ORISSA HIGH COURT, CUTTACK.

W.P. (CRL) No. 154 of 2012

An application under Articles 226 & 227 of the Constitution of India and Section 362 of the Cr.P.C. arising out of the judgment dated 23.11.2011 passed by this Court in JCRLA No.143 of 2004 confirming the order passed in S.T. No.125/1 of 2003/04 by learned Ad-hoc Additional Sessions Judge (F.T.C), Keonjhar, under Sections 341/376(2)(g)/302/201/34, I.P.C.

Saban Majhi … **Petitioner**

Versus

State of Orissa and others … **Opp. Parties**

For Appellant : M/s. Niranjan Panda, M. Majhi, S.P. Barik and C.R. Behera, Advocates.

For Respondents : Mr. B.P. Pradhan, Addl. Government Advocate.

P R E S E N T :

THE HONOURABLE MR. JUSTICE L. MOHAPATRA
AND
THE HONOURABLE MR. JUSTICE C.R. DASH

Date of Argument : 10.08.2012 Date of Judgment : 26.09.2012

C.R. Dash, J. The sole petitioner Saban Majhi, son of Chamra Majhi of village Uppardiha in the district of Keonjhar and some others were convicted for offence under Sections 341/376(2)(g)/302/201/34, I.P.C. by the learned Ad hoc Additional Sessions Judge (F.T.C.), Keonjhar in S.T. No.125/1 of 2003/04. The petitioner preferred JCRLA No.143 of 2004 and others

preferred two other appeals. All the appeals were heard and disposed of together. Vide judgment dated 23.11.2011 passed in those appeals, this Court maintained the conviction recorded by learned Trial Court and confirmed the order of sentence. The present petitioner has now questioned legality of the conviction so recorded and sentence so awarded on the ground of his juvenility.

2. The question of juvenility was never raised by or on behalf of the petitioner at any stage of the proceeding and trial or in the Jail Criminal Appeal before the High Court. This Court, on consideration of the arguments advanced and the evidence obtained on record, dismissed the appeal preferred by this petitioner vide JCRLA No.143 of 2004. The JCRLA was dismissed on 23.11.2011. The present writ petition was filed on 10.02.2012 with a prayer to recall the order passed in the aforesaid Jail Criminal Appeal and to set the petitioner at liberty on the ground that the writ petitioner was a juvenile on the date of occurrence, i.e. 11.02.2003. Vide order dated 05.03.2012 passed in this writ petition, this Court directed an enquiry to be conducted in respect of the present writ petitioner Saban Majhi by the Juvenile Justice Board, Keonjhar to find out whether he was a juvenile on the date of occurrence, i.e. 11.02.2003. In obedience to the aforesaid direction, learned Chief Judicial Magistrate-cum-Principal Magistrate, Juvenile Justice Board, Keonjhar conducted an enquiry and found that the writ petitioner Saban Majhi was aged 15 years 07 months and 05 days as on the date of the alleged occurrence, i.e. 11.02.2003, and thus he was a juvenile on the relevant date of occurrence.

3. The writ petition having been nomenclatured to be one under Articles 226 and 227 of the Constitution of India read with Section 362 of the Criminal Procedure Code ("Cr.P.C." for short) with the main prayer to recall / modify the order / judgment passed in JCRLA No.143 of 2004, the very first objection that is raised by Mr. Pradhan, learned Addl. Govt. Advocate is to the effect that in the guise of exercise of jurisdiction under Articles 226 and 227 of the Constitution of India, the judgment passed in the aforesaid Jail Criminal Appeal cannot be reviewed in derogation of the express provision contained in Section 362, Cr.P.C. Learned counsel for the petitioner oppugns such objections with all the vehemence at his command and submits that in view of the provision contained in Section 7-A of the Juvenile Justice (Care & Protection of Children) Act, 2000, as amended in 2006 by the Amending Act 33 of 2006 (hereinafter referred to as "Juvenile Justice Act" for short), this Court cannot close its eyes when there has been flagrant violation of the rights of the petitioner guaranteed under Article 21 of the Constitution of India especially in view of the fact that he is confined under illegal detention.

4. It is contended by Mr. Pradhan, learned Addl. Govt. Advocate that the Jail Criminal Appeal having already been disposed of by a competent Bench of this Court, it is not possible now to review the judgment passed in the JCRLA. He relies on the case of **Sunil Kumar *vs.* State of Haryana,** A.I.R. 2012 Supreme Court 1754, to substantiate his contention.

5. Hon'ble Supreme Court, in the aforesaid case, dealt with the issue involving the provisions contained in Section 362, Cr.P.C., which puts a complete embargo on the criminal courts to reconsider any case after delivery of the judgment, as the court becomes functus officio. In paragraph-9 of the

judgment, Hon'ble Supreme Court referring to and following its earlier judgments, held thus –

> "9. This Court in a recent judgment in State of Punjab v. Davinder Pal Singh Bhullar & Ors. etc., AIR 2012 SC 364 : *(2012 AIR SCW 207)* dealt with the issue considering a very large number of earlier judgments of this Court including Vishnu Agarwal vs. State of U.P. & Anr., AIR 2011 SC 1232 : *(2011 AIR SCW 1473)* and came to the conclusion :
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> *"Thus, the law on the issue can be summarized to the effect that the criminal justice delivery system does not clothe the court to add or delete any words, except to correct the clerical or arithmetical error as specifically been provided under the statute itself after pronouncement of the judgment as the Judge becomes functus officio. Any mistake or glaring omission is left to be corrected only by the appropriate forum in accordance with law."*

6. We do not dispute the settled position of law referred to by learned Addl. Govt. Advocate so far as Section 362, Cr.P.C. is concerned. But this Court has become *functus officio* after disposal of the Jail Criminal Appeal *stricto sensu* in terms of Section 362, Cr.P.C. only. And such an embargo is operative in respect of trial, appeal, revision, etc., as governed by the provisions of the Cr.P.C. only.

7. Section 5, Cr.P.C. enshrines the saving clause of the Code. There are three components in the saving clause contained in Section 5. They are :-

(i) Cr.P.C. generally governs the matters covered by it;

(ii) If a special or local law is in force covering the same area, the latter law will prevail over the Code;

(iii) But, if there is a specific provision to the contrary, then that will over-ride the special or local law.

It is not disputed at the Bar that Juvenile Justice Act has been enforced as a special statute / law. In view of such accepted position, the special law of Juvenile Justice Act will prevail over the Code so far as trial, etc. of a juvenile is concerned. Only we have to see if there is any "specific provision to the contrary" in the Code to oust the operation of Juvenile Justice Act in a particular case. In that context reference may be made to Section 27, Cr.P.C., which speaks of jurisdiction in the case of juveniles. In view of ruling of Hon'ble Supreme Court in the case of **Raghubir *vs.* State of Haryana,** A.I.R. 1981 S.C. 2037, Section 27, Cr.P.C. is not a "specific provision to the contrary" within the meaning of Section 5, Cr.P.C., but is an enabling provision only. In view of the law settled by Hon'ble the Supreme Court in the aforesaid case of Raghubir, and Section 5, Cr.P.C., it is to be held that provisions of the Cr.P.C. have to give way to provisions of the Juvenile Justice Act, when it concerns a juvenile. In that event Section 362, Cr.P.C. may not be a bar for considering question of juvenility raised for the first time even after conclusion of the trial or disposal of the appeal arising therefrom, if the age of the juvenile and the benefit of the Act was not considered by the Court concerned while disposing of the concerned case. Such a beneficial interpretation shall also be in conformity with the provisions in Section 7-A of the Juvenile Justice Act as amended by Act 33 of 2006.

8. The next limb of argument by Mr. Pradhan, learned Addl. Govt. Advocate is to the effect that in the guise of exercise of writ jurisdiction under Articles 226 and 227 of the Constitution of India, this Court cannot set aside the judgment passed in the aforesaid Jail Criminal Appeal.

We do not dispute the proposition of law that no writ can be issued to a co-ordinate Bench of the same High Court or another High Court in exercise of jurisdiction under Articles 226 and 227 of the Constitution of India. (*see* ***Rupa Ashok Hurra vs. Ashok Hurra and another,*** *A.I.R. 2002 SC 1771).* But, this Court, in exercise of its jurisdiction under Articles 226 and 227, can certainly consider the claim of juvenility of an accused even after disposal of the appeal, if the age of the juvenile and the benefit of the Act for the juvenile was not raised and considered in the appeal. The Court has to be however satisfied prima facie on the basis of cogent material about such claim of juvenility then.

9. Learned counsels for both the parties relied on a catena of decisions to substantiate their respective contentions. Those decisions are **Gurpreet Singh *vs*. State of Punjab**, (2005) 12 S.C.C. 615, **Murari Thakur *vs*. State of Bihar**, (2009) 16 S.C.C. 256, **Pawan *vs*. State of Uttranchal**, **etc.,** (2009) 15 S.C.C. 259, **Lakhan Lal *vs*. State of Bihar,** 2011 CRI. L.J. 1116, **Jitendra Singh *vs*. State of Uttar Pradesh**, 2011 CRI. L.J. 1004, and so on. Learned counsels also relied on the cases of **Gopinath Ghosh *vs*. State of West Bengal,** A.I.R. 1984 S.C. 237**, Bhoop Ram *vs*. State of U. P.** A.I.R. 1989 S.C. 1329**, Bhola Bhagat *vs*. State of Bihar,** A.I.R. 1998 S.C. 236**, Hari Ram *vs*. State of Rajasthan,** (2009) 13 S.C.C. 211, which have recognized beneficial nature of provisions enacted by the Parliament in the Juvenile Justice Act. We are not inclined to refer to all the decisions relied on

by the learned counsels for the parties, as those are not relevant for the purpose of the present case in as much as those decisions relate to raising of the claim of juvenility for the first time before the Supreme Court and dealing with the questions by the Hon'ble Supreme Court either in negative or in affirmative. We feel persuaded, however, to quote here the view of a three judges Bench, in paragraph-41 of the judgment in **Pawan *vs*. State of Uttranchal**, **etc.,** which runs as follows :-

> "41. The question is : should an enquiry be made or report be called for from the trial court invariably where juvenility is claimed for the first time before this Court. Where the materials placed before this Court by the accused, prima facie, suggest that the accused was "juvenile" as defined in the 2000 Act on the date of incident, it may be necessary to call for the report on an enquiry be ordered to be made. However, in a case where plea of juvenility is found unscrupulous or the materials lack credibility or do not inspire confidence and even, prima facie, satisfaction of the court is not made out, we do not think any further exercise in this regard is necessary. If the plea of juvenility was not raised before the trial court or the High Court and is raised for the first time before this Court, the judicial conscience of the Court must be satisfied by placing adequate and satisfactory material that the accused had not attained the age of eighteen years on the date of commission of offence; sans such material any further enquiry into juvenility would be unnecessary."

10. Hon'ble Supreme Court, on consideration of the materials placed before it in the aforesaid case, held that the evidence regarding age of the petitioner in his confession under Section 313, Cr.P.C. and the School Leaving Certificate without the primary evidence of Birth Certificate being tendered in evidence are not satisfactory and adequate to arouse judicial

conscience regarding juvenility, that too when the School Leaving Certificate was procured after conviction. This Court, in the present case, however on being satisfied about the claim of juvenility by the petitioner-appellant had issued direction vide order dated 05.03.2012 for an enquiry to be conducted by the concerned Juvenile Justice Board and the concerned Juvenile Justice Board, after the enquiry, has reported that the petitioner was aged 15 years 07 months and 05 days on the date of occurrence, i.e., 11.02.2003.

11. Hon'ble Supreme Court in the case of **Amit Singh *vs.* State of Maharashtra & Anr.,** (2011) 50 OCR (SC) – 221 (2011) 13 S.C.C. 744 had the occasion to deal with the claim of juvenility of the petitioner after the Special Leave to Appeal Petition against the conviction by the concerned High Court was dismissed. The claim of juvenility was raised for the first time seeking issuance of a writ in the nature of Habeas Corpus under Article 32 of the Constitution of India alleging illegal detention of the petitioner contrary to the fundamental rights guaranteed under Article 21 of the Constitution of India. Hon'ble Supreme Court, taking into consideration its earlier decision in **Hari Ram *vs*. State of Rajasthan,** (2009) 13 S.C.C. 211, held the petitioner therein to be entitled to the beneficial provision of the Juvenile Justice Act, 2000. Further, taking into consideration the provisions contained in Section 2(l) and Section 2(k), Section 7-A, Section 20, Section 15, Section 64 of the Act and Rule 98 of the Juvenile Justice (Care & Protection of Children) Rules 2007 (in short "the Rules"), Hon'ble Supreme Court held the petitioner entitled to be released from prison, as he has already undergone more than the maximum period of imprisonment prescribed in Section 15 of the Juvenile Justice Act. It was also held therein that in view of Section 7-A of the Juvenile Justice Act, the claim of juvenility can be raised even after final disposal of the

case. Same is the view of Hon'ble Bombay High Court in the case of **Saheb Sopan Kale *vs.* State of Maharashtra,** 2008 CRI. L.J. 2115, wherein the Bombay High Court taking into consideration the provisions contained in Section 7-A, Section 2(l), Section 2(k) and Section 15 of the Juvenile Justice Act had directed release of the petitioner from prison, as he was a juvenile on the date of occurrence.

12. Learned counsels for the parties fairly submit that the petitioner is in custody from the date of his arrest and at no point of time he was on bail. The petitioner is there in custody for about nine years by now. He has already undergone the sentence of maximum period prescribed for a juvenile in Section 15 of the Juvenile Justice Act.

13. Regard being had to the provisions contained in Sections 7-A, 15, 20 and 64 read with Sections 2(l) and 2(k) of the Juvenile Justice Act, we are of the considered view that no useful purpose shall be served by sending the matter back to the juvenile Justice Board, Keonjhar now, as the same would result in illegal detention of the petitioner for some more days. The petitioner-appellant having already suffered the sentence for more than the period prescribed in Section 15 of the Juvenile Justice Act, we feel persuaded to issue direction for release of the petitioner-appellant from prison, if his detention is not required in any other case.

14. The report dated 24.03.2012 submitted by the C.J.M.-cum-Principal Magistrate, Juvenile Justice Board, Keonjhar, which is there in the record of learned Advocate General on being called through the office of the

learned Advocate General, be filed by the learned Addl. Govt. Advocate to form a part of the record of the present case.

The Writ Petition is accordingly disposed of.

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C.R. Dash, J.

L. Mohapatra, J. I agree.

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L. Mohapatra, J.

Orissa High Court, Cuttack.
The 26th day of September, 2012. /*Parida.*