences and also the circumstances in which the alleged offence was committed, no report was called for from any psychologist.”

(emphasis supplied)

11. In view thereof, the present petition is allowed. Impugned orders dated 22nd of August, 2019 and 6th of July, 2019 are hereby set aside.

The Board shall reassess the petitioner with aid of an expert in terms of

Section 15(1) of 2015 Act. The relevance of test at this stage is also left to the realm of the Board to opine.

12. Ordered accordingly.

January 29, 2024	(Pankaj Jain)
Dpr	Judge

Whether speaking/reasoned	:	Yes
Whether reportable	:	Yes