IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Present: The Hon'ble Mr. Justice R. K. Bag.

C.R.R. No.2493 of 2011

Sorokhybam Memcha Devi @ Sorokkhaibam
Omita Devi @ Umita @ Omita
Versus
National Investigating Agency

For the appellant: Mr. Sandipan Ganguly,
Mr. Arnab Chatterjee,

For the respondent: Mr. B. R. Ghoshal,
Mr. Sanjoy Bardhan,

Date of hearing : 8th July, 2014.
Judgment on: 8th July, 2014.

R. K. Bag, J.:-

The petitioner has preferred this criminal revision challenging the order dated 6th July, 2011 passed by learned Sessions Judge, Darjeeling, in G.R. Case No.434 of 2010, by which learned Sessions Judge rejected the plea of juvenility of the petitioner.

2. Mr. B.R. Ghoshal, learned senior counsel appearing on behalf of the opposite party, National Investigating Agency, submits that the criminal revision under Section 482 of the Code of Criminal Procedure, 1973 is not maintainable in view of specific bar under Section 21 of the National Investigation Agency Act, 2008. On the other hand, Mr. Sandipan Ganguly, learned counsel appearing on

behalf of the petitioner contends that the impugned order challenged in this criminal revision was passed by learned Sessions Judge, Darjeeling and not by learned Judge of the Special Court constituted under Section 11 of the National Investigation Agency Act, 2008 and as such, this criminal revision is maintainable in law.

3. It is relevant to mention Section 21 of the National Investigation Agency Act, 2008, which is as follows:

"Appeals.-(1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

(2) Every appeal under sub-section (1) shall be heard by a Bench of two Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order, of a Special Court.

(4) Notwithstanding anything contained in sub-section (3) of section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

(5) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days:

Provided further that no appeal shall be entertained after the expiry of period of ninety days."

4. On perusal of the provision of Section 21 of the National Investigation Agency Act, 2008, it appears that the aggrieved party has a right to prefer an appeal to the High Court from any judgment, sentence or order (not being an interlocutory order) passed by the Special Court, both on facts and on law. Without deciding the dispute whether the impugned order is an interlocutory order, it will be prudent on my part to point out that the impugned order was passed by learned Sessions Judge, Darjeeling and not by learned Judge of the Special Court constituted under Section 11 of the National Investigation Agency Act, 2008. The Notification No.SO1589 (E) dated 16th July, 2012 was issued by the Joint Secretary to the Government of India and published in the Gazette of India Extraordinary on 16th July, 2012 for the purpose of Constitution of the Special Court under Section 11(1) of the National Investigation Agency Act, 2008. It appears from the said notification dated 16th July, 2012 that the Additional District & Sessions Judge, 2nd Court, Siliguri, is designated as Judge of the Special Court under Section 11 of the National Investigation Agency Act, 2008. Since there was no existence of the Special Court under the National Investigation Agency Act, 2008, on 6th July, 2011 and since learned Sessions Judge, Darjeeling, decided the plea of juvenility of the petitioner by passing order on 6th July, 2011, I am of the opinion that the bar under Section 21 of the National Investigation Agency Act, 2008 will not be attracted in the instant case as contended on behalf of the opposite party. The logical inference is that the

impugned order dated 6th July, 2011 passed by learned Sessions Judge, Darjeeling, is amenable to the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973.

5. It appears from the certified copy of the order dated 30th March, 2011 passed by learned Sessions Judge, Darjeeling, that the date of birth of the petitioner was allowed to be changed from 14th February, 1990 to 3rd March, 1994 at the time of filling up the form for HSLC Examination in the State of Manipur. As a result, in the admit card of the Board of Secondary Education Examination of Manipur, the date of birth of the petitioner was recorded as 3rd March, 1994. It also appears from the said order passed by learned Sessions Judge that the date of birth of the petitioner is recorded as 14th February, 1990 in the provisional certificate dated 31st July, 2006 issued by the Headmaster of Martin Grammar School, Kakching, Manipur. No enquiry is conducted by learned Sessions Judge to decide how the entries about the date of birth of the petitioner was recorded in the register of the Martin Grammar School where the petitioner had her primary education. In the absence of discovery of facts as to how the date of birth of the petitioner was recorded in the admission register of the primary school for the first time, the authenticity of the provisional certificate issued by the Headmaster of the said primary school becomes doubtful. In this regard, the submission made by Mr. Ghoshal that learned Judge should have considered the statement of the father of the petitioner recorded under Section 161 of the Code of Criminal Procedure cannot be accepted, because there is no scope for consideration of such statement for the purpose of conducting enquiry

to decide the plea of juvenility under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. In the absence of plea of authentic documents like matriculation or equivalent certificate of the petitioner or the certificate of date of birth from the school first attended by the petitioner or the birth certificate of the petitioner given either by the Corporation or the Municipality or the Panchayat, learned Judge of the court below had rightly given direction for ossification test of the petitioner.

6. It appears from the impugned order dated 6th July, 2011 passed by learned Sessions Judge that the age of the petitioner was decided in between 19 and 20 years on 18th May, 2011 i.e. the date of medical examination of the petitioner. Consequently, the age of the petitioner will be between 18 and 19 years on the date of her arrest on 14th March, 2010. However, learned Sessions Judge did not give any benefit to the petitioner at the time of consideration of her age on the lower side within the margin of one year as laid down in Rule 12(3)(b) of the Juvenile Justice (Care and Protection of Children) Rules, 2007. The exact age can never be determined by way of ossification test and there is bound to be variation of one to two years of age depending on climate and racial structure of the person undergoing ossification test. Accordingly, the legislatures in their wisdom have given benefit to the child or juvenile relaxation of one year of age on the lower side at the time of framing Rule 12(3)(b) of the Juvenile Justice (Care and Protection of Children) Rules, 2007. I can, thus, safely conclude that the age of the petitioner must be in between 17 and 18 years on the date of arrest i.e. on 14th March, 2010. Consequently, the impugned order dated 6th July, 2011

passed by learned Sessions Judge is liable to be set aside so far as the determination of age of the petitioner is concerned.

7. Mr. Ghoshal has relied on the decision of "Brij Mohan Singh V. Priya Brat Narayan & Ors." reported in AIR 1965 SC 282 in support of the contention that learned Judge of the court below should have relied on the statement of the father of the petitioner recorded under Section 161 of the Code of Criminal Procedure and also the provisional certificate issued by the Headmaster of Martin Grammar School, Manipur. This decision of the Hon'ble Supreme Court relates to entries made in the public record by a Public Officer in discharge of his official duty. In the instant case, the Headmaster of the private primary school issuing provisional certificate showing the date of birth of the petitioner is neither a public servant nor preparing documents by making entries in the public record as laid down in Section 35 of the Indian Evidence Act. Accordingly, the ratio of the decision of the Hon'ble Supreme Court reported in AIR 1965 SC 282 cannot be made available in the facts of the present case.

8. Mr. Ghoshal has also relied on the decision of the Hon'ble Supreme Court in the case of "Om Prakash V. State of Rajasthan & Anr." reported in (2012) 5 SCC 201 in support of the contention that the petitioner should be adjudged as major on the basis of the ossification test as she is involved in the activities subversive to the integrity and sovereignty of the country. On perusal of the said decision of the Hon'ble Supreme Court, I find that in the said case, the medical evidence indicated that the accused attained majority at the time of commission of the offence, whereas in the instant case, the ossification test report indicates

that the petitioner is a juvenile at least on the date of arrest. As a result, the ratio of the decision of "Om Prakash Vs. State of Rajasthan & Anr." reported in (2012) 5 SCC 201 is also not applicable in the facts of the present case.

9. I have already observed that the impugned order challenged in this revision is liable to be set aside so far as the determination of age of the petitioner is concerned. Accordingly, the impugned order dated 6th July, 2011 passed by learned Sessions Judge, Darjeeling, in G.R. Case No.434 of 2010, is set aside so far as the determination of the age of the petitioner is concerned. The age of the petitioner is determined as 17 to 18 years on the date of arrest i.e. on 14th March, 2010. The criminal revision is, thus, disposed of.

10. Learned Judge of the Special Court will proceed against the petitioner in accordance with law and in compliance with the observation made by this Court. It is submitted from the Bar that the record is pending before this Court for about 3 years and as such, the hearing of the matter is delayed before the Trial Court. Accordingly, let a copy of the order along with the entire Lower Court Records be sent down to the learned Judge of the Special Court constituted under Section 11 of the National Investigation Agency Act, 2008 cum Additional District & Sessions Judge, Siliguri, forthwith by special messenger.

Urgent photostat certified copy of this order, if applied for, shall be given to the parties as expeditiously as possible.

(R. K. Bag, J.)