Ravinder Singh Gorkhi vs State Of U.P on 12 May, 2006

Equivalent citations: AIR 2006 SUPREME COURT 2157, 2006 AIR SCW 2648, 2006 (4) ALL LJ 269, 2006 (3) AIR JHAR R 292, 2006 (2) SCC(CRI) 632, 2006 (5) SCALE 682, 2006 (2) CALCRILR 137, 2006 (5) SCC 584, 2006 (6) SRJ 218, 2006 CALCRILR 2 137, 2006 CRILR(SC&MP) 531, 2006 CRILR(SC MAH GUJ) 531, (2006) 43 ALLINDCAS 562 (SC), (2005) 124 DLT 491, (2006) 130 DLT 602, (2006) 2 CHANDCRIC 260, (2006) 1 KER LT 32, (2006) 3 RECCIVR 45, (2006) 4 EASTCRIC 199, (2006) 2 MAD LJ(CRI) 770, (2006) 34 OCR 507, (2006) 3 PAT LJR 205, (2006) 2 RAJ CRI C 454, (2006) 3 RECCRIR 156, (2006) 6 SCJ 195, (2006) 4 SUPREME 337, (2006) 2 ALLCRIR 1892, (2006) 5 SCALE 682, (2006) 55 ALLCRIC 814, (2006) 4 ALLCRILR 47, (2006) 2 CRIMES 242, (2006) 2 CHANDCRIC 29, (2006) 3 RECCRIR 439, (2006) 1 RECCRIR 797, (2006) SC CR R 1300, (2006) 37 ALLINDCAS 383 (DEL), (2006) 3 CURCRIR 59, 2006 (3) ANDHLT(CRI) 39 SC, (2006) 3 ANDHLT(CRI) 39, 2006 (2) ALD(CRL) 168

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Bench: S.B. Sinha, P.P. Naolekar

CASE NO.:
Appeal (crl.) 362 of 1999

PETITIONER:
Ravinder Singh Gorkhi

RESPONDENT:
State of U.P.

DATE OF JUDGMENT: 12/05/2006

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:

J U D G M E N T S.B. SINHA, J :

Whether a school leaving certificate purported to have been issued by the authorities of a primary school would attract the provision of Section 35 of the Indian Evidence Act, 1872 is in question in this appeal which arises out of a judgment and order dated 23.09.1997 passed by the High Court of Allahabad in Criminal Appeal No.3368 of whereby and whereunder the appeal preferred by the appellant from an order dated

29.11.1979 passed by the Additional Sessions Judge, Bulandshahr in Sessions Trial No. 293 of 1979 was dismissed.

The appellant herein was said to have been born on 01.06.1963. He was involved in a criminal case relating to the murder of one Chhattrapal which took place on 15.05.1979. The allegation against the appellant was that he along with his father Surendra, Satish Chandra, Narendra and Ramji Lal attacked him with a country-made pistol and knife. The appellant is said to have been armed with a country-made pistol.

The said deceased while traveling on a cycle was fired at, whereupon he threw his cycle on the road and rushed towards the shop of one Chhitariya and entered therein to save his life. The accused persons chased him, entered into the said shop and killed him by firing from the country- made pistols and knife. At the trial all the accused persons were convicted of commission of the said offence and were sentenced to undergo rigorous imprisonment for life. An appeal preferred by the accused persons including the appellant herein was dismissed by the High Court by reason of the impugned judgment.

Before the trial judge in his statement under Section 313 of the Code of Criminal Procedure a purported statement was made by the appellant herein that he was aged 16 years whereas the court assessed his age to be 18 years. He indisputably did not claim any benefit of the provisions of the Uttar Pradesh Children Act, 1951 (for short, 'the Act'), which was applicable in the case.

Before this Court for the first time, a contention was raised that as the appellant was a minor on the date of commission of the offence, he was entitled to the benefit thereof in terms of the provision of Section 2 (4) of the Act. Whereas special leave petition filed by the other accused persons was dismissed, notice was directed to be issued in the special leave petition filed by the appellant herein. On the aforementioned question, parties exchanged their affidavits. A Division Bench of this Court by an order dated 11.12.1998 through it appropriate to refer the question in regard to his age to the Sessions Judge, Bulandshahr before whom the parties were directed to appear on 04.01.1999 to lead both oral and documentary evidences. The learned Sessions Judge was asked to return his findings to this Court.

The learned Sessions Judge, Bulandshahr pursuant to or in furtherance of the said direction allowed the parties to adduce evidence. Relying upon or on the basis of the school leaving certificate wherein the date of birth of the appellant was recorded to be 01.06.1963, he was held to be a minor on the date of occurrence i.e. 15.05.1979. The appellant in his statement recorded on 26.09.1979 disclosed his age to be 16 years; but the learned Sessions Judge opined that he appeared to be 18 years of age.

The learned Sessions Judge, however, did not rely upon the other evidences produced on behalf of the appellant, namely, horoscope and extract of 'Parivar Register'. He further did not put any

reliance on the testimony of the mother of the appellant.

Mr. P.S. Mishra, the learned Senior Counsel appearing on behalf of the appellant, submitted that in view of the findings arrived at by the learned Sessions Judge, Bulandshahr, the appellant was entitled to the benefit of the provisions of the Act and in that view of the matter no sentence of life imprisonment could have been imposed upon him.

The Uttar Pradesh Children Act, 1951 was enacted to provide for the custody, protection, treatment and rehabilitation of children and for the custody, trial, punishment of youthful offenders, and for the amendment of the Reformatory Schools Act. 1897 in its application to the State of Uttar Pradesh. Sub-section (4) of Section 2 defines a "child" to mean a person under the age of sixteen years. Section 63 of the Act, however, provides that where a child is charged with an offence together with any other person not being a child then notwithstanding anything contained in the said Act the child may be tried together with the adult in accordance with the provisions of the Code of Criminal Procedure and nothing in the said Act shall require the child to be tried by a Juvenile Court but the sentence, if any, awarded to the child shall be in accordance with the provisions of the Act.

Ordinarily a Juvenile Court was required to be established in terms of the provisions of the said Act as envisaged under Section 60 thereof. In this case, admittedly, apart from the appellant herein all other accused persons were adults. A joint trial was held in terms of the provisions of the Code of Criminal Procedure. At no point of time any exception thereto was taken by or on behalf of the appellant. Before us no contention has been raised that the trial was illegal.

The only question which has been raised and arises for consideration is as to whether having regard to the provision of Section 27 of the Act, the sentence awarded against the appellant herein was illegal.

For the purpose of determining the aforementioned question, we may notice a few provisions of the said Act.

Section 27 of the Act reads as under :

> "Sentence that may not be passed on child.- Notwithstanding anything to the contrary contained in any law, no Court shall sentence a child to death or transportation or imprisonment for any term or commit him to prison in default of payment of fine :
>
> Provided that a child who is twelve years of age or upwards may be committed to prison when the Court certifies that he is of so unruly, or of so depraved a character that he is not fit to be sent to an approved school and that none of the other methods in which the case may legally be dealt with is suitable."

Section 30 of the Act, however, empowers the Court to discharge youthful offender or to commit him to suitable custody. Section 31 provides for payment of fine by the parents of the child. Section

32 provides for detention in case of certain crimes by children, which reads as under :

> "Detention in case of certain crimes by children.-(1) When a child is found to have committed an offence of so serious a nature that the Court is of opinion that no punishment which under the provisions of this Act it is authorized to inflict is sufficient, the Court shall order the offender to be kept in safe custody in such place or manner as it thinks fit and shall report the case for the orders of the State Government.
>
> (2) Notwithstanding the provisions of Section 13 the State Government may order any such child to be detained in such place and on such conditions as it thinks fit, and while so detained the child shall be deemed to be in legal custody :
>
> Provided that no period of detention so ordered shall exceed the maximum period of imprisonment to which the child could have been sentenced for the offence committed."

We have noticed hereinbefore that the learned Sessions Judge, Bulandshahr in his report dated 17.02.1999 did not rely upon any evidence other than the school leaving certificate. He not only disbelieved the statement of the mother of the appellant but also did not place any reliance upon the other documentary evidences adduced on behalf of the appellant, namely, the horoscope and the 'Parivar Register'. No exception having been taken to by the parties we accept the said part of the report. We are, thus, required only to consider as to whether the School Leaving Certificate is reliable.

The purported school leaving certificate was sought to be proved by Chandra Pal Singh, Head Master of the Primary Pathshala, Hajratpur. In his cross-examination, he categorically stated that the date of birth of the appellant might have been disclosed by the appellant at the time of admission. He did not have any personal knowledge with regard thereto. No enquiry was made as regards the age of the appellant while he was admitted in the institution. He accepted that it was quite possible that the age disclosed by the guardian may be more or less.

The school leaving certificate was said to have been issued in the year 1998. A bare perusal of the said certificate would show that the appellant was said to have been admitted on 01.08.1967 and his name was struck off from the roll of the institution on 06.05.1972. The said school leaving certificate was not issued in ordinary course of business of the school There is nothing on record to show that the said date of birth was recorded in a register maintained by the school in terms of the requirements of law as contained in Section 35 of the Indian Evidence Act. No statement has further been made by the said Head Master that either of the parents of the appellant who accompanied him to the school at the time of his admission therein made any statement or submitted any proof in regard thereto. The entries made in the school leaving certificate, evidently had been prepared for the purpose of the case. All the necessary columns were filled up including the character of the appellant. It was not the case of the said Head Master that before he had made entries in the register, age was verified. If any register in regular course of business was maintained in the school;

there was no reason as to why the same had not been produced.

In the counter affidavit filed on behalf of the State, it has categorically been stated that the appellant had been a history sheeter; as many as 34 cases for commission of heinous crimes have been filed against him, which included cases under Sections 302, 392, 395 and 364 of the Indian Penal Code; a large number of cases under the U.P. Goonda Act; and Section 25 and 27 of the Arms Act. One case was filed against him under Section 302 as early as in 1973 and the last case which had been filed against him was in 1996 under Section 395/364-A of the Indian Penal Code. It is, therefore, unlikely that the appellant was not aware of his legal right.

The school leaving certificate was not an original one. It was merely a second copy. Although it was said to have been issued in July 1972, the date of issuance of the said certificate has not been mentioned. The copy was said to have been signed by the Head Master on 30.04.1998. It was accepted before the learned Additional Sessions Judge, Bulandshahr on 27.01.1999. The Head Master has also not that the copy given by him was a true copy of the original certificate. He did not produce the admission register.

There cannot, however, be any doubt whatsoever that the certificate was issued for the purpose of the case. The father of the appellant was also an accused. He was described as 'Surender Pal Singh'. The appellant had also been described as 'Ravinder Pal Singh S/o Surender Pal Singh'. Before us, the father's name has been described as 'Surender Singh', the appellant's name has been shown as 'Ravinder Singh Gorkhi'; whereas the name of the student in the school leaving certificate has been shown as 'Ravinder Pal Singh'.

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.

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 indisputably must have an access thereto.

A question was raised as to whether the determination of the age of a child should be made on the basis of the date on which the occurrence took place or when, he was produced before the court. The said question came up for consideration in the context of the provisions of the Juvenile Justice Act, 2000 before a Constitution Bench in Pratap Singh v. State of Jharkahand and Anr [(2005) 3 SCC 551]. It was held that the date of commission of the offence would be the relevant date.

In terms of the aforementioned decision of the Constitution Bench such determination is required to be made even if at the relevant time, the juvenile crossed the age of eighteen years. In absence of any other statute operating in the field, Section 35 will have application and the court, while determining such age would depend upon the materials brought on records by the parties which would be admissible in evidence in terms of Section 35 of the Act.

In Birad Mal Singhvi v. Anand Purohit [(1988 Supp. SCC 604], this Court held:

> "To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 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."

(emphasis supplied) In Sushil Kumar v. Rakesh Kumar [(2003) 8 SCC 673], this Court as regards determination of age of a candidate in terms of Section 36(2) of the Representation of the People Act, 1951 observed :

> "32. The age of a person in an election petition has to be determined not only on the basis of the materials placed on record but also upon taking into consideration the circumstances attending thereto. The initial burden to prove the allegations made in the election petition although was upon the election petitioner but for proving the facts which were within the special knowledge of the respondent, the burden was upon him in terms of Section 106 of the Evidence Act. It is also trite that when both parties have adduced evidence, the question of the onus of proof becomes academic [see Union of India v. Sugauli Sugar Works (P) Ltd. and Cox and Kings (Agents) Ltd. v. Workmen. Furthermore, an admission on the part of a party to the lis shall be binding on him and in any event a presumption must be made that the same is taken to be established."

This Court therein followed, inter alia, Birad Mal Singhvi (supra) and several other decisions.

In Updesh Kumar and Others v. Prithvi Singh and Others [(2001) 2 SCC 524], this Court having regard to the overwhelming evidence came to the opinion that the Respondent No. 1 had attained the age of 21 years as on the date of his application for the allotment of the retail outlet. In that case also reliance was placed on the matriculation certificate holding that the correction of the date of the birth in the certificate was an official act and the must be presumed to have been done in accordance with law.

We, however, notice that in Ramdeo Chauhan alias Raj Nath v. State of Assam [(2001) 5 SCC 714], as regard applicability of the provision of Section 35 of the Indian Evidence Act, 1872 vis-`-vis a school register, it was stated :

> "19. It is not disputed that the register of admission of students relied upon by the defence is not maintained under any statutory requirement. The author of the register has also not been examined. The register is not paged (sic) at all. Column 12 of the register deals with "age at the time of admission". Entries 1 to 45 mention the age of the students in terms of years, months and days. Entry 1 is dated 25-1-1988 whereas Entry 45 is dated 31-3-1989. Thereafter except for Entry 45, the page is totally blank and fresh entries are made w.e.f. 5-1-1990, apparently by one person up to Entry 32. All entries are dated 5-1-1990. The other entries made on various dates appear to have been made by one person though in different inks. Entries for the years 1990 are up to Entry 64 whereafter entries of 1991 are made again apparently by the same person. Entry 36 relates to Rajnath Chauhan, son of Firato Chauhan. In all the entries except Entry 32, after 5-1-1990 in column 12 instead of age some date is mentioned which, according to the defence is the date of birth of the student concerned. In Entry 32 the age of the student concerned has been recorded. In column 12 again in the entries with effect from 9-1-1992, the age of the students are mentioned and not their dates of birth. The manner in which the register has been maintained does not inspire confidence of the Court to put any reliance on it. Learned defence counsel has also not referred to any provision of law for accepting its authenticity in terms of Section 35 of the Evidence Act. The entries made in such a register cannot be taken as a proof of age of the accused for any purpose."

We are, however, not oblivious of a decision of this Court in Bhola Bhagat v. State of Bihar [(1997) 8 SCC 720], wherein an obligation has been cast on the court that where such a plea is raised having regard to the beneficial nature of the socially-oriented legislation, such a plea should be examined with great care. We are, however, of the opinion that the same would not mean that a person who is not entitled to the said benefit would be dealt with leniently only because such a plea is raised. Each plea must be judged on its own merit. Each case has to be considered on the basis of the materials brought on records.

The aforementioned decisions have been noticed by this Court in Zakarius Lakra and Others v. Union of India and Another [(2005) 3 SCC 161], wherein a Bench of this Court while entertaining an

application under Article 32 of the Constitution of India opined that although the same was not maintainable, but having regard to the decision of this Court in Rupa Ashok Hurra v. Ashok Hurra [(2002) 4 SCC 388], the review petition should be allowed to be converted into curative petition. [See also Raj Singh v. State of Haryana (2000) 6 SCC 759].

We are, however, not concerned in this case with such a situation.

The deposition of the Head Master of the school in this case did not satisfy the requirements of the law laid down in the aforementioned decisions.

Mr. Mishra, however, relied upon Umesh Chandra v. State of Rajasthan [(1982) 2 SCC 202]. Therein a register maintained by a public school of repute had been produced. This Court relied thereupon, opining that Section 35 cannot be read with Sections 73 and 74 of the Evidence Act. If a public school maintains a register in ordinary course of business, the same would be admissible in evidence.

We have not been shown as to whether any register was required to be maintained under any statute. We have further not been shown as to whether any register was maintained in the school at all. The original register has not been produced. The authenticity of the said register, if produced, could have been looked into. No person had been examined to prove as to who had made entries in the register. The school leaving certificate which was not issued by a person who was in the school at the time when the appellant was admitted therein, cannot be relied upon.

Reliance has also been placed by Mr, Mishra on Bhoop Ram v. State of U.P. [(1989) 3 SCC 1], wherein the appellant was treated to be a child within the meaning of Section 2(4) of the Act; upon taking into consideration three factors : (i) that the appellant had produced a school certificate and correctness whereof was not questioned; (ii) the learned trial Judge thought it fit to award the lesser sentence of imprisonment for life instead of capital punishment when he pronounced the judgment on 19.09.1977 on the ground that the appellant was 17 years of age which gave credence to the appellant's case that he was less than 16 years of age on 03.10.1975 when the offences were committed; and (iii) although he was medically examined, for determination of age, the doctor based his opinion only on an estimate and possibility of an error of creeping into the said opinion could not be ruled out. This Court, therefore, took into consideration more than one factors in accepting the plea of the appellant therein that he was minor on the date of commission of the offence.

We have noticed hereinbefore that in this case the learned Sessions Judge had discarded all other evidences which have been adduced on behalf of the appellant in support of his contention that he was minor on the date of commission of the offence. Entry of a date of birth in the school records is merely a piece of evidence. Having regard to the experience of the court, in Birad Mal Singhvi (supra), it was opined that the same should be authentic in nature.

The age of a person as recorded in the school register or otherwise may be used for various purposes; namely, for obtaining admission; for obtaining an appointment; for contesting election;

registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum, e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted.

We are, therefore, of the opinion that that until the age of a person is required to be determined in a manner laid down under a statute, different standard of proof should not be adopted. It is no doubt true that the court must strike a balance. In case of a dispute, the court may appreciate the evidence having regard to the facts and circumstance of the case. It would be a duty of the court of law to accord the benefit to a juvenile, provided he is one. To give the same benefit to a person who in fact is not a juvenile may cause injustice to the victim. In this case, the appellant had never been serious in projecting his plea that he on the date of commission of offence was a minor. He made such statement for the first time while he was examined under Section 313 of the Code of Criminal Procedure.

The family background of the appellant is also a relevant fact. His father was a 'Pradhan' of the village. He was found to be in possession of an unlicensed firearm. He was all along represented by a lawyer. The court estimated his age to be 18 years. He was tried jointly with the other accused. He had been treated alike with the other accused. On merit of the matter also the appellant stands on the same footing as other accused.. The prosecution has proved its case. In fact no such plea could be raised as the special leave petition of the persons similarly situated was dismissed when the court issued notice having regard to the contention raised by him for the first time that he was minor on the date of occurrence.

Having regard to the peculiar facts and circumstances of this case, we do not accept the report of the learned Sessions Judge.

For the reasons aforementioned, we do not find any merit in this appeal which is dismissed accordingly.