

Manguli Muduli and ors. Vs. State of Orissa and anr.

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Court : Orissa

Decided On : Mar-15-2000

Reported in : 2000CriLJ4176

Judge : P.K. Tripathy, J.

Acts : [Indian Majority Act, 1875](#) - Sections 3; The Hindu Minority and Guardianship Act, 1956 - Sections 4; Code of Criminal Procedure (CrPC) , 1974 - Sections 309, 320, 320(9), 321 and 482; [Indian Penal Code \(IPC\), 1860](#) - Sections 109, 266, 361, 366 and 409

Appeal No. : Criminal Misc. Case No. 1153 of 1995

Appellant : Manguli Muduli and ors.

Respondent : State of Orissa and anr.

Advocate for Def. : Bimanjit Mohanty 3 and ;C.R. Swain, Advs. for Opposite Party No. 2 and ;Addl. Standing Counsel for Opposite Party No. 1

Advocate for Pet/Ap. : Raja Kishore Nayak, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

P.K. Tripathy, J.

1. The alleged kidnapper turned husband and the alleged associates-abettors of the offence of kidnapping have approached this Court in this application under Section 482, Cr. P.C., to quash the order of cognizance taken under Sections 366/109, I.P.C. by the learned Subdivisional Judicial Magistrate (Sadar), Cuttack, vide his order dated 10-8-1994 in G.R. Case No. 2143 of 1993.

2. Usha (O.P. No. 2) is the girl who was allegedly kidnapped on 23-12-1993 as per the F.I.R. of her father Upendra (O.P. No. 3). It is alleged in the F.I.R. that by the date of occurrence she was 16 1/2 years old. It appears from order dated 24-6-1994 in the G.R. case that the date of birth of Usha as noted in the certificate granted by the Board of Secondary Education, Orissa, is May 29, 1977. Petitioner No. 2 after being arrested was allowed to go on bail as per order dated 26-4-1994 of this Court in Criminal Misc. Case No. 840 of 1994. Petitioner No. 1 was allowed to go on bail by this Court on 23-3-1994 in Criminal Misc. Case No. 458 of 1994. On the request of opposite party No. 3, learned Judge, in that case, directed the petitioner No. 1 to produce Usha in the chamber of the Hon'ble Judge. Accordingly, she was produced on 23-3-1994. In that connection this Court passed the following order :-

23-3-1994 : Pursuant to the direction given Usharani has appeared in person. She did not give any positive statement as to with whom she would like to stay. She did not agree to the suggestion given by the learned counsel for the parents that she should stay with them. From the order of the learned Sessions Judge, I find that necessary examination by a qualified doctor to ascertain her age has not been done. Let her appear before the learned Sub-divisional Judicial Magistrate, Sadar, Cuttack, in connection with G.R. Case No. 2143 of 1993 on 26-3-1994 so that appropriate order can be passed in that regard. The learned SDJM shall decide about custody of the girl after hearing the informant, the accused and the girl. The petitioner-Manguli Muduli shall produce the girl before the learned S.D.J.M. Since there was lot of disturbances created, when she was being brought to this Court, if motion is made to Mangalabag Police Station, necessary arrangements shall be made for her safe production before the learned SDJM.

The criminal misc. case is disposed of.

A copy of the order be handed over to the learned counsel for State.

3. In view of these above quoted direction of this Court, learned S.D.J.M. conducted a summary inquiry and heard the parties and thereafter, passed order on 24-6-1994, granting the custody of the said Usha in favour of petitioner No. 2. The medical report basing upon the dates, both physical and radiological, was to the effect that she was more than 18 years and less than 20 years old by the date of her examination by the Doctor on a day during March to June, 1994 (date is not available from the said order). Learned S.D.J.M. relied upon the ossification report in preference to the date of birth noted in the certificate granted by the Board of Secondary Education, Orissa. He, however, observed that even according to the date of birth mentioned in the certificate she was more than 17 years old and, therefore, she was a major. Accordingly, learned S.D.J.M. directed for leaving opposite party No. 2 in the custody of petitioner No. 2.

4. It may be incidentally noted here that the reason assigned by learned S.D.J.M. that opposite party No. 2 having completed seventeenth year of age and running eighteenth year is a major one is wholly superficial, unjust and in complete disregard to the provisions of law. In that connection reference may be made to second part of Section 3 of the [Indian Majority Act, 1875](#) which provides that-

Subject as aforesaid, every other person domiciled in India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before.' Admittedly, the parties being 'Hindu' by religion reference if made to Section 4(a) of 'The Hindu Minority and Guardianship Act, 1956 it provides that-(a) 'minor' means a person who has not completed the age of eighteen years.

Above all Section 361, Indian Penal Code defines kidnapping from lawful guardianship in the following quoted manner :-

361. Kidnapping from lawful guardianship :- Whoever takes or entices any minor under sixteen years of age if male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.- The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.- This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

The above quoted provisions of law does not leave any doubt that a girl until completing her eighteenth year, shall be regarded as a minor so far as the offence of kidnapping is concerned.

5. On 10-5-1994, learned S.D.J.M. took cognizance of the aforesaid offences on the basis of charge-sheet which was filed in that case.

6. After filing of the application under Section 482, Cr. P.C., on 10-12-1996 petitioners prayed to implead the informant as opposite party No. 3 and on 14-2-1997 vide Order No. 20 the informant was added as opposite party No. 3. Since the petitioner did 'not take steps to issue notice to opposite party No. 3, on 4-12-1997, the Criminal Misc. case was dismissed as regard to opposite party No. 3. Under the given circumstances, informant has been withheld from participating in the proceeding and the Criminal Misc. case has been dismissed as against him.

7. The sincere attempt of the petitioners is to get rid of the trial of the criminal proceeding on the ground that petitioner No. 2 and the opposite party No. 2 are leading a happy marital life and when of her own she went to petitioner No. 2 and married him. Keeping in view the medical report relating to the age and the overall conduct of the parties, the (sic) order be quashed and the criminal proceeding be closed. In support of the aforesaid contention petitioners have relied upon the case of Manoranjan alias Manu Prusty v. State (1992) 5 OCR 200, Bansidhar Swain v. State Vol. 77 (1994) CLT 56 : 1993 Cri LJ 830, Jawahar Mohanty v. State of Orissa Vol. 73 (1992) CLT 206.

8. Learned Additional Standing Counsel opposed to the aforesaid submissions of the petitioners on the ground that a prima facie case for the alleged offences being well made out against the petitioners, the cognizance order is not liable to be

quashed.

9. In support of the contention that by the date of occurrence the opposite party No. 2 was above eighteen years of age and was legally entitled to move freely therefore for her coming out from the custody of the O.P. No. 3 and marrying the petitioner No. 2 cannot be regarded as an offence of kidnapping, learned counsel for the petitioners relied on the case of Manoranjan (supra). In that case while hearing appeal against an order of conviction and assessing and appreciating the evidence on record, learned Judge found that to determine the age of the girl the medical report is to be preferably accepted then the entry of the date of birth in the School Admission Register. The inference taken therein about the date of birth mentioned in the School Admission Register was that 'It is a notorious fact that in our country correct date of birth is never disclosed in the School Admission Register, a fact which was noticed by the Supreme Court in AIR 1965 SC 282 (Brij Mohan Singh v. Priya brat Maraia Sinha AIR 1970 SC 1029 : 1970 Cri LJ 991 (Ram Murti v. State of Haryana) as also other cases. In AIR 1991 SC 930 : 1991 Cri LJ 1370 (Dayachand v. Sahib Singh) the conflicting evidence of the School Register as regards age was not accepted in view of the more determinative evidence of the radiological examination and other physical characteristics available for ascertainment of the age.

On perusal of the above cited three decisions from the Apex Court this Court finds that :- In the case of Brij Mohan Singh (supra) the Apex Court was considering an election dispute in appeal. Contention of the respondent (petitioner) was that appellant was less than 25 years of age on the date when he contested the election. In that context, the respondent-petitioner inter alia relied upon Ext. 2 which was an entry regarding the date of birth of the appellant in the School Admission Register and Ext. 16 the certificate issued by Biharpur Education Board in favour of the appellant mentioning the date of birth. In both these documents, appellants' date of birth was noted as October 15, 1987. In that context, appellants contention was that the aforesaid date of birth showing less age of the appellant was done for future prospects in service and, therefore, no importance should be attached to entry of such date of birth. In that context, the Apex Court has stated that 'this explanation was accepted by the Election Tribunal but was rejected by

the High Court as untrustworthy. However much one may condemn such an act of making a false statement of age with a view to secure an advantage in getting public service a Judge! of facts cannot ignore the position that in actual life this happens not infrequently. We find it impossible to say that the Election Tribunal was wrong in accepting the appellant's explanation.' (quoted from paragraph 20 at page 287).

In the case of Ram Murti (supra) the Apex Court while hearing an appeal against judgment of conviction for the offence under Section 266, I.P.C. found that the date of birth appearing in the School Admission Register was considered and accepted to determine the age of the prosecutrix. The Apex Court held that trial Court should not have placed reliance on that document being an approved and unexhibited document, which also mentioned a different date of birth than the date of birth mentioned in the birth register.

In the case of Dayachand (supra), the point in issue was as to whether the respondent-Sahib Singh as claimed, was a juvenile delinquent to get the benefit of bail in a murder case. In that respect after conducting an inquiry learned Metropolitan Magistrate, Delhi, did not accept the date of birth in the School Admission Registers because of the different dates of birth mentioned in the Admission Registers and relied upon the medical report to hold that Sahib Singh, by the date of occurrence, was above 16 years of age. Learned Additional Sessions Judge affirmed the said assessment of age but Delhi High Court accepting date of birth from one Admission Register declared Sahib Singh to be a juvenile delinquent. While not appreciating the reasons and order thereof of the Delhi High Court, Apex Court have been pleased to hold that-

In a case like this, the conflicting evidence of the record from the two schools is not safe to rely on....

In that context their Lordships further held that-

In fact, the date particularly fusion of the illiac crests and the clavicle, does indicate his age to be at least 19 years if not more on 18-3-1989. This conclusion is recorded even without placing reliance on the testimony of H. J. Solmoon,

according to whom the date of birth of Sahib Singh, recorded in his school was 12-2-1968 as against 1-1-1973, recorded in the other school, which is relied on behalf of Sahib Singh. The tendency of many to have lesser age recorded in school is well known and, therefore, the date of birth being recorded as 1-1-1973 in the other school, can be easily appreciated but cannot be accepted, because the same is clearly in conflict with the medical evidence.

(both the passages are quoted from paragraph 7 at page 932).

10. It is thus seen from the above referred decisions of the Apex Court that no universal rule has been propounded that a date of birth mentioned in the school admission register shall be presumed to be false or incorrect. In all those cases after a full dressed trial or enquiry, the evidence on record was assessed to consider if the date of birth in the School Admission Register or Board's Certificate should be accepted or the medical report or any other rebuttable evidence tendered should be accepted. In other words, this Court or the Apex Court, in the above referred decisions, have not proposed a ratio that at the threshold of criminal proceeding one of the disputed documents relating to the date of birth should be accepted rejecting the other one when at the time of taking cognizance of offences or framing of charge a Court is concerned only with existence of a prima facie case. All that can be said regarding the evidentiary value of a date of birth in the School Admission Register or Board's Certificate or birth registers that such evidence is rebuttable one and that aspect can be gone into and at the time of trial by proper assessment of evidence, adduced by the parties.

11. In the case of Jawahar Mohanty (supra) under a similar circumstance like the present one this Court quashed the criminal proceeding on the grounds that by the date of occurrence the girl was a major one and as per the order in the O.J.C. filed by her mother, she was found to be more than 18 years old as per the date of birth noted in her School Leaving Certificate and she volunteered to live with the accused petitioner on the ground that she had married him. So in this case, if the evidence prima facie will show that the opposite party No. 2 was a major by the date of occurrence, then the aforesaid ratio would be followed in this case.

12. In the case of Bansidhar Swain (supra) this Court quashed the F.I.R. on the ground of absence of a prima facie case for the offences under Section 409, I.P.C. due to lack of averments in the F.I.R. that the alleged amount has been entrusted to the accused-petitioner. The ratio in that case is relied upon by the petitioner in support of the contention that in the absence of a prima facie case the criminal proceeding is liable to be quashed. As noted in the preceding paragraph, if by the date of occurrence opposite party No. 2 was eighteen years old i.e. completed eighteenth year, then keeping in view the facts and the law, the criminal proceeding will be liable to be quashed. But if she was under eighteen years of age, then, in view of that making out a prima facie case for kidnapping from lawful guardianship, petitioners may not be entitled to the relief claimed.

13. The date of birth of opposite party No. 2, as noted in the Admission Register and her Matriculation Certificate in May 29th, 1977. The date of occurrence as alleged is December 23rd, 1993. The medical report suggests that her age between March-June, 1994 was between 18 to 20 years. Petitioners have not come up with a case showing a positive date of birth (sic) the one noted in the said certificate. The ossification test which was done, is not the surest test to exactly and accurately determine the age. The aforesaid examination only indicates about a probable age which according to the Apex Court may be considered by granting two years allowance either way. (See 1982 Cri LJ 1777 *Jaya Mala v. Home Secretary, Government of Jammu and Kashmir*). At this stage, the medical report cannot be regarded as conclusive evidence to determine the age of the opposite party No. 2. Such facts can be ascertained properly on assessment of evidence (sic) at the time of trial. On the other hand basing upon the aforesaid materials and the principle as noted above a prima facie case is made out that by the date of the occurrence she was under eighteen years of age.

14. Cupid is blind is a well known saying. Activities due to such blindness of cupid, if are against the established principles and social norms and that make out a heinous offence like kidnapping, should that be ignored because of the sympathy due to marriage after kidnapping and for that should the inherent power be invoked, is the first point which falls for consideration. In a case of this nature, it is often seen that a girl during the period of (age of) adolescence falls trapped to the

allurement because of the biological urges. Perhaps keeping that as one of the factors, the law makers in their wisdom, while defining the offence of kidnapping from the lawful guardianship prescribed that a girl under eighteen years of age cannot be taken or enticed out of the keeping of the lawful -guardian without consent of such lawful guardian. Thus the alleged act of the petitioners is a sin according to the social norm (law) and that is a crime according to the penal law. If the conduct of a minor girl in moving away, being taken or enticed will be construed as a passport to cross the barrier of criminal law, then it may not lead to a healthy tradition for the discipline in the social life and society and may amount to melting the iron hand of the law. Though sympathy can be extended individually to an accused in a case of this nature but for that reason law cannot be moulded, (sic) or blended at the cost of social decency and discipline and by way of ignoring or keeping aside the provision of law.

15. In that context, another contention of the petitioner deserves mentioning. It was contended by the petitioners that if a criminal trial shall be resorted to that may not serve any useful purpose because the girl had left with the boy at her own choice and now they are living together. Such argument is not found to be sound or solid one because according to the provision of law cognizance of offences is taken or charge in a case is framed when a prima facie case is made out from the materials available in the case record or the case diary. Unless the charge is groundless, a criminal case should reach to its logical conclusion via a fair trial. The State which prosecutes does not act as a tradesman or a businessman to count the loss and profits and accordingly to pursue or not to pursue a case calculating the net result in the case. A Court equally while taking up a case for trial should not consider the ultimate conclusion of the case but should do its duty honestly, impartially and lawfully in accordance with the provisions of law and at the conclusion of the trial, record a finding either acquitting or convicting the accused on the basis of evidence on record.

16. When a prima facie case exists against the petitioners for the offence under Sections 366/109, I.P.C., whether it is lawful for this Court to exercise the inherent power Under Section 482, Cr. P.C. to quash the cognizance order? It is the settled principle of law that the inherent power should be exercised in rare types of cases

i.e., exceptional circumstances to prevent abuse of the process of any Court or failure of ends of justice or to give effect to any order under Cr. P.C. In the present case none of the aforesaid requirements of Section 482, Cr. P.C. is attracted inasmuch as the information lodged, investigation undertaken and charge-sheet filed are not on the basis of false or fabricated evidence nor the cognizance order suffers from any factual or legal lacuna. Apart from that simply because the opposite party No. 2, as stated by petitioners, voluntarily went, will not absolve the petitioners, if the prosecution allegations basing upon the ingredients of the offences will be proved. As per the prima facie case when the opposite party No. 2 has been enticed away from the lawful custody of her parents and that to without their consent, the steps taken by the petitioners resulting in marriage of opposite party No. 2 with the petitioner No. 1 (sic) loudly highlighted to seek the discretionary relief under Section 482, Cr. P.C. from this Court. It is as good or as bad an example where the booty collected in a dacoity after being donated for charitable purposes dacoits ask to quash the criminal proceeding stating that the looted property was not only not converted for their use but also donated for charitable purpose of needy and poor people. In other words, this Court observes that the logic which the petitioners have advanced is not only illogical but also irrational.

17. Apart from that in Section 320, Cr. P.C., in their wisdom the framers of law have provided for effecting compromise and compounding of certain type of offences keeping in view the nature and gravity of such offences and their impact on the Society. Sub-section (9) in Section 320, Cr. P.C., provides that no offence shall be compounded except as provided in Section 320. If the aforesaid cognizance order shall be quashed on the ground of mutual living between the victim girl and the alleged kidnappers it has the effect of allowing them to compound the offence which as stated above, is impermissible in the eye of law. However, in an appropriate case provision in Section 321, Cr. P.C. can be resorted to by the State with the prayer to withdraw from prosecution and in this case if the petitioners will be so advised they may move to the appropriate authority in that respect. If such a move is made it is left to the discretion of the concerned authorities to consider if the prosecution shall be withdrawn. If the concerned authorities will move for withdrawal, then it is left to the discretion of the

trial Court to consider the same and to pass order in accordance with law.

18. After due consideration of the matter in the aforesaid manner, this Court finds that the material i.e. the certificate granted by the Board of Secondary Education, Orissa, prima facie shows the opposite party No. 2 to be a minor on the date of kidnapping. As per the allegations and other material evidence available in the case diary that shows existence of a prima facie case, so it is neither desirable nor permissible under law to quash the cognizance order. Hence petitioners prayer stands rejected and the criminal misc. case is dismissed.

19. No findings and observations made in this judgment be binding on the trial Court at the time of trial or while considering any application filed by any of the parties. Since the criminal proceeding is of the year 1994, the trial Court shall take steps for its expeditious disposal by resorting to day-today trial in compliance with the provision in Section 309, Cr. P.C. Registry is directed to send back the L.C.R. immediately.

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