
(2014) 05 AHC CK 0044

Allahabad High Court (Lucknow Bench)

Case No: Criminal Revision No. 617 of 2013

C.B.I.

APPELLANT

Vs

Yogendra Kumar

RESPONDENT

Date of Decision: May 22, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 401
- Evidence Act, 1872 - Section 35
- Juvenile Justice (Care and Protection of Children) Act, 2000 - Section 52, 53, 7-A
- Penal Code, 1860 (IPC) - Section 307, 323, 332, 352, 396

Citation: (2014) 3 ACR 3407 : (2014) 6 ALJ 786 : (2014) 86 ALLCC 454

Hon'ble Judges: Arvind Kumar Tripathi (II), J

Bench: Single Bench

Advocate: Bireshwar Nath and Amar Jeet Singh Rakhra, Advocate for the Appellant; Ajai Kumar, Sartaj Ahmad Siddiqui and Umesh Chandra, Advocate for the Respondent

Judgement

Arvind Kumar Tripathi (II), J.

Heard Shri Amar Jeet Singh Rakhra, learned Counsel for the revisionist and Shri Ajay Kumar and Shri Sartaj Ahmad Siddiqui, learned Counsel for the opposite party. Instant criminal revision u/s 53 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the Act) read with section 401 Cr.P.C., has been filed by the Central Bureau of Investigation challenging the order dated 28.10.2013 passed by the learned Sessions Judge, Lucknow in Criminal Appeal No. 142 of 2013 (Yogendra Kumar @ Bablu v. C.B.I. and another) by which learned Sessions Judge, Lucknow has allowed the criminal appeal and declared Yogendra Kumar @ Bablu a juvenile, and has set aside the order passed by the Juvenile Justice Board by which application for declaring juvenile was rejected.

2. As per factual matrix of the case, Yogendra Kumar @ Bablu was involved in case crime No. 19 of 2013, under sections 396, 307, 323, 504, 332, 352 IPC and section 7 of Criminal Law Amendments Act, Police Station Kunda, District Pratapgarh. An application was moved by the guardian of Yogendra Kumar @ Bablu with the prayer that Yogendra Kumar @ Bablu be declared juvenile on the date of occurrence i.e. 2.3.2013. The basis of claim was date of birth recorded in high school certificate issued by Madhyamik Shiksha Parishad, U.P., Allahabad, which is 18.5.1996. It was submitted that on the date of occurrence he was of 16 years 9 months and 14 days.

3. Objections were filed by the C.B.I. against the application and it was mentioned that date of birth of Yogendra Kumar @ Bablu was 18.12.1994, and the same has been changed in the record of Dukhi Ram School, Balipur, which was run by the family of Yogendra Kumar @ Bablu. It was mentioned that Phool Chand Yadav, who is running the school, is the uncle of Yogendra Kumar @ Bablu.

4. The Juvenile Justice Board conducted the inquiry, examined Salig Ram Pal, Principal of Dukhi Ram Intermediate College, Balipur; Indresh Kumar; and Avinash Kumar and rejected the application, and held that Yogendra Kumar @ Bablu was not a juvenile on the date of occurrence. Feeling aggrieved, criminal appeal u/s 52 of the Act was filed, which was allowed vide impugned order, and Yogendra Kumar @ Bablu was declared a juvenile. Hence, this criminal revision.

5. It was submitted by the learned Counsel for the CBI that Yogendra Kumar @ Bablu has completed his 10th standard education from Dukhi Ram Intermediate College. The management of this school is being run by the family of Yogendra Kumar @ Bablu. Yogendra Kumar @ Bablu has passed 5th standard and was promoted to 6th standard on 6.4.2004, and further promoted to 10th standard on 1.7.2008. He completed his 10th class in the month of March April, 2009. Taking into account his date of birth, which is accepted by the learned Sessions Judge, Lucknow i.e. 18.5.1996, Yogendra Kumar @ Bablu was less than 12 years, when he passed class 10th. This is very unusual from a child coming from village background. It was further submitted that younger brother of Yogendra Kumar @ Bablu was born in the month of March, 1997. Thus, considering the alleged date of birth i.e. 18.5.1996 it is revealed that younger brother was born less than eight months after Yogendra Kumar @ Bablu was born. This is conclusive proof that record of school has been tampered.

6. It was further submitted that Salig Ram Pal, the Principal and Indresh Kumar, Record Clerk of Dukhi Ram Intermediate College, Balipur were examined by the Juvenile Justice Board, and both of them have testified that original date of birth of Yogendra Kumar @ Bablu was 18.12.1994, and changes in the record of school, in respect of date of birth of accused, were carried out deliberately at the time of submitting registration form for matriculation examination at the instruction of Phool Chand Yadav, Manager of school and uncle of Yogendra Kumar @ Bablu. It was further submitted that this clearly prove that this date of birth, mentioned in

matriculation certificate, does not carry genuine date of birth of opposite party, hence cannot be relied upon as conclusive evidence to support the claim of Yogendra Kumar @ Bablu for determination of age.

7. It was further submitted that Juvenile Justice Board declared Yogendra Kumar @ Bablu as major after examining the school record as well as other facts and circumstances of the case after conducting the detailed inquiry. It was further submitted that learned Sessions Judge has set aside the order without any evidence and on conjectures and surmises.

8. Learned Counsel for the opposite party submitted that basis of declaring Yogendra Kumar @ Bablu a juvenile is his high school/matriculation certificate, and there is no other evidence to show that this matriculation certificate has been forged or has been tampered.

9. Learned Counsel for the opposite party has relied upon the decisions in the cases of [Vijay Singh Vs. State of Delhi](#), [Ashwani Kumar Saxena Vs. State of M.P.](#), [Babloo Pasi Vs. State of Jharkhand and Another](#), and [Abuzar Hossain @ Gulam Hossain Vs. State of West Bengal](#),

10. In *Vijay Singh v. State of Delhi* (supra) the Apex Court has held as under:--

"14. Going by Rule 12 of the Rules, in particular, sub-rule (3), the age determination inquiry should be conducted by the Court or by the Board or the Committee by seeking evidence by obtaining (a)(i) the matriculation or equivalent certificate, if it is 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 municipal authority or a panchayat; b) and 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." (para. 14)

11. In *Abuzar Hossain @ Gulam Hossain v. State of West Bengal* (supra) the Apex Court has held in para. 36(iii) that "As to what materials would prima facie satisfy the Court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rule 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the Court about the age of the delinquent necessitating further enquiry under Rule 12."

12. In *Babloo Pasi v. State of Jharkhand and another* (Supra) the Apex Court has held as under:--

"Insofar as the Board is concerned, it is evident that it has mechanically accepted the entry in Voters List as conclusive without appreciating its probative value in terms of the provisions of section 35 of the Indian Evidence Act, 1872. Section 35 of the said Act lays down that an entry in any public or other official book, register, record, stating a fact in issue or relevant fact made by a public servant in the discharge of his official duty especially enjoined by the law of the country is itself a relevant fact. It is trite that to render a document admissible u/s 35, three "conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible u/s 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. (See: *Birad Mal Singhvi v. Anand Purohit*) 1988 (Supp) SCC 604."

13. Before entering into the merit of rival contentions, the procedure for determination of age given u/s 7-A of the Act is reproduced below:--

"7-A. Procedure to be followed when claim of juvenility is raised before any Court.--(1) Whenever a claim of juvenility is raised before any Court or a Court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the Court shall make an enquiry, take such evidence as may be necessary (but not a affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any Court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the Court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence, if any, passed by a Court shall be deemed to have no effect"

14. Both, Central Government and State of Uttar Pradesh has framed rules to be followed for determination of age. Rule 12(3) of Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short "Rules 2007") framed by the Central Government reads as under:--

"12(3). Procedure to be followed in determination of Age.--(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;"

15. Rule 22(5) of Uttar Pradesh Juvenile Justice (Care and Protection of Children) Rules, 2004 (hereinafter referred to as Rules 2004) reads as under:--

"Rule 22(5) In every case concerning a juvenile or child, the Board shall either obtain--

(i) a birth certificate given by a corporation or a municipal authority; or

(ii) a date of birth certificate from the school first attended; or

(iii) matriculation or equivalent certificates, if available; and

(iv) in the absence of (i) to (iii) above, the medical opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board, regarding his age; and, when 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."

16. According to Rule 12(3) of Rules, 2007 the question of juvenility of the accused has to be decided primarily on the basis of matriculation certificate.

17. Admittedly, the basis for allowing the appeal by the learned Sessions Judge, Lucknow, against the order of Juvenile Justice Board, is matriculation certificate.

18. Avinash Kumar, Tehsildar, Kunda has proved the voter list of 2012 in which the age of Yogendra Kumar @ Bablu is shown to be 19 years.

19. In the case of [Annu @ Vikram Vs. State of U.P. and Others](#), and [Waseem Vs. State of U.P.](#), it has been held that age recorded in the voter list cannot be taken to be a guide. In view of this, the evidence adduced by CW-3 Avinash Kumar is of no help to either of the parties.

20. Now remains the statement of Salig Ram Pal and Indresh Kumar. The statement of Indresh Kumar has been annexed along with counter affidavit as Annexure 2. Indresh Kumar was employed in the Dukhi Ram Intermediate College since 2002. After going through the admission register he has stated that the date of birth of Yogendra Kumar @ Bablu was earlier mentioned as 18.12.1994, he has altered it as 18.5.1996 on the direction of Phool Chand Yadav, Manager of the school. CW-1 has admitted that at the time of admission no form was to be filed by the guardian only

a scholar register is prepared.

21. The Juvenile Justice Board has, after going through the record produced by the parties, found that there are several cuttings, eraser has been used, whitening liquor has been used on the date of birth mentioned in the scholar register, "18.12.1994" has been altered, and "18.5.1996" has been mentioned.

22. The Sessions Judge, Lucknow has given very curious reasoning to discard this fact. He has written in his judgment that "I had raised one important query with learned Counsel for the C.B.I. that why the prosecution or CBI has proceeded with the case by presuming that the date of birth of appellant as 18.12.1994, contained in the document concerning pre-matriculation class, would have been actual and exact date and not 18.5.1996. The possibility cannot be ruled out that actual date of birth of the appellant would have been 18.5.1996 and not 18.12.1994. The possibility also cannot be ruled out that father and guardian of the appellant would have approached to the authority of the School to get the wrong date of birth 18.12.1994 corrected as 18.5.1996. On this query, the learned CBI Counsel failed to give specific reply to the Court. It is also established law that if two views are possible in respect of the matter of declaring some person as a juvenile, the view favouring the applicant/accused must be adopted. At the same time, it should also be kept in mind the judicial notice of the fact may be taken that when parents of a child, while getting him admitted in primary class, are always tempted in getting the date of birth mentioned 1, 2 or 3 years lessor than actual date of birth, so that benefit of this can be availed by the child in the Government service."

23. The Sessions Judge has lost sight of the fact that the age of the person recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission, for obtaining an appointment, for contesting elections, for registration of marriage, for obtaining separate unit in ceiling laws, and even for the purposes of litigating before civil forum. I am afraid that these examples are only indicative, there may be several other reasons also.

24. The Sessions Judge has also lost sight of the fact that it is for the person claiming himself to be juvenile to prove that he is juvenile, so the burden of proof is on the person claiming to be juvenile. There is no scope for conjectures and surmises. Learned Sessions Judge has not given any thought to the fact that there were several cuttings, interpolations in the entries and whitener was also used. These entries are the only basis on which date of birth in matriculation certificate has been mentioned. Date of birth in matriculation certificate is mentioned on the basis of form filled by the student, so when there is any doubt regarding correctness of entries in the school register, then entries must be proved strictly with regard to section 35 of the Indian Evidence Act.

25. The claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the

Court at the threshold whenever raised. (See: Abuzar Hossain @ Gulam Hossain v. State of West Bengal (supra).

26. For determination of date of birth of a person before Court of law, whether in civil proceeding, or a criminal proceeding the Apex Court has held as under:--

"Determination of the date of birth of a person before a Court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties. Different standards having regard to the provision of section 35 of the Evidence Act cannot be applied in a civil case or a criminal case. Mr. Mishra, however, would urge that while in a civil dispute a strict proof may be necessary, in a criminal case and particularly in the case of a juvenile, the Court may consider any evidence which may be brought on records by the parties. We do not agree. (para. 13)

Section 35 of the Evidence Act would be attracted both in civil and criminal proceedings. The Evidence Act does not make any distinction between a civil proceeding and a criminal proceeding. Unless specifically provided for, in terms of section 35 of the Evidence Act, the register maintained in ordinary course of business by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which, inter alia, such register is kept would be a relevant fact. Section 35, thus, requires the following conditions to be fulfilled before a document is held to be admissible thereunder: (i) it should be in the nature of the entry in any public or official register; (ii) it must state a fact in issue or relevant fact; (iii) entry must be made either by a public servant in the discharge of his official duty, or by any person in performance of a duty specially enjoined by the law of the country; and (iv) all persons concerned in-disputably must have an access thereto." (para. 14)

27. Admittedly, none of the witnesses examined are the author of the entries, so it is not clear as to what was the basis of date of birth entry into the scholar register, which is the basis of entry of matriculation certificate, when Yogendra Kumar @ Bablu was admitted in class IV for the first time, so it was essential for the Sessions Judge to consider as to on what basis the date 18.5.1996 was held to be his date of birth. Certainly, the boy must have been admitted by his father or other relatives. Unfortunately, father of Yogendra Kumar @ Bablu has died, so the best person to show the basis of date of birth was his mother. She has not been examined.

28. The deposition of Salig Ram Pal and Indresh Kumar, examined in this case, do not satisfy the requirements of section 35 of the Indian Evidence Act. None of the above witnesses have stated about the basis on which the entry of date of birth was made in school register. Cuttings and use of whitening fluid creates doubt about the authenticity of entry made in the school register. If the entry of date of birth

"18.5.1996" is treated to be correct, without any interpolation, then too there is no basis of such entry. The juvenile has failed to prove that entry made in the school register i.e. "18.5.1996" is correct one.

29. On the contrary, it is evident from the record that the date of birth mentioned in matriculation certificate is due to manipulation of documents.

30. A Court of law, for the purposes of determining the age of party to the lis must have regard to the provisions of section 35 of the Indian Evidence Act, will have to apply the same standard. No different standard can be applied in civil cases, and in criminal cases. In case of dispute, the Court may appreciate the evidence having regard to the facts and circumstances of the case. It would be a duty of the Court of law to accord the benefit to the juvenile provided he is one. To give the same benefit to a person, who, in fact, is not juvenile may cause injustice to the victim. Hence, this Court is of the view that the impugned order passed by the learned Sessions Judge, Lucknow is liable to be quashed, being erroneous and perverse.

31. The matter is liable to be remanded back to the learned Sessions Judge to decide the appeal afresh in the light of the evidence on record and observations made above. The criminal revision is liable to be allowed, and is hereby allowed. The impugned order dated 28.10.2013 passed by the learned Sessions Judge, Lucknow in Criminal Appeal No. 142 of 2013 (Yogendra Kumar @ Bablu v. C.B.I. and another) is quashed. Learned Sessions Judge, Lucknow to decide the appeal afresh in the light of the evidence discussed by the Juvenile Justice Board and the observations made by this Court in the body of the judgment. It is made clear that if learned Sessions Judge, Lucknow is of the opinion that exact assessment of age cannot be done, then he may, for the reasons recorded by them, may consider to obtain medical opinion from a duly constituted medical board, which will declare the age of the juvenile. In case exact assessment of age cannot be done by medical board, then the Court, or the board, or as the case may be, the committee, for the reasons to be recorded, by them may, if considers necessary, give benefit to Yogendra Kumar alias Bablu by considering his age on lower side within the margin of one year.