

**A.F.R.**

**Court No. - 9**

**Case :-** HABEAS CORPUS No. - 21284 of 2018

**Petitioner :-** Deepa through her next friend Mithun

**Respondent :-** State Of U.P. through Principal Secretary, Department of Home, Lucknow and others

**Counsel for Petitioner :-** Soniya Mishra, Rajiv Mishra

**Counsel for Respondent :-** Govt. Advocate

**Hon'ble Ajai Lamba,J.**

**Hon'ble Sanjay Harkauli,J.**

1. The petition seeks issuance of a writ in the nature of Habeas Corpus commanding the opposite parties specially opposite party no. 2 to produce the detenu (petitioner) before this Court and she may be set at liberty from the illegal custody of opposite party no. 2 forthwith and also quashing the impugned order dated 25.05.2018 passed by opposite party no. 3 in First Information Report No. 0173 of 2018, under Sections 363, 366 Indian Penal Code, Police Station Fatehpur Chaurasi, District Unnao.

2. Gist of the issue raised in the petition is recorded in order dated 26.7.2018. For brevity sake, the order is extracted here-below :

*"1. The petition seeks issuance of a writ in the nature of Habeas Corpus commanding the opposite parties specially opposite party no. 2 to produce the detenu (petitioner) before this Hon'ble Court and she may be set at liberty from the illegal custody of opposite party no. 2 forthwith and also quashing the impugned order dated 25.05.2018 passed by opposite party no. 3 in Case Crime No. 173 of 2018, under Sections 363, 366 Indian Penal Code, Police Station Fatehpur Chaurasi, District Unnao.*

*2. Learned counsel has referred to Annexure-5 to say that petitioner has attained medical age of seventeen and half years and age of discretion. The petitioner gave her statement under Section 164 Cr.P.C. (Annexure-7) in which she stated that she went to Delhi with Mithun. She had not been victimized. The case registered at the instance of her father is a fabrication.*

*3. It has been pleaded that the relationship of the petitioner with the deponent has not been accepted by respondent no. 6. In abuse of process of the law and process of the Court, Crime No. 173 of 2018 has been registered in Police Station Fatehpur Chaurasi, District Unnao, under Sections 363, 366 Indian Penal Code. Simply because the petitioner has acted as per her own wish in exercise of her right under Article 21 of the Constitution of India, the petitioner is being kept in captivity in Naari Niketan.*

*4. Issue notice to serve respondent no. 6 through Station House Officer, Fatehpur Chaurasi, District Unnao.*

*5. Respondent no. 2 is directed to produce the petitioner in Court.*

*6. Respondent no. 6 is also directed to remain present in Court.*

7. State Counsel to ensure compliance.

8. List alongwith Writ Petition Miscellaneous Bench No. 18794 of 2018, Muthun Vs. State of U.P. and Others, on 03.08.2018.

9. The Investigating Officer of the case is directed to file his counter affidavit."

3. In deference to our order, the petitioner has been produced in Court. We have questioned the petitioner at some length. The petitioner states that she is married to Mithun and wants to live with him in the matrimonial home and not in her paternal home, with respondent No.6.

4. Respondent No.6 is present in Court. Respondent No.6 states that he has nothing to say in the matter.

5. In the above extracted order, it has been noted that the petitioner is a victim/ witness in case registered as First Information Report No.0173 of 2018, under Sections 363, 366 Indian Penal Code, Police Station Fatehpur Chaurasi, District Unnao.

In the statement recorded in the course of investigation, the petitioner has stated that she went to Delhi with Mithun. She had not been victimised.

It transpires that Mithun has not been accused of abducting or kidnapping the petitioner.

6. We have taken into account, on the basis of our perception, that the petitioner has attained the age of discretion.

The petitioner as per medical examination report is 17 1/2 years of age. A margin of two years on either side can be given as has been held by Hon'ble Supreme Court of India. In this regard, we refer to relevant portions of the judgments:

7. In **(2009) 6 Supreme Court Cases 681, Ram Suresh Singh Vs. Prabhat Singh Alias Chhotu Singh and Another**, the following has been held in Paragraph 13 (relevant portion):

***"13. Even if we had to consider the medical report, it is now well known that an error of two years in determining the age is***

**possible. In *Jaya Mala v. Government of J and K*, this Court held: (SCC p. 541, para 9)**

*“9.....However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.”*

(emphasised by us)

**8. In (1982) 2 Supreme Court Cases 538, *Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir and Others*, the following has been held in Paragraph 9 (relevant portion):**

*“9. Detenu was arrested and detained on October 18, 1981. The report by the expert is dated May 3, 1982, that is nearly seven months after the date of detention; Growing in age day by day is an involuntary process and the anatomical changes in the structure of the body continuously occur. Even on normal calculation, if seven months are deducted from the approximate age opined by the expert in October, 1981 detenu was around 17 years of age, consequently the statement made in the petition turns out to be wholly true. However, it is notorious and **one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.** Undoubtedly, therefore, the detenu was a young school going boy. It equally appears that there was some upheaval in the educational institutions. This young school going boy may be enthusiastic about the students' rights and on two different dates he marginally crossed the bounds of law. It passes comprehension to believe that he can be visited with drastic measure of preventive detention. One cannot treat young people, may be immature, may be even slightly misdirected, may be a little more enthusiastic, with a sledge hammer. In our opinion, in the facts and circumstances of this case the detention order was wholly unwarranted and deserved to be quashed.”*

(emphasised by us)

**9. In (2011) 10 Supreme Court Cases 192, *Mohd. Imran Khan Vs. State Government (NCT of Delhi)*, the following has been held in Paragraph 20 (relevant portion):**

***20. The medical report and the deposition of the Radiologist cannot predict the exact date of birth, rather it gives an idea with a long margin of 1 to 2 years on either side. In *Jaya Mala v. Government of J & K*, this Court held (SCC p. 541, para 9).***

*“ 9....However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.” (See also: *Ram Suresh Singh v. Prabhat Singh and State of U.P. v. Chhotey Lal*).*

(emphasised by us)

**10. In (2008) 15 Supreme Court Cases 223, Jyoti Prakash Rai Alias Jyoti Prakash Vs. State of Bihar**, the following has been held in Paragraphs 14 to 16 :

*14. In a case of this nature, thus, where the delinquent was examined by two different medical boards, who on two different dates have reached the identical opinion, viz, the age of the appellant between 18 and 19 years, and, thus, resulting in two different conclusions, a greater difficulty arises for the court to arrive at a correct decision. For the said purpose, the court may resort to some sort of hypothesis, as no premise is available on the basis whereof a definitive conclusion can be arrived at.*

*15. It is in the aforementioned situation, we are of the opinion that the test which may be applied herein would be to take the average of the age as opined by both the medical boards. Even applying that test, the age of the appellant as on 01.04.2001 would be above 18 years.*

*16. We, however, hasten to add that we have taken recourse to the said method only for the purpose of this case and we do not intend to lay down any general proposition of law in this behalf. As indicated hereinbefore, in so doing, we have also taken into consideration the fact that the appellant had filed documents in support of his claim that he was a juvenile but the same were found to be forged and fabricated which is itself a factor to show that he was making attempts to obtain a benefit to which he might not have been entitled to.”*

(emphasised by us)

**11. In (2011) 2 Supreme Court Cases 385, Alamelu and Another Vs. State represented by Inspector of Police**, the following has been held in Paragraphs 39, 40 and 42 to 49 (relevant portion):

*“39. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ext.P16 and the certificate issued by PW8 Dr. Gunasekaran, Radiologist, Ext.P4 and Ext.P5.*

*40. Undoubtedly, the transfer certificate, Ext.P16 indicates that the girl’s date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act, 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.*

42. Considering the manner in which the facts recorded in a document may be proved, this Court in case of *Birad Mal Singhvi Vs. Anand Purohit 1*, observed as follows: (SCC pp. 618-19, para 14).

**“14.....The date of birth mentioned in the scholars’ register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined.....Merely because the documents Exts. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exts. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted.”**

(emphasised by us)

43. The same proposition of law is reiterated by this Court in *Narbada Devi Gupta Vs. B irendra Kumar Jaiswal* where this Court observed as follows: (SCC p.75, para 16)

**“16.....The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the “evidence of those persons who can vouchsafe for the truth of the facts in issue”.”**

44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate can not be relied upon to definitely fix the age of the girl.

45. In fixing the age of the girl as below 18 years, the High Court relied solely on the certificate issued by PW8 Dr. Gunasekaran. However, the High Court failed to notice that in his evidence before the Court, PW8, the X-ray Expert had clearly stated in the cross-examination that on the basis of the medical evidence, generally, the age of an individual could be fixed approximately. He had also stated that it is likely that the age may vary from individual to individual. The doctor had also stated that in view of the possible variations in age, the certificate mentioned the possible age between one specific age to another specific age. On the basis of the above, it would not be possible to give a firm opinion that the girl was definitely below 18 years of age.

46. In addition, the High Court failed to consider the expert evidence given by PW13 Dr. Manimegalaikumar, who had medically examined

*the victim. In his cross-examination, he had clearly stated that a medical examination would only point out the age approximately with a variation of two years. He had stated that in this case, the age of the girl could be from 17 to 19 years. This margin of error in age has been judicially recognized by this Court in the case of **Jaya Mala Vs. Government of Jammu & Kashmir**. In the aforesaid judgment, it is observed as follows: (SCC p. 541, para 9)*

*“9...However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.”*

*47. We are of the opinion, in the facts of this case, the age of the girl could not have been fixed on the basis of the transfer certificate. There was no reliable evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate. The expert evidence does not rule out the possibility of the girl being a major. In our opinion, the prosecution has failed to prove that the girl was a minor, at the relevant date.*

*48. We may further notice that even with reference to Section 35 of the Indian Evidence Act, a public document has to be tested by applying the same standard in civil as well as criminal proceedings. In this context, it would be appropriate to notice the observations made by this Court in the case of **Ravinder Singh Gorkhi Vs. State of U.P.** held as follows: (SCC p. 595, para 38)*

*“38. 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 a 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.” (emphasis supplied)*

*49. In such circumstances, we are constrained to hold that the High Court without examining the factual and legal issues has unnecessarily rushed to the conclusion that the girl was a minor at the time of the alleged abduction. There is no satisfactory evidence to indicate that she was a minor.*

(emphasised by us)

**12.** From the case law, as extracted above, it becomes evident that age of a person as recorded in the school register or a

certificate issued by a school may be used for various purposes, namely, for obtaining admission; for obtaining appointment; for contesting election; registration of marriage etc. It has been held that mere production and making of a document as an exhibit by the Court cannot be held to be proof of its contents. The execution of the document has to be proved by admissible evidence; that is, “ by the evidence of those persons who could vouchsafe for the truth of the facts in issue”.

A certificate issued by school would not be of much evidentiary value to prove the age of the person in question, in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in a certificate/testimonial would have no evidentiary value unless the person who made the entry or who gave the date of birth is examined.

Mere proof of the documents produced does not furnish evidence of the truth of the facts or contents of the documents. The truth of the fact, namely of the date of birth of a witness or an accused as mentioned in a school certificate, be it a transfer certificate or mark-sheet or a degree, could be proved by admissible evidence, that is, by the evidence of those persons who could verify the truth of the facts in issue, the fact being the date of birth.

When the Court relies on medical age of a person, the Court has to resort to some sort of hypothesis as no premise is available on the basis where of a definite conclusion can be arrived at. In such cases, margin of error in age has been judicially recognised by the Hon'ble Supreme Court of India by two years on either side.

**13.** We are also of the considered view that aspect of age is required to be considered in a writ of habeas corpus in context of right of the petitioner vested under Art. 21 of the Constitution of India. In such circumstances, right of the person has been considered, primarily.

The right cannot be denied on hyper-technicalities while saying that the detinue is a few months less than the age of majority. This is particularly so because the petitioner has refused to go in the company of her natural guardian(s). The detinue asserts that she is married and has not been abducted or kidnapped. Consequently, the person with whom, the detinue wants to live is neither a kidnapper nor an abductor. Surely, in such circumstances, a person cannot be directed to be housed in a Nari Niketan.

**14.** We take judicial notice of the fact that the conditions in Nari Niketan for the young girls are not ideal. Prolonged custody in such Homes would be detrimental to the mental and physical health of the girl(s). This aspect is required to be considered in view of the fact that the detinue wants to go and live in her matrimonial home. Surely, housing such a girl in a Nari Niketan should be the last alternative.

The Court would consider release of the detinue in case she is pregnant or is a young mother and asserts her wish and right to live in her matrimonial home. In such cases, relatively, the age factor is required to be relaxed, in the interest of the mother/the detinue, her liberty and in the interests of justice.

**15.** In the case in hand, the petitioner has been directed to be detained/housed in a Shelter Home/Nari Niketan on the premise that her date of birth is 3.2.2001, determined on the basis of a certificate of school. However, it was felt necessary by the investigating agency to get the bone age/radiological age of the petitioner assessed. On radiological examination, the petitioner has been found to be 17 ½ years of age.

**16.** Considering various aspects of the case, we are of the considered view that detention of the petitioner in respondent No.2 facility will violate her right vested under Art. 21 of the Constitution of India.

**17.** We hereby allow this petition. Order dated 25.5.2018 is hereby quashed, it having been passed de hors the right of the petitioner vested under Article 21 of the Constitution of India, without considering the relevant aspects of the case.

We hereby direct respondent No.2 to release the petitioner forthwith and allow her to live as per her own wish.

**18.** Let a copy of this order be released under the signatures of Bench Secretary.

**Order Date :-** 3.8.2018

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