A.F.R.

Court No. - 49

Case :- HABEAS CORPUS WRIT PETITION No. - 390 of 2021
Petitioner :- Vandana @ Bandana Saini And Another
Respondent :- State Of U.P. And 5 Others
Counsel for Petitioner :- Anjeet Singh

Hon'ble Bachchoo Lal,J.
Hon'ble Shamim Ahmed,J.

1. Heard learned counsel for the petitioners, Sri Anjeet Singh through video conferencing, learned A.G.A. for the State and perused the record.

2. This writ petition has been filed seeking the following reliefs:-

> *"(I) Issue a writ, order or direction in the nature of habeas corpus commanding and directing the respondents/Superintendent of Government Women's Asylum Khuldabad, District - Prayagraj to produce the detenue-Vandana @ Bandana Saini before this Hon'ble Court and to set free of detenue on her own sweet will and wishes.*
>
> *(II) Issue a writ, order or direction, which this Hon'ble Court may deem fit and proper in the circumstances of the case.*
>
> *(III) Award the cost of the writ petition in favour of the petitioners."*

3. This writ petition has been filed on behalf of petitioner no. 1, Vandana @ Bandana Saini (detenue) through her husband, Vivek @ Vivek Kumar, petitioner no. 2 against whom F.I.R. was lodged on 24.05.2019 which was registered as Case Crime No. 131 of 2019, under Sections 363, 366, 120B I.P.C. and Section 7/8 of P.O.C.S.O. Act, 2012, Police Station Malwan, District - Fatehpur. As per the statement of the detenue recorded on 23.12.2020 under Section 164 Cr.P.C. in which she had stated her age to be 17 years. As per F.I.R. version the age of the detenue is 16 years and 2 months. The detenue was sent in the custody of Superintendent of Government Women's Asylum Khuldabad, District-Prayagraj by order dated 25.12.2020 passed by Judge, Child Welfare Committee, Fatehpur. As per school

leaving certificate of the detenue, her date of birth is 02.04.2004. Thus, she is minor.

4. Learned counsel for the petitioners submits that in medical report, the age of the victim/detenue has been opined about 19 years. As per the medical report, at the time of alleged incident, the victim/detenue was major. The victim/detenue has solemnized her marriage with Vivek @ Vivek Kumar on 17.5.2019 in a Temple at Gujarat. The victim/detenue in her statement recorded under Section 164 Cr.P.C. has not made any allegation against the petitioner no. 2, Vivek @ Vivek Kumar. It has further been submitted that in school leaving certificate, her date of birth has wrongly been shown as 02.04.2004 but the real fact is that at the time of the alleged incident, the victim/detenue was major.

5. Learned A.G.A. submits that the victim/detenue is a child below the age of 18 years as in her school leaving certificate of Class 8th, the date of birth of victim/detenue has been shown as 02.04.2004, copy of the same has been filed as Annexure-4 to the writ petition. In her own statement recorded under Section 164 Cr.P.C., the detenue has stated her age to be 17 years. Thus, she is minor. Therefore, there is no illegality in the order dated 25.12.2020 to keep the detenue in Government Women's Asylum Khuldabad, District-Prayagraj as she has refused to go with her parents. The order passed by the CWC is a judicial order, which has not been challenged in the present writ petition and even against the said order remedy of appeal lies under Section 101 of Juvenile Justice (Care and Protection of Children) Act, 2015.

6. We have carefully considered the submissions of the learned counsel for the parties and perused the record of the writ petition.

7. Section 94(2) of the Juvenile Justice (Care and Protection), 2015 (hereinafter referred to as "the J.J. Act") provides for

presumption and determination of age, as under:

> *"(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."*

8. Thus, as per provisions of Section 94(2) of the J.J. Act, the Child Welfare Committee or the Board has reasonable grounds for doubt as to 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, **firstly**, the date of birth certificate from school, or matriculation or equivalent certificate from the concerned examination Board, if available; and **in the absence thereof; secondly**, the birth certificate given by a corporation or a municipal authority or a panchayat; and **thirdly**, in absence of educational certificate or birth certificate as aforementioned, the 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**. Thus, as per statutory mandate of Section 94(2) of the J.J. Act, primacy is to be accorded to the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned Examination Board and only in absence thereof, the birth certificate of a corporation or municipal authority or a panchayat can be looked into. When the certificates as

provided under sub-clauses (i) and (ii) of sub-Section (2) of Section 94, is not available, only then the medical evidence as provided in sub-clause (iii) is to be taken into consideration. In the present set of facts, as per educational certificate, the date of birth of the petitioner is 02.04.2004.

9. The "juvenile" has been defined in Section 2(35) of the J.J. Act to mean a child below the age of eighteen years. The word "child" has been defined in Section 2(12) of the J.J. Act to mean a person who has not completed eighteen years of age. The phrase "child in conflict with law" has been defined under Section 2(13) of the J.J. Act to mean a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence. Section 2(14) of the J.J. Act defines the phrase "child in need of care and protection", as under:

> *"(14) "child in need of care and protection" means a child--*
>
> *(i) who is found without any home or settled place of abode and without any ostensible means of subsistence; or*
>
> *(ii) who is found working in contravention of labour laws for the time being in force or is found begging, or living on the street; or*
>
> *(iii) who resides with a person (whether a guardian of the child or not) and such person--*
>
> > *(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or*
> >
> > *(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or*
> >
> > *(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person;or*
>
> *(iv) who is mentally ill or mentally or physically challenged or suffering from terminal or incurable disease, having no one to support or look after or having parents or guardians unfit to take care, if found so by the Board or the Committee; or*
>
> *(v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or*

(vi) who does not have parents and no one is willing to take care of, or whose parents have abandoned or surrendered him; or

(vii) who is missing or run away child, or whose parents cannot be found after making reasonable inquiry in such manner as may be prescribed; or

(viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or

(x) who is being or is likely to be abused for unconscionable gains; or

(xi) who is victim of or affected by any armed conflict, civil unrest or natural calamity; or

(xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage;"

10. Section 37 of J.J. Act empowers the Child Welfare Committee that on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, it may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders as provided in clauses (a) to (h) of Sub-Section (1) of Section 37. Section 37 of the J.J. Act is reproduced below:

*"**37. Orders passed regarding a child in need of care and protection.**- (1) The Committee on being satisfied through the inquiry that the child before the Committee is a child in need of care and protection, may, on consideration of Social Investigation Report submitted by Child Welfare Officer and taking into account the child's wishes in case the child is sufficiently mature to take a view, pass one or more of the following orders, namely:--*

(a) declaration that a child is in need of care and protection;

(b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;

(c) placement of the child in Children's Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best

interest of the child;

(d) placement of the child with fit person for long term or temporary care;

(e) foster care orders under section 44;

(f) sponsorship orders under section 45;

(g) directions to persons or institutions or facilities in whose care the child is placed, regarding care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies;

(h) declaration that the child is legally free for adoption under section 38.

(2) The Committee may also pass orders for--

(i) declaration of fit persons for foster care;

(ii) getting after care support under section 46 of the Act; or

(iii) any other order related to any other function as may be prescribed."

11. Section 37(1)(c) of the J.J. Act empowers the Child Welfare Committee to place a child in Children's Home or fit facility or Specialised Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child. The order dated 25.12.2020 passed by the Child Welfare Committee is in exercise of powers under Section 37 of the J.J. Act. Under the circumstances, when undisputedly detenue-petitioner is a juvenile within the meaning of Section 2(35) and is in need of care and protection within the meaning of Section 2(14), the order passed by the Child Welfare Committee under Section 37 is in exercise of powers under the J.J. Act, cannot be said to suffer from any illegality.

12. It would be relevant to observe that Hon'ble Supreme Court has consistently taken the view that the principles applicable for

determining the age of "juvenile in conflict with law" are to be applied for determining the age of child victim vide **Jarnail Singh Vs. State of Haryana[1], Mahadeo Vs. State of Maharashtra[2], and State of M.P. Vs. Anoop Singh[3], (paras 14 to 18 are quoted below).**

> *14. We have given our thoughtful consideration to the first contention advanced at the hands of the learned counsel for the accused-appellant. We shall venture to determine the factual aspects taken into consideration by the learned counsel for the appellant, to substantiate the alleged free will and consent of the prosecutrix VW - PW6 individually ,so as to effectively determine the veracity of the submissions noticed above.*
>
> *15. In so far as the issue of having gone with the accused-appellant Jarnail Singh of her own free will, and of having had sexual intercourse with him consensually, it is necessary only to examine the uncontested deposition of the prosecutrix VW - PW6. In this behalf, it may be pointed out, that in her statement recorded under Section 164 of the Code of Criminal Procedure before the Judicial Magistrate, First Class, Jagadhari on 6.4.1993, the prosecutrix VW – PW6 had expressly asserted, that she was forcibly taken away on 25.3.1993, when she had gone out of her house to urinate in the street, by Jarnail Singh and his three accomplices. She had clearly and categorically testified, that all the four had caught hold of her. They had made her inhale something, which rendered her unconscious. She had further stated, that the accused-appellant Jarnail Singh and his accomplices, had then taken her to some unknown place in Uttar Pradesh in a vehicle where Jarnail Singh forcibly attempted to commit intercourse with her. At that juncture, she had slapped Jarnail Singh on his face, but in order to subjugate her, he had put a cloth in her mouth to prevent her from raising an alarm. Thereafter, the accused-appellant Jarnail Singh and his accomplices had committed forcible intercourse with her, one after the other. In her statement before the Trial Court, where she appeared as PW6, she had reiterated clearly the position of having been taken away by the accused-appellant Jarnail Singh, and his three accomplices. She affirmed, that she was taken away in a tanker to Uttar Pradesh and then all the accused had committed rape on her in a small room. On the aforestated aspect of the matter, she was not subjected to cross-examination at the behest of the accused. Only a suggestion was put to her, that she had persuaded the accused-appellant Jarnail Singh to take her away, in order to perform marriage with her, and for the said purpose had taken away cash, clothes and jewellery from her own residence. The aforestated suggestion was denied by the prosecutrix VW - PW6. Keeping in view the statement of the prosecutrix VW - PW6 under Section 164 of the code of Criminal*

1 (2013) 7 SCC 263
2 (2013) 14 SCC 637
3 (2015) 7 SCC 773

procedure before the Judicial Magistrate, First Class, Jagadhri, as also, the statement made by her while appearing before the trial court, and the manner in which she was subjected to cross-examination, there is no room for any doubt, that the prosecutrix was forcefully taken away, and that, she was subjected to rape at the hands of the accused-appellant Jarnail Singh and his three accomplices. It may still have been understandable, if the case had been, that she had consensual sex with the accused-appellant alone. But consensual sex with four boys at the same time, is just not comprehensible. Since the fact, that the accused-appellate Jarnail Singh and the prosecutrix VW – PW6 had eloped together is not disputed. And furthermore, since the accused-appellant having had sexual intercourse with the prosecutrix is also the disputed. It is just not possible to accept the proposition canvassed on behalf of the accused-appellant. We, therefore, find no merit in the instant submission.

16. The contention advanced at the hands of the learned counsel for the accused-appellant Jarnail Singh, that while leaving her house on 25.3.1993, the prosecutrix VW – PW6, had taken away a sum of Rs.3,000/-, needs a holistic examination. Whilst it is true that in the complaint, Jagdish Chandra (PW8), the father of the prosecutrix VW - PW6, had categorically mentioned that a sum of Rs.3,000/- was missing from his residence, and the said fact was duly mentioned in his complaint to the police dated 27.3.1993, yet he had not accuse the prosecutrix VW - PW6 for having taken it away. The instant aspect, in our considered view pales into insignificance, on account of the statement made by Jagdish Chandra (PW8) before the Trial Court. During the course of his deposition before the Trial Court, he had asserted, that he had mentioned that a sum of Rs.3,000/- was missing from his residence, but his wife Savitri Devi had found the aforesaid money from the residence itself, a few days later. Accordingly, the assertion made by the learned counsel representing the accused- appellant to the effect that the prosecutrix VW - PW6 had taken away a sum of Rs.3,000/-, when she left the house of her father on 25.3.1993, cannot be stated to have been duly proved. Besides the aforesaid, it is apparent from the cross-examination of the prosecutrix VW - PW6, that a suggestion was put to her that besides cash, she had taken away clothes and jewellery at the time of leaving her father's house on 25.3.1993. The prosecutrix VW - PW6 expressly denied the suggestion. There is no material on the record of the case to substantiate the said allegation. Therefore, it is not possible for us to accept the accusation levelled by the accused-appellant Jarnail Singh against the prosecutrix VW - PW6, either on the issue of having taken away a sum of Rs.3,000/- while leaving her house, or that she left her house on 25.3.1993 along with clothes and jewellery. Accordingly, the inference drawn by assuming the said factual position as true, simply does not arise.

17. The first contention advanced at the hands of the learned counsel for the appellant can be conveniently determined from another perspective. The High Court in the impugned order arrived at the conclusion that the prosecutrix VW - PW6 was a

minor at the time of occurrence on 25.3.1993, and had concluded, that even if she had accompanied the accused-appellant Jarnail Singh on 25.3.1993 of her own free consent, and even if she had had sexual intercourse with the accused consensually, the same would be immaterial. For, consent of a minor is inconsequential.

18. During the course of hearing of the present appeal, learned counsel for the appellant vehemently contested the determination of the High Court in the impugned judgment, wherein it had concluded, that the prosecutrix VW - PW6 was a minor. Insofar as the instant aspect of the matter is concerned, it was pointed out, that the sexual organs of the prosecutrix VW - PW6 were found to be fully developed by Dr. Kanta Dhankar- PW1. Her hymen was found to be ruptured. It was also seen during the medico-legal examination of the prosecutrix VW - PW6, that the vagina admitted two/three fingers easily. Learned counsel for the appellant-accused Jarnail Singh, also invited our attention to the cross-examination of Dr. Kanta Dhankar- (PW1), wherein she acknowledged having mentioned the age of the prosecutrix VW - PW6 as 15 years, on the basis of the statement made by the prosecutrix to her. Dr. Kanta Dhankar-PW1 had also acknowledged, that she had not got the ossification test conducted on the prosecutrix VW - PW6 to scientifically determine the age of the prosecutrix. Based on the aforesaid, it was averred that there was no concrete material on the record of the case, on the basis of which it could have been concluded by the High Court, that the prosecutrix was a minor on the date of occurrence.

13. In the case of **Independent Thought v. Union of India**[4], (paras-95, 96, 97, 107), Hon'ble Supreme Court held as under:

"95. Whatever be the explanation, given the context and purpose of their enactment, primacy must be given to pro-child statutes over IPC as provided for in Sections 5 and 41 IPC. There are several reasons for this including the absence of any rationale in creating an artificial distinction, in relation to sexual offences, between a married girl child and an unmarried girl child. Statutes concerning the rights of children are special laws concerning a special subject of legislation and therefore the provisions of such subject-specific legislations must prevail and take precedence over the provisions of a general law such as IPC. It must also be remembered that the provisions of the JJ Act as well as the provisions of the POCSO Act are traceable to Article 15(3) of the Constitution which enables Parliament to make special provisions for the benefit of children. We have already adverted to some decisions relating to the interpretation of Article 15(3)of the Constitution in a manner that is affirmative, in favour of children and for children and we have also adverted to the discussion in the Constituent Assembly in this regard. There can therefore be no other opinion regarding the pro-child slant of the JJ Act as well as the POCSO Act.

4 (2017) 10 SCC 800

96. A rather lengthy but useful discussion on this subject of special laws is to be found in L.I.C. v. D.J. Bahadur in paras 52 and 53 of the Report. Briefly, it was held that the subject-matter and the perspective of the statute are determinative of the question whether a statute is a general law or a special law. Therefore, for certain purposes a statute might be a special law but for other purposes, as compared to another statute, it might be a general law. In respect of a dispute between the Life Insurance Corporation and its workmen qua workmen, the Industrial Disputes Act, 1947 would be a special law vis-à-vis the Life Insurance Corporation Act, 1956; but, "when compensation on nationalisation is the question, the LIC Act is the special statute". It was held as follows: (SCC pp.350-51)

"52. In determining whether a statute is a special or a general one, the focus must be on the principal subject-matter plus the particular perspective. For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with finer points of law. In law, we have a cosmos of relativity, not absolutes -- so too in life. The ID Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for the nature of industrial disputes coming within its ambit. It creates an infrastructure for investigation into, solution of and adjudication upon industrial disputes. It also provides the necessary machinery for enforcement of awards and settlements. From alpha to omega the ID Act has one special mission -- the resolution of industrial disputes through specialised agencies according to specialised procedures and with special reference to the weaker categories of employees coming within the definition of workmen. Therefore, with reference to industrial disputes between employers and workmen, the ID Act is a special statute, and the LIC Act does not speak at all with specific reference to workmen. On the other hand, its powers relate to the general aspects of nationalisation, of management when private businesses are nationalised and a plurality of problems which, incidentally, involve transfer of service of existing employees of insurers. The workmen qua workmen and industrial disputes between workmen and the employer as such, are beyond the orbit of and have no specific or special place in the scheme of the LIC Act. And whenever there was a dispute between workmen and management the ID Act mechanism was resorted to.

53.What are we confronted with in the present case, so that I may determine as between the two enactments which is the special? The only subject which has led to this litigation and which is the bone of contention between the parties is an industrial dispute between the Corporation and its workmen qua workmen. If we refuse to be obfuscated by legal abracadabra and see plainly what is so obvious, the conclusion that flows, in the wake of the study I have made, is that vis-a-vis "industrial disputes" at the termination of the settlement as between the workmen and the Corporation, the ID Act is a special legislation and the LIC Act a general legislation. Likewise, when compensation on nationalisation is the

question, the LIC Act is the special statute. An application of the generalia maxim as expounded by English textbooks and decisions leaves us in no doubt that the ID Act being special law, prevails over the LIC Act which is but general law."

(Emphasis in original)

The scope and amplitude of the two significant pro-child statutes may now be examined in light of the law laid down by this Court including Sections 5 and 41 of the IPC.

(i) The JJ Act

97. A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a child in need of care and protection (Section 2(14) (xii) of the JJ Act). In our opinion, it cannot be said with any degree of rationality that such a girl child loses her status as a child in need of care and protection soon after she gets married. The JJ Act provides that efforts must be made to ensure the care, protection, appropriate rehabilitation or restoration of a girl child who is at imminent risk of marriage and therefore a child in need of care and protection. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not be physically, mentally or psychologically ready. The intention of the JJ Act is to benefit a child rather than place her in difficult circumstances. A contrary view would not only destroy the purpose and spirit of the JJ Act but would also take away the importance of Article 15(3) of the Constitution. Surely, such an interpretation and understanding cannot be given to the provisions of the JJ Act."

107. On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is -- this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 IPC -- in the present case this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years -- this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 IPC -- this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." It is only through this

reading that the intent of social justice to the married girl child and the constitutional vision of the Framers of our Constitution can be preserved and protected and perhaps given impetus."

14. In the present set of facts, it is not in dispute that as per the school leaving certificate of victim/detenue, the date of birth of the detenue is 02.04.2004. Hence, keeping in mind the provisions of Section 94 of the J.J. Act, the age recorded in the educational certificate cannot be discarded in the proceedings under the J.J. Act moreso when detenue in her statement recorded on 23.12.2020 under Section 164, Cr.P.C. has stated that her age is 17 years.

15. Once the detenue has been found to be a child as defined by Section 2(12) of the J.J. Act and allegedly, a victim of a crime, she would fall in the category of "child in need of care and protection" in view of clauses (iii), (viii) and (xii) of sub-Section (14) of Section 2 of the J.J. Act. Hence the order passed by the Child Welfare Committee placing the minor child in a Children Protection Home would be within its powers confers under Section 37 of the J.J. Act.

16. For all the reasons stated above, the action of the respondent Nos.1 to 5 is neither without jurisdiction nor illegal nor perverse, keeping in mind the provisions of the J.J. Act, 2015. Therefore, the detention of the detenue in Government Women's Asylum Khuldabad, District - Prayagraj cannot be said to be illegal so as to warrant issuance of a writ of habeas corpus. If the petitioner is aggrieved by the order dated 25.12.2020 passed by Judge, Child Welfare Committee, Fatehpur, she is at liberty to take recourse to the remedy of an appeal provided under Section 101 of the J. J. Act, 2015.

17. For all the reasons stated, above, the writ petition is dismissed.

18. No order as to costs.

Order Date :- 30.6.2021/SA