

Court No. - 9

A. F. R.

Case :- MISC. BENCH No. - 13419 of 2018

Petitioner :- Smt. Parvati Kumari And Ors.

Respondent :- State Of U.P. Thru. Prin Secy Home & Ors.

Counsel for Petitioner :- Bhoopal Singh

Counsel for Respondent :- Govt. Advocate, S.B. Pandey, Shiv P. Shukla (A.S.G.)

Hon'ble Ajai Lamba, J.

Hon'ble Rajeev Singh, J.

ORAL

1. The petition seeks issuance of a writ in the nature of certiorari quashing First Information Report No.033 of 2018, under Sections 363, 366 and 352 Indian Penal Code, Police Station Sujauli, District Bahraich.

2. We have heard learned counsel for the petitioners, Shri S.P. Singh learned counsel for the State, and Shri Shiv P. Shukla, learned counsel who has given assistance to the Court on behalf of respondent no.5/Unique Identification Authority of India, New Delhi (for short "UIDAI").

In deciding a related issue as to 'of what facts Aadhaar Card is Proof?', Ms. Jasmine, Deputy Director, UIDAI, Regional Office, Lucknow has also assisted the Court.

3. Learned counsel for the petitioners contends that although the facts reflected in Para-6 of the petition contain clerical errors, however the case of the petitioners is to the effect that families of petitioners no.1 and 2 (Smt. Parvati Kumari and Virendra Kumar) arranged their marriage. A dispute arose in regard to some demand

whereupon parents of Smt. Parvati Kumari petitioner no.1 refused to marry her with petitioner no.2 Virendra Kumar.

On behalf of the petitioners, in context of the accusations of committing offence under Sections 363, 366 Indian Penal Code and Section 352 Indian Penal Code it has been pleaded that petitioner no.1 has neither been kidnapped nor abducted. Marriage of choice of petitioner no.1 Smt. Parvati Kumari has not been accepted by respondent no.4 who happens to be the mother of Parvati Kumari. In such circumstances, in total abuse of process of the law and process of the Court, respondent no.4 initiated impugned criminal proceedings not only against petitioner no.2 Virendra Kumar but also against his family members.

4. It has been highlighted by learned counsel for the petitioners that petitioner no.1 Smt. Parvati Kumari had attained age of majority. So as to show that petitioner no.1 attained age of majority, petitioner no.1 has relied on the date of birth recorded in her Aadhaar Card. Being of marriageable age and there being no legal impediment in her marriage with petitioner no.2, she got married to him.

In evidence of marriage, learned counsel has brought attention of the Court towards Annexure – 2 which is a marriage certificate issued by Arya Samaj Mandir indicating that petitioner no.1 got married to petitioner no.2 on 07.05.2018.

It has been pleaded that petitioner no.2 had also attained age of majority. In such circumstances, offence, as alleged, has not been committed.

5. Petitioner no.1 Smt. Parvati Kumari has relied on Aadhaar Card prepared by UIDAI to establish her date of birth. The Aadhaar Card declares the date of birth of petitioner no.1 Smt. Parvati Kumari as 01.01.1999 (Annexure – 3 appended with the writ petition).

Likewise, the Aadhaar Card of petitioner no.2 Virendra Kumar indicates his date of birth as 01.01.1997 (Annexure – 4 appended with the writ petition).

6. This Court being intrigued by a large number of cases wherein Aadhaar Cards declare the date of birth as 1st of January of a particular calendar year, and in some cases only the year of birth is given, recorded a detailed order dated 16.05.2018 directing ‘UIDAI’ to be arrayed as respondent no.5 to demonstrate as to whether Aadhaar Card would be evidence of date of birth/age or not. Consequently, UIDAI was arrayed as respondent no.5.

7. The core issue before this Court is whether offence under Sections 363 and 366 Indian Penal Code has been committed, and whether petitioner no.1 Smt. Parvati Kumari had been abducted or kidnapped by petitioner no.2 Virendra Kumar.

The factum of age of the victim assumes importance and relevance because the victim petitioner no.1 claims to be married to petitioner no.2. Offence under Section 363 Indian Penal Code can be said to be committed if it is demonstrated by the prosecution that the victim was a minor; and therefore, had been kidnapped from the custody of her legal guardian. Legally, offence of ‘kidnapping’ as defined under Section 361 Indian Penal Code can be said to be committed only if the victim (in the case of female) is under the age of 18 years.

8. Likewise, petitioner no.2, the husband, relied on entry of date of birth in Aadhaar Card to show that he was of marriageable age.

It is in this context, in the interest of justice, we asked UIDAI to clarify the issue, while framing the question **“of what facts Aadhaar Card is proof ?”**

9. We find that three affidavits have been filed on behalf of respondent no.5/UIDAI, dated 04.09.2018, 10.09.2018 and

24.10.2018, all sworn by Ms. Jasmine, Deputy Director serving with UIDAI, Regional Office, Lucknow.

10. Considering the core of the issue, order dated 16.07.2018 was passed in the following terms :-

“1. In deference to order dated 16.5.2018, Unique Identification Authority of India (UIDAI), New Delhi has been impleaded as respondent no.5.

2. Shri Sunil Kumar Pandey, posted as Deputy Director, Unique Identification Authority of India (UIDAI), is present in court. We have interacted with Shri Sunil Kumar Pandey. He says that Senior most officer in UIDAI, Lucknow is Ms. R.H.Singh, Deputy Director General.

We find that an officer holding senior and responsible post in the said authority is stationed in Lucknow.

*3. We hereby request Ms. R.H.Singh, Deputy Director General, UIDAI, Lucknow to file her affidavit clarifying as to **of what fact(s) Aadhaar Card is a proof ?***

We would also like to know the documents/nature of documents that are relied on for making an Aadhaar Card.

4. List on 6.8.2018.

5. In the meantime, investigation be concluded.

6. Interim direction to continue till the next date of listing.”

(emphasised by us)

11. The initial affidavit of Ms. Jasmine, Deputy Director, UIDAI, Regional Office, Lucknow, did not clarify the issue. In such circumstances, another order dated 04.09.2018 was passed in the following terms :-

“1. Ms. Jasmine, posted as Deputy Director, Unique Identification Authority of India, Regional Office, Lucknow has appeared alongwith Shri Shiv P. Shukla learned counsel for Union of India.

Affidavit of Ms. Jasmine has been filed in court, which is taken on record.

*2. The anxiety of the court has been brought to the notice of Ms. Jasmine, in particular the query raised vide order dated 16.7.2018 ("**AS TO OF WHAT FACT(S) AADHAAR CARD IS A PROOF?**")*

The anxiety of the court was raised also vide order dated 16.5.2018.

3. On request of Shri Shiv P.Shukla, list on 10.9.2018, as fresh at 10.15 a.m.

4. We request Ms. Jasmine to remain present in court again to assist the court.

5. Shri Dinesh Singh Rana, learned counsel for the respondent State has filed short counter affidavit on behalf of the investigating agency in court, which is taken on record.”

12. We hereby record that Ms. Jasmine, Deputy Director, UIDAI, Regional Office, Lucknow appeared in Court repeatedly to assist the Court to clarify the issue, which frequently arises. We appreciate the effort.

13. We need not make a detailed reference to the contents of the affidavits filed on behalf of UIDAI. Suffice it to say that essentially UIDAI relied on relevant excerpts from the judgment rendered by the Hon’ble Supreme Court of India in ***W.P. (C) No. 829 of 2013 entitled S.G. Vombatkere & Anr. Vs. Union of India, decided on 24.08.2017***, in particular relevant portions of Para Nos. 54, 55, 446(a),(b),(c).

Pertinent gist of the case set up by UIDAI on the basis of judgment rendered in S.G. Vombatkere’s case (**supra**) would be that :-

(a) Biometric information received at the time of authentication is matched with the Aadhaar number (identity).

(b) The UIDAI relies on name/address/date of birth derived from the proof of identity/proof of address documents, as submitted during enrolment. UIDAI takes no responsibility with respect to the correctness of the name, date of birth or address of the person enrolled.

The information furnished at the time of enrolment can be reviewed in case of a dispute by way of update.

(c) Enrolment of Aadhaar is done through a resident enrolment process and verification of proof of identity and

proof of address documents, against acceptable documents as per UIDAI valid list of documents as provided under Schedule II and Schedule III (Enrolment and Update) Regulations, 2016, read with Regulations 10.

UIDAI takes responsibility in creating and implementing standards, ensuring matching systems installed in CIDR work as they are designed to do, and providing options to Aadhaar holders in terms of controlling their identity (such as updating their data, locking their biometrics, etc.) and accessing their own authentication records.

(d) It has been pleaded on behalf of UIDAI that the whole architecture of Aadhaar is devised to give unique identity to the citizens of this country. No doubt, a person can have various documents on the basis of which that individual can establish her/his identity. It may be in the form of a passport, Permanent Account Number (PAN) card, ration card and so on. For the purpose of enrolment itself, a number of documents are prescribed which an individual can produce, on the basis of which Aadhaar card can be issued.

However, there is a fundamental difference between the Aadhaar card as a means of identity, and other documents through which identity can be established. Enrolment for Aadhaar card also requires giving of demographic information as well as biometric information which is in the form of iris and fingerprints. This process eliminates any chance of duplication.

It has been emphasised that an individual can manipulate the system by obtaining more than one or even a number of PAN cards, passports, ration cards etc. However, when it comes to obtaining Aadhaar card, there is no possibility of obtaining duplicate card. Once the biometric

information is stored and on that basis Aadhaar card is issued, it remains in the system with the Authority.

Wherever there would be a second attempt for enrolling for Aadhaar and for this purpose same person gives his biometric information, it would immediately get matched with the same biometric information already in the system and the second request would stand rejected. It is for this reason the Aadhaar card is known as Unique Identification (UID). Such an identity is unparalleled.

(e) To enable a resident to get Aadhaar number, he is required to submit demographic as well as biometric information i.e., apart from giving information relating to name, date of birth and address, biometric information in the form of photograph, fingerprint, iris scan is also to be provided. Aadhaar number given to a particular person is treated as unique number as it cannot be reassigned to any other individual.

14. In Para-2 of affidavit dated 24.10.2018, Ms. Jasmine, the deponent, has clarified that if a resident does not have any valid supporting date of birth document, date of birth is recorded on the basis of declared and approximate date of birth. In case of approximate date of birth, the age is verbally communicated by the resident to the operator and ECMP client calculates the year of birth, and by default, consequently, the date of birth is recorded as 1st January of that calendar year.

It has further been clarified specifically that The Aadhaar (Targeted delivery of financial and other subsidies, benefits and services) Act No.18 of 2016 does not mention that Aadhaar can be accepted as proof of date of birth. The date of birth is recorded on the basis of self declaration given by the resident. Therefore, in case of dispute regarding correctness of the date of birth, the burden of proof lies with the resident/card holder.

15. Ms. Jasmine has further clarified in Para-3 of affidavit dated 24.10.2018 that Aadhaar is only a proof of the fact that the person who is trying to obtain a subsidy/service by identifying himself on the basis of Aadhaar number is the same person who had enrolled for Aadhaar, after providing his biometrics and other documents at the time of enrolment. Aadhaar is only a method of identification of the identity that the Aadhaar holder presented himself at the time of his enrolment.

16. From the above we can safely deduce that **firstly** Aadhaar Card is a document providing conclusive connection between the photograph of the Aadhaar Card holder, his fingerprints and iris scan details, with the Aadhaar Number.

Secondly, we clearly deduce from the above that the other information namely name, date of birth, gender and address as entered in the Aadhaar Card, is furnished by the Aadhaar applicant at the time of authentication/enrolment.

Although, the regulations provide for the applicant to rely on a set of documents for giving information in regard to name, address and proof of date of birth, however, because the said information is merely given by the applicant, and is not authenticated by UIDAI at the time of authentication, the Aadhaar Card cannot be conclusive proof in regard to those entries.

It thus follows that in case of dispute regarding correctness of date of birth etc., burden of proof lies with the resident/applicant/Aadhaar Card holder.

17. From the above conclusion it stands demonstrated that in case a person relies on entries in Aadhaar Card in regard to address, date of birth etc., on the basis of the Aadhaar Card, under the Evidence Act it cannot be said that the entries in those regards are conclusive proof of those facts. If question in these regards arises, the source of giving date of birth etc., are required to be verified in the process of investigation in criminal cases.

In this regard it would be pertinent to refer to the law under which facts such as date of birth would be verified. We refer to judgment rendered by a division bench of this Court of which one of us (Ajai Lamba, J.) was a member. While relying of judgments rendered by Hon'ble Supreme Court of India, the following (relevant portion only) was held in **Habeas Corpus No.21284 of 2018 'Deepa Vs. State of U.P. & Ors.'** decided on **03.08.2018** :-

"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.

18. We find that the investigating agency has not conducted any investigation as regards the source or basis of recording date of birth of petitioner no.1 as 01.01.1999 in the Aadhaar Card. Rather the investigating agency in its wisdom got the victim subjected to ossification test.

19. In the case in hand, we find that the complainant/respondent no.4, mother of the victim/petitioner no.1 gave out the age of petitioner no.1 as 16 years in the impugned first information report.

In the marriage certificate, petitioner no.1 herself gave her date of birth as 01.01.1999 (Annexure – 2 appended with the petition). As per the Aadhaar Card, date of birth of the petitioner is recorded as 01.01.1999. A dispute in regard to date of birth/age of petitioner no.1, therefore, arose.

20. Learned counsel for the State has pointed out, on the basis of affidavit of Shri Jitendra Kumar, Sub-Inspector, Police Station Sujauli, District Bahraich sworn on 30.07.2018, that the investigating agency relied on medical age/bone age of petitioner no.1, the victim. On medical examination, her age was determined as approximately 17 years on the basis of document placed on record as Annexure – SCA 2 with the counter affidavit.

21. Considering the totality of facts and circumstances of the case noticed above which clearly indicated discrepancy in the age of petitioner no.1 given by mother of the said petitioner in the impugned first information report, and the date of birth given in the Aadhaar Card by the victim herself or her family members, bone age of the prosecutrix was determined through a medical test, viz. ossification test.

We approve of the practice followed by the investigating agency in verifying the age through Ossification Test in case of dispute regarding age of a witness, complainant or accused. Ossification test is based on scientific medical examination.

22. Apparently in context of element of kidnapping and abduction, the investigating officer in his wisdom has given a margin of two years on the higher side to the bone age of the victim in concluding that the victim had attained age of majority on the date of the incident.

We find the conclusion drawn by the investigating officer to be in conformity with the law laid down by this Court vide judgment dated **03.08.2018** rendered in **Habeas Corpus No.21284 of 2018 (Deepa Vs. State of U.P. & Ors.)** while relying on various judgments

of the Hon'ble Supreme Court of India. The relevant portions read as under :-

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. X X X

12. X X X

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."

23. We approve of such conclusion having been drawn by the investigation officer. Demonstratively it is clear that the offence of kidnapping or abduction has not been committed. It stands established on the basis of facts and circumstances that marriage of choice of petitioner no.1 with petitioner no.2 was not accepted by respondent no.4 and therefore, in abuse of process of the law and process of the Court, impugned criminal proceedings were initiated.

24. We have also taken into account the fact that statement of petitioner no.1 as victim/prosecutrix was recorded under Section 164 Cr.P.C. The statement has been placed on record as Annexure – SCA 3 with the counter affidavit. In the statement the prosecutrix stated that she has been married to petitioner no.2 Virendra Kumar since the last about one year. False information was given by her mother to prosecute the accused.

25. In cases such as the present one, the core of the issue to be considered by the Writ Court is whether the victim had been kidnapped or abducted, consequently whether offence under Sections 363 and 366 Indian Penal Code has been committed.

26. Kidnapping has been defined under Section 359 Indian Penal Code, Section 361 Indian Penal Code and has to be read with Section 363 Indian Penal Code. The provisions read as under :-

“359. Kidnapping.—*Kidnapping is of two kinds: kidnapping from India, and kidnapping from lawful guardianship.*

361. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under sixteen years of age if a 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 lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.”

363. Punishment for kidnapping.—Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

27. Abduction has been defined under Section 362 Indian Penal Code and is to be read with Section 366 Indian Penal Code. The provisions read as under :-

“362. Abduction.—Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.”

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid.

28. From the facts and circumstances brought on record in the course of investigation, the investigating agency has concluded that the victim had neither been kidnapped nor abducted. Consequently, finding no evidence of commission of offence, as alleged, final report has been prepared and filed in Court.

29. We have also taken into account another important factor viz. the prosecutrix/kidnappee/abductee/victim has approached this Court as a petitioner to quash the proceedings. This aspect of the matter would also invite a conclusion that petitioner no.1 had not been kidnapped or abducted.

30. We are pained at recording that cases of such nature are on the rise by the day. A parent or parents do not accept the marriage of choice of their daughter and do not respect the right of their daughter to get married as per her own volition. The right is constitutional. However, for their personal reasons they are aggrieved; and in abuse of process of the law and process of the Court, allegations of committing criminal offence of serious nature are made, dehors the actual facts. Knowing fully well that their daughter has willingly gone with another person of her choice, such proceedings are initiated. Such abuse of process of the Court is required to be prevented by taking not only legal and pragmatic but also realistic view of the matter.

31. The petition is *disposed of*.

Order Date :- 9.1.2019

Nishant/-