

**ishwar Singh Vs. State (Delhi) Administration**

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**Court :** Delhi

**Decided On :** Sep-17-1993

**Reported in :** 1993IVAD(Delhi)1; 1993(3)Crimes699; 1993(27)DRJ351

**Judge :** Y.K. Sabharwal, J.

**Acts :** [Constitution of India](#) - Article 226

**Appeal No. :** Criminal Miscellaneous Appeal No. 320 of 1992

**Appellant :** ishwar Singh

**Respondent :** State (Delhi) Administration

**Advocate for Pet/Ap. :** R.M. Tiwari and; P.S. Sharma, Advs

**Judgement :**

**Y.K. Sabharwal, J.**

(1) Ishwar Singh, the petitioner and one Mangat Ram were charged for an offence under Section 302 read with Section 34 of the Indian Penal Code. They were tried together. Mangat Ram was acquitted. Ishwar Singh was, however, convicted and sentenced to imprisonment for life by court of Session and Cr.A-94 of 1982 filed by him was dismissed by this Court on 26th April 1984. The Special Leave Petition of Ishwar Singh was dismissed by Supreme Court on 14th September, 1984.

(2) After having already served the sentence for about 12 years, this writ petition under Article 226 and 227 of the [Constitution of India](#) has been filed by Ishwar Singh claiming that since at the time of commission of the offence he was a 'child' within the meaning of Section 2(e) of the Children Act, 1960 ( for short 'the Act') he could not, in view of Section 24 of the Act, be charged with and tried together with a person who was not a 'child' and that his trial and consequent conviction and sentence was without jurisdiction, thus, entitling him to be released forthwith. The petition was filed on 9th June, 1992. A Division Bench of this Court on 10th July 1992 directed the District Judge to hold enquiry regarding the age of the petitioner at the time of commission of the offence. A report dated 11th November, 1992 was submitted by District and Sessions Judge to this Court stating that Ishwar Singh was born on 8th December, 1965 and that he was below 16 years of age at the time of alleged offence and was a child within the meaning of Section 2 (e) of the Act. The report of the learned District and Sessions Judge, inter-alia, states that it appears that in the trial court as well as in the appellate court and also in the Supreme Court the petitioner had not raised the plea that he was below 16 years at the time of the alleged offence and that he was 'child' within the meaning of Section 2 (e) of the Act. The District and Sessions Judge recorded the statement of Ishwar Singh and Sarpanch of Gram Panchayat as also of Piara Singh, father of Ishwar Singh. No evidence was produced before the District and Sessions Judge on behalf of the State to show that Ishwar Singh was more than 16 years of age at the time of the alleged offence. The report concludes that:- 'On the basis of evidence on record and circumstances of this case, in my opinion, Ishwar Singh, accused, was born on 8th December, 1965 and that he was below 16 years of age at the time of alleged offence and that he was a child within the meaning of Section 2(e) of the Children Act, 1960.'

(3) The arguments in the matter were heard by a Division Bench (Mahindar Narain and Jaspal Singh, JJ) and the judgment was reserved. The arguments before the Division Bench proceeded on the assumption that the question about the age of Ishwar Singh had not been raised during trial in the Court of Sessions or before the Bench hearing Cr. A.94/82 or before the Supreme Court. No one brought to the notice of the court that the question of age of Ishwar Singh had not only been raised but had been adjudicated upon in Criminal Appeal No. 94/82. The file of the

said appeal was neither requisitioned nor sent to the Bench hearing the writ petition. It seems that after the draft judgment was ready the said file was called for by Jaspal Singh, J. In his opinion Jaspal : Singh, J. says:- 'However, for no ostensible reason I called for that file. What was at the back of my action? Was it sense of shock, still persisting and haunting Or was it only curoosity, simple and innocent? Or a sense of disbelief which was probably still lurking somewhere in the corner of my subconscious I am not sure.'

(4) On perusal of the file Jaspal Singh, J. found that the question regarding the age of the petitioner had already been gone into in Cr.A.94/82 and that the Division Bench, after recording evidence comprising of the statement of Dr-M.C.Bhatia, a Radiologist and so also Vidyawati and Piara Singh, parents of the petitioner, had come to a finding that the 353 petitioner was not a child within the meaning of Section 2 (e) of the Act at the time of the commission of the offence. Jaspal Singh, J. has opined:- 'Thus, the entire edifice rest on the foundation of falsehood and perfidy crumbled to the ground but not without leaving me aghast over hos designedly we were tried to be misled.'

(5) The file of Criminal Appeal 94/82 shows that counsel for Ishwar Singh contended before the Bench hearing the appeal that Ishwar Singh was below 16 years of age when the offence was committed. In this regard the order dated 14th February 1983 may be reproduced as under:- 'At the forefront of his argument counsel for the appellant has contended that appellant was below 16 years of age at the time when the alleged offence was supposed to have been committed by him, thereforee, he had to be tried by the Children Court.'

(6) By order dated 16th February 1983 the Bench observed that it is necessary to hold an enquiry as to the age of Ishwar Singh. The Bench directed the Superintendent of Jail, Tihar, to send Ishwar Singh to Police Hospital for being examined by Police Surgeon as it was felt necessary to have a medical report with regard to the age of the appellant after radiological and other examinations. The report dated 2nd March, 1983 was received from the Resident Medical Officer, Central Jail, Tihar, staling that Ishwar Singh was referred to Police Hospital on 21st February, 1983 and that the age of Ishwar Singh as per report of Radiologist

was over 20 years. The statement of Dr.M.C.Bhatia, Radiologist, Police Hospital, was recorded by the Bench and he was cross examined at length by counsel for Ishwar Singh. The evidence of parents of Ishwar Singh was also recorded. By orders made on 9th August, 1983 the Bench after considering the evidence of Dr.Bhatia and parents of Ishwar Singh concluded that:-

'WE have carefully considered the evidence produced by both the State and the appellant and we find that the medical evidence shows that the age of the appellant at the time of offence was over 16 years. The oral evidence of the parties regarding estimated year of birth of the appellant cannot be trusted.'

(7) After aforesaid finding the arguments in Criminal Appeal No-94/82 were heard and it was dismissed on 26th April 1984.

(8) Mahindar Narain J. in his opinion has come to the conclusion that the Division Bench fell into a very grave error in not giving the benefit of two years to Ishwar Singh and that the evidence of Dr.M.C.Bhatia was of doubtful import inasmuch as it was not established that he was an expert in the matter of giving opinion of age; Dr.Bhatia did not produce or cite any authoritative medical text to support his views during his cross examination and the Bench did not give any finding regarding the inapplicability of the judgment of the Supreme Court in *Jaimala Vs . Home Secretary*', *Government of Jammu & Kashmir & Ors. : 1982 CriLJ1777* holding that the margin of error in age ascertained by Radiological examination is two years on either side. Justice Mahindar Narain has also opined that decision as to age given by the earlier Division Bench was not final or conclusive and the principle that a Bench has to accept judgment of coordinate Bench would not be applicable as decision as to age was per incuriam having been delivered by the Bench not following the binding law laid down in *Jaimala's* case. It has further been 354 opined that the prohibition contained in Article 21 of the Constitution is much stronger than the principle of binding precedent and in any case per incuriam judgment delivered in breach of a binding precedent of a superior court does not bind any Bench of the Court and further that habeas corpus writ recognised no 'finality' of judgments of courts. It recognised no principle similar to those of *resjudicata*. The learned Judge has thus concluded that he would not

consider that the act of filing the present petition as a 'fraud'. The history of writ of habeas corpus has been examined in detail by Mahindar Narain J. Mahindar Narain, J. opines that in view of the judgment in Jaimala's case regarding the judicial recognition of margin of error of two years, he would prefer the testimony of parents of Ishwar Singh and hold that Ishwar Singh was a 'child' to whom the Act applied at the time of commission of the crime and he was thus entitled to be tried in accordance with the provisions of the Act and not according to the provisions of the Criminal Procedure Code. In the conclusion Mahindar Narain, J. has opined that Ishwar Singh has been denied the personal liberty by a procedure which is not prescribed by law and he is entitled to the writ of habeas corpus.

(9) Mahindar Narain, J. has directed that Ishwar Singh be set at liberty forthwith. In the opinion of Jaspal Singh, J. the writ petition deserves dismissal. In view of difference of opinion the matter has been placed before me.

(10) When arguments commenced before me I thought it appropriate to peruse the Special Leave Petition which had been filed in Supreme Court to challenge the judgment dated 26th April 1984 whereby Criminal Appeal No-94/82 had been dismissed. A copy of the said Special Leave Petition (Criminal) No.2117/84 now placed on record, by the petitioner pursuant to directions made by me, has unfolded certain further facts. A perusal of the petition has now revealed that earlier to this petition, another Special Leave Petition (Criminal) No-2670/83 had been filed challenging the correctness of the decision of Division Bench dated 9th August, 1983 on the question of age. Special Leave Petition (Criminal) 2670/83 was dismissed by the Supreme Court by passing the following order:-

'SPECIAL Leave Petition is dismissed at this stage. However, it is clarified that in the event the petitioner is convicted by the High Court, he is at liberty to approach this Court and the contentions that the Petitioner was a child within the meaning of the Children Act is kept open and shall be examined by this Court on merits.'

(11) The judgment of High Court dated 26th April 1984 whereby Cr.A.92/84 was dismissed was challenged by filing Special Leave Petition (Criminal) No.21 17/84 and, in terms of aforequoted order Ishwar Singh again agitated before the Supreme Court that he was a 'child' within the meaning of the Act. The grounds

taken in Special Leave Petition (Criminal) No.2117/84 show in the petition the main thrust is that Ishwar Singh was a 'child' at the time of commission of offence. This petition was also dismissed by the Supreme Court on 14th September. 1984.

(12) In the light of facts noticed herein before the point for determination is can the question of age of Ishwar Singh at the time of commission of offence be examined again in this petition and what relief the petitioner is entitled.

(13) The orders passed by the Supreme Court on Special Leave Petition (Criminal) 355 2670/83 show that in the event of the petitioner's conviction being upheld by the High Court, he could only approach Supreme Court and contend that he was a 'child' at the time of commission of offence. That is what he did when he filed Special Leave Petition (Criminal ) No.2117/84 challenging the judgment of the High Court dated 26th April 1984. The petitioner again agitated before Supreme Court that he was a 'child' at the time of commission of offence as this was the thrust of even second Special Leave Petition. In the first Special Leave Petition the only question was as to the age of the petitioner. In view of dismissal of these Special Leave Petitions it is not open to the petitioner to again agitate before this court the same question but assuming, in law, it can be again agitated, the petitioner, for the reasons and facts and circumstances noticed hereinafter, cannot be permitted to reopen the question of his age at the time of commission of offence.

(14) Admittedly in the writ petition reference has not been made to the orders dated 9th August, 1983 passed by the Division Bench about the age of the petitioner. The said orders were passed by the Bench on appreciation of evidence led before it including the evidence of a Radiologist. In this petition, it seems, arguments before the Bench proceeded on the assumption that there was no adjudication about the age of the petitioner in the Criminal Appeal. The fact about orders dated 9th August, 1983 came to light when Jaspal Singh, J. summoned the file of Criminal Appeal as noticed hereinbefore.

(15) Faced with this situation Mr.Tiwari contended that the order regarding the age of petitioner passed by the Division Bench on 9th August, 1983 in the Criminal Appeal is not binding' on this court as the said order does not refer to what is laid

by Supreme Court in Jaimala's case and as such that order given in ignorance of Supreme Court decision, is a judgment per incuriam and has no binding force. Counsel contends that the Division Bench which decided Cr.A.94/82 fell into grave error in not giving benefit of two years to the petitioner. It is also pointed out that Dr.Bhatia neither stated that he was an expert in the matter of giving opinion in respect of age nor did he cite any authoritative medical book to support his views during cross examination and thus his evidence was of doubtful nature and as it is a case of violation of Article 21, these contentions should be examined in this petition in view of wide scope of powers of this court while dealing with a writ of Habeas corpus. On the other hand, Mr.Sharma submitted that it is not open to the petitioner to contend before a Coordinate Bench that earlier Bench committed any error and this contention of the petitioner should not be examined in this petition in view of comity existing between the courts. Mr.Sharma also submitted that question put to Dr.Bhatia in cross examination and grounds taken in Special leave Petition (Criminal) No.2117/84 are suggestive of the fact that the aspect of margin of error of two years on either side in the case of determination of age from ossification test was very much alive in the minds of the parties and it was squarely taken up by the petitioner in Supreme Court but his Special Leave Petitions were dismissed. Mr.Sharma further submitted that the order passed on 9th February 1982 is binding on this court and from the mere fact that the said order does not refer to Jaimala's case it cannot be assumed that it was given in ignorance of law laid down by the Supreme Court and is per incuriam.

(16) It is not necessary to examine afore noticed contentions as the petitioner has not raised any such pleas in the writ petition. It is one thing to state in the writ petition that an earlier Bench, on the same issue, had passed an order and then contend that the said order is not binding on any stated grounds but the position would be altogether different where the fact of earlier order is suppressed from the court and when it comes to light then to 356 make submission that the said order is not binding on the parties. The present case does not fall in the former category but falls in later category. If in such a situation the petitioner is allowed to raise afore noticed contentions, it would amount to putting a premium on dishonesty. That cannot be allowed. It is clear and blatant abuse of the process of the court and deliberate suppression of material facts from the court. The petitioner neither

brought to the notice of the court the orders dated 9th August, 1983 nor the fact that the said orders were challenged by filing a separate and substantive Special Leave Petition before the Supreme Court. The later aspect came into light only on a perusal of copy of Special Leave Petition (Criminal) No.2117/84, which was placed on record when, during course of hearing of arguments, I made it clear to the counsel for the petitioner that a copy of the said Special Leave Petition must be placed on record. In this petition reference has been made to filing of Special Leave Petition No-2670/83 and its dismissal by Supreme Court. This is a glaring case of abuse of the process of law and suppression of most material and vital facts from the court. When a petitioner approaches the High Court invoking its extraordinary powers under Article 226 of the Constitution he has to come with clean hands.; has to disclose all material and relevant facts and cannot suppress those facts and breach of these fundamentals would disentitle a petitioner to claim a relief seeking issue of a prerogative writ. The principles of law are not different, where a petitioner seeks issue of writ of Habeas corpus. In this case if the petitioner had not suppressed the facts, it is likely that the Bench may not have asked for the report from the District Judge on the question of age of the petitioner. The court was kept in complete dark about the orders dated 9th August, 1983 and the dismissal of the Special Leave Petitions. The District Judge recorded the statement of the petitioner, his parents and a Sarpanch and came to the conclusion that the petitioner was a child at the time when the offence was committed. The District Judge was also given the impression that the question as to age had not been raised and examined earlier as would be evident from the following passage of the report of the District Judge:- 'After the conviction of the accused Ishwar Singh on 7.4.1982, the accused had filed Cr.A.No-94/82 which was dismissed by the Hon' ble High Court on 26.4.1984. After that, Ishwar Singh filed a SLP(Criminal) No.2117/84 which was also dismissed by the Hon' ble Supreme Court on 14th September, 1984. It appears that in the trial court as well as in the appellate court and also in the Supreme Court the petitioner/ accused had not raised a plea that he was below 16 years at the time of alleged offence and that he was a child within the meaning of Section 2 (e) of the Children Act, 1960.'

(17) The petitioner kept everyone in dark. As noticed hereinbefore, some aspects came to light only during course of arguments before me. The copy of the Special Leave Petition (Criminal) No.2117/84 shows that it was accompanied by an affidavit of the brother of the petitioner. I cannot say whose affidavit was filed along with Special Leave Petition (Criminal) No.2670/83 as copy of that petition has not been filed. I am in respectful agreement with the opinion of Jaspal Singh.J. that the entire foundation of the writ petition is falsehood with a design to mislead this court. The petitioner is not entitled to any relief from this Court.

(18) For the aforesaid reasons, I would dismiss the writ petition.

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