

PATNA HIGH COURT

Krishna Bhagwan

Vs

State of Bihar

Criminal Appeal No. 478 of 1984

(N.Y. Singh, Prabha Shanker Mishra and Bimalendu Narayan Sinha, JJ.)

27.03.1989

JUDGMENT

N.Y. Singh, J.

1. The appellant has been convicted under Sections 302, 307 and 324 of the Penal Code by the Sessions Judge and has been sentenced to undergo imprisonment for life under Section 302, ten years under Section 307 and two years under Section 324. The sentences have been directed to run concurrently. The appellant is alleged to have committed the offences in question on 83.1982. It appears that no plea was taken in the Court below that the appellant was a child within the meaning of the Bihar Children Ordinance on the date of the commission of the offence and as such he should not have been put on trial before the Sessions Judge. This plea was taken for the first time before this Court during the hearing of the appeal. The Bench hearing the appeal has referred the case for consideration of the following questions by a larger Bench.

- (i) Whether the provisions of the Bihar Children Act 1982 shall be applicable even to a case where by the time the trial commences or concludes the accused ceases to be a child although when the offence was committed he was a child within the meaning of the Act ?
- (ii) Where the plea that the accused was a child within the meaning of the Act aforesaid and as such the trial could not have proceeded before the Criminal Court, has not been taken at the trial stage but is taken at the appellate stage what procedure should be followed for the purpose of determination of the age of the accused at the time of the commission of the offence and if the accused is found to be child, then for extending the benefits of the Act ?

2. In olden days every home was the best child care home but with growth of population and industrialization children are being neglected by their own parents and come in contact with evil elements in the society. Many of such children who are charged as criminals are themselves victims of the circumstances, prevailing in the society. As such different States framed legislation's for dealing with children alleged to have committed different offences. Initially Bihar Children Ordinance, 1973 (Ordinance No. 33 of 1973) was promulgated which was ultimately replaced by the Bihar Children Act, 1982 (hereinafter referred to as the Children Act'),

Later Parliament enacted the Juvenile Justice Act, 1986 (hereinafter referred to as the Juvenile Act' containing more or less similar provisions, perhaps, with an object that there should be a Central Act in respect of children throughout the country.

3. Section 2(d), (e), (g), (i) and (in) of the Children Act defines the expressions "child", "children's court", "competent authority", "delinquent child" and "offence" respectively as follows :-

"2(d) "child" means a boy or a girl who has not attained the age of sixteen years or eighteen years; respectively as the case may be

2(e) "children's court" means a court constituted under Section 5 :

2(g) "competent authority" means, in relation to neglected children, a Board constituted under Section 4 and, in relation to delinquent children a children's court constituted under Section 5, and where no such Board or children's court has been constituted, includes any court empowered under sub-section (3) of Section 7 to exercise the powers conferred on a Board or children's court;

2(i) "delinquent child" means a child who has been found to have committed an offence;

2(m) "offence" means an offence punishable under any law for the time being in force."

4. Sections 7 and 8 which are relevant are as follows :

"Section 7. Power of Board and Children's Court (1) Where a Board or a children's court has been constituted for any area, such Board or court shall notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, have power to deal exclusively with proceedings under this Act relating to neglected children or delinquent children, as the case may be.

(2) Provided, if the Board and the children's court differ at the point as to where should the proceeding be started the differences should be put up before the Sessions Judge and the order of the Sessions Judge will be final.

(3) Where no Board or children's court has been constituted for any area, the powers conferred on the Board or the children's court by or under this Act, shall be exercised in that area, only by the following respectively namely :

(a) the District Magistrate, or

(b) the Sub-Divisional Magistrate, or

(c) any Judicial Magistrate of First Class.

(4) The powers conferred on the Board or children's court by or under this Act may also be exercised by the High Court and the Court of Session, when the proceeding comes before them in appeal, revision or otherwise. Section 8. Procedure to be followed by a Magistrate not empowered under this Act

(1) When any magistrate not empowered to exercise the powers of a Board or a children's court under this Act is of opinion that a person brought before him under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a child, he

shall record such opinion and forward the child and the record of the proceedings to the competent authority having jurisdiction over the proceeding.

(2) The competent authority to which the proceeding is forwarded under sub-section (1) shall hold the inquiry as if the child had originally been brought before it."

On a plain reading Section 7 requires that where children's court has been constituted for any area, such court shall notwithstanding anything contained in an other law for the time being in force have power to deal exclusively with all proceedings under this Act relating to delinquent children. Where no such children's court has been constituted such power shall be exercised by the District Magistrate or the Sub-Divisional Magistrate or any Judicial Magistrate of the First Class. In view of Section 8 whenever a child is brought before any Magistrate not empowered to exercise the powers of a children's court he has to record his opinion and to forward the child and the record of the proceedings to the competent authority i.e. to a children's court which shall hold inquiry in respect of the offence alleged to have been committed by such child.

5. Section 18 says that when a child is arrested and is accused of a non-bailable offence, notwithstanding anything contained in the Code of Criminal Procedure, shall be released on bail with or without surety. He shall not be so released if it appears reasonable that by release he shall come in contact with reputed criminals. Even in that situation he has to be kept with fit persons in prescribed manner. Section 20 prescribes that where a child having been charged with an offence appears or is produced before a children's court, such children's court shall hold the inquiry in accordance with the provisions of Section 39 of that Act and may make such order in relation to the child as it deems fit. Section 39 is as under :

"39. Procedure in inquiries appeals and revision proceedings (1) Save as otherwise expressly provided by this Act a competent authority while holding any inquiry under any of the provisions of this Act shall follow such procedure as may be prescribed and subject thereto shall follow as far as may be, the procedure laid down in the Code of Criminal Procedure, 1973 (2 of 1974) for trial in summons cases.

(2) Save as otherwise expressly provided by or under this Act the procedure to be followed in hearing appeals or revision proceeding, under this Act shall be, as far as practicable, in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974)."

6. Sections 21 and 22 prescribe the different orders which can be passed by the children's court notwithstanding anything to the contrary contained in any other law for the time being in force. Under Section 21 the children's court may allow the child to go home after advice on admonition or direct the child to be released on probation of good conduct or direct the child to be sent to a special school. Section 22 is relevant for the purpose of the present case and is as follows :-

"22. Orders that may not be passed against delinquent children (1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent child shall be sentenced to death or imprisonment, or committed to prison in default of payment of fine or in default of furnishing security :

Provided that where a child who has attained the age of fourteen years has committed an offence and the children's court is satisfied that the offence committed is of so serious a nature or his conduct and behaviour have been such that it would not be in his interest or in the interest of other children in a special school to send him to such special school and that none of the other measures provided under this Act is suitable or sufficient the children's court may order the delinquent child to be kept in safe custody in such place and manner as it thinks fit and shall report the case for the orders of the State Government.

(2) On receipt of a report from a children's court under sub-section (1) the State Government may make such arrangement in respect of the child as it deems proper and may order such delinquent child to be detained at such place and on such conditions as it thinks fit :

Provided that the period of detention so ordered shall not exceed the maximum period of imprisonment to which the child could have been sentenced for the offence committed." In view of Section 22 aforesaid, no delinquent child even if he has committed an offence punishable with sentence of death or imprisonment shall be so sentenced or committed to prison. But where a child has attained the age of 14 years and has committed an offence about which the children's court is satisfied that it is of such a serious nature or his conduct and behaviour has been such that it would not be in interest or in the interest of other children to send him to such special school and other measures provided under the Act are not suitable or sufficient, then such children's court shall direct the delinquent child to be kept in safe custody in such place and manner as it thinks fit. The State Government as to make arrangement for the safe custody of such a delinquent child. The proviso to sub-section (2) does not prescribe the period for which such delinquent child can be detained but only prescribes the limit of the detention by saying that the period of detention shall not exceed the period of imprisonment provided under any law.

7. The Parliament while enacting the Juvenile Act has made virtually similar provisions like the Children Act. In that Act also juvenile has been defined to mean a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years. Under provisions of that Act, the Juvenile Courts have to be established and a juvenile has to be produced before such court. In absence of establishment of a Juvenile Court the power of a Juvenile Court has to be exercised by the District Magistrate or the Sub-divisional Magistrate or any Judicial Magistrate of the First Class, as the case may be. There also, in view of Section 8 of the Act, any Magistrate who is not empowered to exercise the powers of a Juvenile Court and who is of opinion that a person brought before him is a juvenile has to forward such juvenile to the Juvenile Court or to a competent authority having jurisdiction over the proceeding. Section 18 of this Act also requires a juvenile to be released on bail with or without surety and further directs that instead of committing such juvenile to prison, he shall be sent to observation home or a place of safety if there is reasonable chance of such juvenile coming in contact of known criminals after release on bail. More or less similar provisions have been made in Section 21 of that Act also as to what orders can be passed by such Juvenile Courts. Section 22 of that Act also prescribes that notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent juvenile shall be sentenced to death or imprisonment, or committed to prison in default of payment of fine or in default of furnishing security. The proviso to sub-section (1) of

Section 22 of that Act is similar to the proviso to sub-section (1) of Section 22 of the Children Act, quoted above, which vests a discretion in the Juvenile Court in respect of a juvenile, who has attained the age of 14 years, to direct such juvenile to be kept in safe custody taking into consideration the nature of the offence committed by him or his conduct and behaviour. The proviso to sub-section (2) of section 22 of that Act also prescribes only a limit on the period of detention by saying that it shall not exceed the period of sentence provided in different laws for the offence in question. But the period for which a juvenile having attained 14 years of age can be detained has not been prescribed in this Act as well.

8. From bare reference to the aforesaid provisions of two Acts it is apparent that extraordinary procedure has been prescribed for inquiring the offence alleged to have been committed by a child/juvenile and punishment thereof. The basic approach appears to be curative instead of punitive. It may be mentioned that even the Indian Penal Code, which was framed more than a century ago, had taken note of the age factor in respect of persons committing offences and that is why in Section 82 immunity was given to a child under seven years of age saying that nothing is an offence which is done by a child under seven years of age. Again in Section 83 it was said that nothing is an offence which is done by a child above seven years of age and under twelve "who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion." Now special provisions have been made even in respect of accused persons who are above twelve years of age but have not attained the age of sixteen years case of a boy And eighteen years in case of a girl under the Children Act and the Juvenile Act.

9. The question, however with which we are faced is as to whether the benefits of the Acts have to be extended even to an accused who was a child/juvenile within the meaning of the Acts at the time of the commission of the offence but ceased to be a child during enquiry or trial. It is a matter of common knowledge especially in the State of Bihar that trial commences in many cases three to five years after the date of the commission of the offence. In the meantime, many accused persons who committed the offences as children cease to be children. I must say at the outset that the provisions of the two Acts are little confusing on this question. Section 7 of both the Acts speaks that Children's Court/Juvenile Court notwithstanding anything contained in any other law for the time being in force shall have power to deal exclusively, with all proceedings under the said Act relating to delinquent children/juveniles. Similarly, Section 8 says that when any person is brought before a Magistrate not empowered to exercise the powers of a Children's Court/Juvenile Court is of the opinion that such person is a child/juvenile then he shall record such opinion and forward the child/juvenile and the record of the proceedings to the competent authority i.e. to the Children's Court/Juvenile Court. Section 20 of both the Acts says that where a child/juvenile having been charged with an offence appears or is produced before a Children's Court/Juvenile Court it shall hold the enquiry in accordance with the provisions of Section 39 and make such order in relation to the child as it deems fit. As a first impression it can be said that in view of Sections 7, 8 and 20, the date on which the accused appears or is put on trial he must be a child/juvenile within the meaning of the respective Acts. But Sections 3 and 52 of the Children Act and Sections 3 and 56 of the Juvenile Act are relevant in this connection. Sections 3 and 52 of the Children Act are as follows :

"3. Continuation of enquiry in respect of child who has ceased to be child Where an inquiry has been initiated against a child and during the course of such inquiry the child

ceases to be such, then notwithstanding anything contained in this Act or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a child."

"52. Delinquent child undergoing sentence at commencement of the Act. In any area in which this Act is brought into force, the State Government may direct that a delinquent child who is undergoing any sentence of imprisonment at the commencement of this Act shall, in lieu of undergoing such sentence, be sent to a special school or be kept in safe custody in such place and manner as the State Government thinks fit for the remainder of the period of the sentence and the provisions of this Act shall apply to the child as if he had been ordered by a Children's Court to be sent to such special school or, as the case may be ordered to be detained under Sub-section (2) of Section 22."

Sections 3 and 56 of the Juvenile Act are the corresponding provisions to Sections 3 and 52 of the Children Act. In view of Section 3 where an inquiry has been initiated against a child/juvenile and during the course of such inquiry the child/juvenile ceases to be such, the inquiry has to be continued and orders have to be made in respect of such person as if such person had continued to be a child/juvenile. Similarly, Sections 52 and 56 give benefit of the provisions of the Acts even to an accused who has already been convicted and is undergoing sentence of imprisonment at the commencement of the Acts.

10. Section 3 says in clear and unmistakable words that even if such an accused has ceased to be a child/juvenile, the inquiry may be continued and orders may be made in respect of such person "as if such person had continued to be a juvenile". Similarly, Sections 52 and 56 when extend benefit to a convicted accused who is undergoing sentence of imprisonment on the dates the two Acts came in force it can be presumed that the framers of the Acts must be conscious of the fact that after undergoing the trial and the imprisonment for some period in many cases such accused must have ceased to be a child/juvenile. The legislature has introduced a deeming fiction in Section 3 and it requires the Courts to treat the accused as a child juvenile although during inquiry he has ceased to be such. The effect of a deeming clause need not be dealt with, in detail, because it has been repeatedly pointed out by courts that if the legislature requires to imagine certain state of affairs although actually such state of affairs does not exist the courts have not only to imagine the existence thereof but follow up the consequences thereof as well. In this connection reference may be made to the oft quoted view of Lord Acquit in the case of *East End Dwellings Co. Ltd. v. Finsbury Borough Council*¹,

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have followed from or accompanied it. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

The same view has been expressed by the Supreme Court in several cases and reference can be made to one of the earlier judgments in the case of *State of Bombay v. Pandurang Vinayak*^{1A},

where it was observed at page 246.

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion."

11. It was submitted on behalf of the State that no useful purpose shall be served by extending the benefit of the provisions of the Acts to persons who are alleged to have committed rape or murder and have ceased to be children/juveniles within the meaning of the Acts during the trial because by that time they ceased to be of tender age requiring any special protection and segregation from the other criminals. Once it is held that legislature requires to treat an accused, who was a child/juvenile at the time of commission of the offence, a child/juvenile throughout the enquiry irrespective of the actual fact, it is not for the Courts to examine the wisdom of the legislature while enacting such provision. It is always open to legislature to treat a group of persons as a special class, subject to the condition that they really form a class by themselves. If such classification for special treatment is unreasonable or irrational then only such provision can be struck down as being violative of Article 14 of the Constitution. It cannot be disputed that boys below 16 years and girls below 18 years of age, accused of different offences can be treated as a class being of tender age and of immature mind. In the atmosphere prevailing in the society many of them are themselves victims of the society, not having got proper care, affection, training or having come in contact with evil elements of the society of today. The legislature can provide for special treatment for such accused persons with an object that they should be reformed so that later they can lead a normal life in the society. It was pointed out by the Supreme Court in the case of *Sheela Barse v. Union of India*²:

"If a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. That is why all the statutes with children provide that a child shall not be kept in jail. Even apart from statutory prescription, it is elementary that a jail is hardly a place where a child should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from the society."

"Really speaking, the trial of children must take place in the Juvenile Courts and not in the regular criminal Courts. There are special provisions enacted in various statutes relating to children providing for trial by Juvenile Courts in accordance with a special procedure intended to safeguard the interest and welfare of children."

In my view, the Children Act as well as the Juvenile Act treat the delinquent children/juveniles as a special class and provide special procedure for enquiry in respect of charges levelled against them. Even if those charges are established, a very liberal approach has been provided in respect of punishment for such offences. Different Sections put a strict bar on the child/juvenile being sent to jail custody either before an enquiry or after the conclusion of the enquiry in respect of the offence alleged or proved to have been committed. Even if a child has committed a murder or a

rape, in view of Section 22, neither he can be sentenced to death nor to imprisonment. It is true that in many cases the offences committed by such delinquent children may be shocking to the conscience and their conduct and behaviour may be abhorring but Section 22 is quite conscious of such situations. Still it provides for keeping the delinquent child juvenile accused of such serious offences, in safe custody at a place ordered by the State Government. This benefit has to be extended not only to an accused who is a child/juvenile at the time of the commencement of the enquiry and has continued as such till the conclusion of the enquiry, but even to an accused who has ceased to be a child/juvenile during the pendency of the enquiry. The same view has been taken by a Full Bench of Calcutta High Court in the case of *Dilip Saha v. State of West Bengal*³, in connection with Section 3 of the W.B. Children Act, 1959.

12. During the hearing of the appeal a controversy arose as to what order is to be passed under proviso to sub-section (2) of Section 22 in cases where the accused at the time of the commission of the offence had attained the age of fourteen years and in respect of whom the Children's Court/Juvenile Court is satisfied that the offence is so serious in nature or taking into consideration the conduct and behaviour of the accused it was not proper to send him to make special school. Sub-section (2) of Section 22 requires the State Government to make arrangement for detention of such delinquent child/juvenile at a place and on conditions as it thinks fit. The proviso to that sub-section says :

"The period of detention so ordered shall not exceed the maximum period of imprisonment to which the child could have been sentenced for the offence committed."

However, no period of detention has been prescribed in any of the sections of the Children Act/Juvenile Act. Proviso to Sub-section (2) of Section 22 of both Acts simply put an outer limit saying that maximum period of detention shall not exceed the maximum period of imprisonment to which the child/juvenile could have been sentenced for the offence committed. In view of the aforesaid proviso it can be urged that the framers of the Act have put an outer limit for the period of detention and have permitted detention upto the maximum period of imprisonment provided in any enactment including the Indian Penal Code. In other words, a Children's Court/Juvenile Court can order detention at a place to be fixed by the State Government for any period like ten to fourteen years, as the case may be, with reference to the nature of the offence committed by the child/juvenile in question. But the difficulty is, in view of Section 5 of Children Act/Juvenile Act. Section 5 of the Children Act is as follows :

"5. Children's Court (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 the State Government may, by notification in the official Gazette, constitute for any area specified in the Act, one or more children's courts for exercising the powers and discharging the duties conferred or imposed on such court in relation to delinquent children under this Act.

2(a) A children's court shall consist of a bench of as many Magistrates as the State Government may declare, out of which one shall be designated as the principal Judicial Magistrate. Each of such bench shall be vested with the powers of the first class magistrate under Criminal Procedure Code, 1973 (Act 2 of 1974).

(b) The children's court will be assisted by a panel of three qualified honorary social

workers as prescribed under rules, of whom at least one should be a woman and one a member of the Scheduled Caste or the Scheduled Tribe."

Sub-section 2(a) of Section 5 says that each bench of Children's Court shall be vested with the powers of a first class magistrate under the Criminal Procedure Code. In view of Section 29(2) of the Code of Criminal Procedure, the Court of a Magistrate of the first class can pass a sentence of imprisonment for a term not exceeding three years. Similar is the provision under the Juvenile Act. Section 5(2) of that Act says that every such Bench shall have the powers conferred by the Code of Criminal Procedure on a Metropolitan Magistrate or a magistrate of the first class. It was urged on behalf of the State that the period of three years prescribed in respect of imprisonment under Section 29(2) of the Code of Criminal Procedure shall not be applicable in respect of order directing detention of a child/juvenile. Merely because such a child/juvenile is to be detained at a place to be fixed by the State Government instead of to be imprisoned is not going to make much difference if the period of detention is to be for any period like ten to fourteen years for serious offences. If the framers of the Act intended to vest the power of ordering detention for period conterminus with the period of sentence prescribed in different enactments, then keeping in view the gravity of the offences in question and period of detention they would have made special provision for such accused persons vesting powers in Sessions Judges to enquire and pass orders of detention in respect of such offences. Apart from that, a swill appear from Section 39, the enquiry into the charges levelled against such delinquent children/juveniles is to be inquired into by following the procedure prescribed for trial of summons cases in the Code of Criminal Procedure. How a Magistrate of first Class by following the procedure of summons cases, while holding an enquiry, can order detention for a period of ten years or fourteen years? It may be pointed out that appeal against orders passed by the Children's Court/Juvenile Court have been prescribed under Section 37 to the Court of session. Revision application can be filed before the High Court under Section 38. It was rightly pointed out that many offences including the offence under Section 326 of the Penal Code are now triable by magistrate of first class as mentioned in First Schedule of the Code of Criminal Procedure although the maximum sentences prescribed for such offences are 10 year or imprisonment for life. But a Magistrate 1st class convicting an accused for such offences cannot pass sentence of imprisonment exceeding three years. The framers of the Act should have made more specific provision indicating as to normally what should be the period of detention. But, in absence thereof, especially taking into account, the liberal approach in respect of bail, trial, conviction and sub-section (2) of Section 5 of the Children Act/Juvenile Act, it has to be held that such period of detention should not exceed three years.

13. Now it has to be examined as to what procedure has to be followed by a Court other than the Children's Court/Juvenile Court where trial against a child is pending on the date the Juvenile Act came in force. Section 26 of the Juvenile Act is as follows :-

"26. Special provision in respect of pending cases-Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any Court in any area on the date on which this Act comes into force in that area, shall be continued in that Court as if this Act had not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing an sentence in respect of the juvenile, forward the juvenile to the Juvenile Court which shall pass orders in respect of

that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that the juvenile has committed the offence"

First part of Section 26 says that notwithstanding anything contained in the Juvenile Act, all proceedings in respect of a juvenile pending in any Court on the date when the said Act came in force shall be continued in that Court as if the Act had not been passed. The effect of a non obstante clause is well known. It overrides all other provisions in the same Act or in any other enactment. In the case of *South India Corporation (F) Ltd. v. Secretary, Board of Revenue, Trivandrum*⁴, it was pointed out as follows at page 215 :-

"Further Article 278 opens with a non-obstante clause. The phrase "notwithstanding anything in the Constitution", is equivalent to saying that in spite of the other Articles of the Constitution, or that the other articles shall not be an impediment to the operation of a Article 278 The result is that Articles 278 overrides Articles 372."

In the case of *Aswini Kumar Ghose v. Arabinda Bose*⁵, the Supreme Court said about non obstante clause as follows :

"It should first be ascertained what the enacting part of the section provides on a fair, construction of the words used according to their natural and ordinary meaning and the non obstante clause is to be understood as operating to set aside as no longer valid, anything contained in relevant existing laws which is inconsistent with new enactment.....The non obstante clause can reasonably be read as overriding "anything contained" in any relevant existing law which is inconsistent with the new enactment, although the draftsman appears to have had primarily in his mind a particular type of law as conflicting with the new Act."

In respect of non obstante clause, in Section 26 of the Act, which was under consideration in the case of *A. V. Fernandez v. The State of Kerala*⁶,:

"In our opinion, Section 26 of the Act, in cases falling within the categories specified under Article 286 of the Constitution has the effect of setting at nought and of obliterating in regard thereto the provisions contained in the Act relating to the imposition of tax on the sale or purchase of such goods and in particular the provisions contained R. 20(2) and other provisions which are incidental to the process of levying such tax.

So far as sales falling within the categories specified in Article 286 of the Constitution and the corresponding Section 26 of the Act are concerned, they are, as it were, taken out of the purview of the Act and no effect is to be given to those provisions which would otherwise have been applicable if Section 26 had not been added to the Act."

The effect of a section having a non obstante clause on the other provisions of the same Act is "of setting at nought and of obliterating such other provisions. As such to give the first part of Section 26 of the Juvenile Act its full effect it has to be held that provisions of the Children Act or Juvenile Act in respect of enquiry into the charges levelled against a child/juvenile shall be deemed to have been obliterated so far the trials which were pending on the date the Juvenile Act

came in force. Such provisions shall revive and become applicable only after the finding regarding the guilt of such delinquent child/juvenile is recorded by the Court which shall also include the High Court. The expression 'Court' in Section 26 of the Juvenile Act has to be read to mean Courts other than Juvenile Courts otherwise the very purpose of saying that proceedings in respect of a juvenile pending in any Court on the date the Act came in force shall be continued in that Court as if this Act had not been passed shall be frustrated. The result will be that on the date the Juvenile Act came in force all proceedings pending before Magistrate, Court of Session as well as this Court have to proceed as if the Act has not been passed. But as the second part of that very section again makes the provisions of that Act applicable only after the finding is recorded in respect of a juvenile that he has committed the offence for which he has been charged and requires such Courts to forward the delinquent juveniles to the Juvenile Courts which shall pass orders in accordance with the provisions of the Juvenile Act, such Courts have to forward the delinquent juveniles to Juvenile Courts after recording finding of guilt.

14. It was pointed out that the proviso to Section 63 of the Juvenile Act says that in spite of repeal of the different corresponding Acts framed by the different States, any right, privilege, obligation or liability acquired can be enforced in spite of such repeal and as such the privilege provided to the children under the Children Act for offences committed by them being enquired into by the Children's Court can be enforced even after coming into force of the Juvenile Act. It need not be pointed out that when first part of Section 26 says that notwithstanding anything contained in that Act, all proceedings in respect of a juvenile pending in any Court shall be continued in that Court as if that Act had not been passed, as a necessary corollary it has to be held that even Section 63 of the Juvenile Act shall be deemed to be not in force so far the pending proceedings are concerned upto the stage of determination of the guilt of such juvenile. All such provisions shall become applicable in different proceedings only after the Courts concerned record findings in respect of the charges levelled against juveniles in question. In such a situation, it has to be held that trials including appeals which were pending on the date the Juvenile Act come in force upto determination of the guilt of the juvenile concerned has to proceed in accordance with the Code of Criminal Procedure.

15. The next question is as to what procedure should be followed where a child within the meaning of the Children Act has been tried and convicted by ordinary Criminal Court and the plea regarding bar of his trial by the ordinary Criminal Court is taken for the first time at the appellate stage. The normal rule is that a plea unless it goes to the very root of the jurisdiction should not be allowed to be taken at the appellate stage especially when it requires the investigation of fact. But the Supreme Court in the case of *Gopinath Ghosh v. The State of West Bengal*⁷, while allowing the plea that the accused in question was a child and as such he should not have been tried and convicted by ordinary Criminal Court, being taken before the Supreme Court for the first time, observed as follows at page SC 240 :

"Unfortunately, in this case, appellant Gopinath Ghosh never questioned the jurisdiction of the Sessions Court, which tried him for the offence of murder. Even the appellant had given his age as 20 years when questioned by the learned Additional Sessions Judge. Neither the appellant nor his learned counsel appearing before the learned Additional Sessions Judge as well as at the hearing of his appeal in the High Court ever questioned the jurisdiction of the trial Court to hold the trial of the appellant, nor was it ever

contended that he was a juvenile delinquent within the meaning of the Act and, therefore, the Court had no jurisdiction to try him, as well as the Court had no Jurisdiction to sentence him to suffer imprisonment for life. It was for the first time that this contention was raised before this Court. However, in view of the underlying intendment and beneficial provisions of the Act read with clause (f) of Article 39 of the Constitution which provides that the State shall direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment, we consider it proper not to allow a technical contention that this contention is being raised in this Court for the first time to thwart the benefit of the provision being extended to the appellant if he was otherwise entitled to it."

Thereafter the conviction under Section 302 of the Penal Code and sentence of imprisonment for life imposed against the accused in question was set aside and the case was remitted to the learned Magistrate for disposal in accordance with law i.e. in accordance with the West Bengal Children Act. As such it has to be held that a plea that the accused in question was a child within the meaning of the Act can be entertained at the appellate stage. At the same time it should not be overlooked that many accused persons who have been tried and convicted for serious offences like murder, dacoity and rape may take this plea in the appeal just to get rid of the sentence of rigorous imprisonment imposed against them, although there are hardly any material on the record in support of the plea that such accused persons on the date of the commission of the offence were children within the meaning of the Act. There may be a case where either in the First Information Report itself the accused might have been described as below 16 years of age or during the trial his age has been determined or admitted to be below 16 years on the date of occurrence. In such cases no further enquiry in respect of his age is called for and this Court can extend the benefit of the Children Act/Juvenile Act to such an accused. But, in other cases, on the materials on record, it may not be possible for the appellate Court to be satisfied even in a prima facie manner that accused may be a child on the date of commission of the offence. In such cases there is no question of directing determination of the age of the accused concerned on the date of commission of the offence. However, if this Court is satisfied in a prima facie manner that on the date of the commission of the offence the accused may be a child, this Court may direct the competent authority to determine the age of such accused on the relevant date in accordance with Section 32 of the Juvenile Act which is as follows

"32. Presumption and determination of age.-(1) Where it appears to a competent authority that a person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile, the competent authority shall make due inquiry as to the age of that person and for that purpose shall take such evidence as maybe necessary and shall record a finding whether the person is a juvenile or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order his been made is not a juvenile, and the age recorded by the competent authority to be the age of the person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that

person."

Section 32 of the Children Act contained a similar provision. Section 23 vests power in the Juvenile Court to make due enquiry in respect of the age of the accused on the date of the commission of the offence and for that purpose such Court has to take evidence as may be necessary and to record a finding whether the accused in question was juvenile. It need not be pointed out that it is not possible for this Court to determine the age of an accused on the date of the commission of the offence because that has to be determined on the basis of the evidence to be adduced and other materials in support thereof being produced. This determination should not be based merely on written opinion of the doctors produced before this Court. Prosecution has right to cross-examine such medical or forensic experts who have given their opinion about the age of the accused in order to demonstrate that the accused was not a juvenile on the date of the commission of the offence. This is necessary because by the time the plea is taken before the appellate court in almost all the cases the accused concerned must have ceased to be a juvenile due to lapse of time making it more difficult for the appellate court as well as the Juvenile Court to determine as to what was his age at the time of the commission of the offence. In my view in such a situation, the Courts including Juvenile Court should get the accused held guilty of serious offences, examined by a Medical Board and should determine the age of such accused on the basis of the materials on the record including the opinion of the Medical Board. Once the legislature has enacted a law to extend special treatment in respect of trial and conviction to juveniles, the Courts should be jealous while administering such law so that the delinquent juveniles derive full benefit of the provisions of such Act but, at the same time, it is the duty of the Courts that the benefit of the provisions meant for juveniles are not derived by unscrupulous persons, who have been convicted and sentenced to imprisonment for having committed heinous and serious offences, by getting themselves declared as children or juveniles on the basis of procured certificates. According to me, if the plea that the accused was a child juvenile on the date of the commission of the offence is taken for the first time in this Court, then this Court should proceed with the hearing of the appeal, as required by Section 26 of the Juvenile Act and should record a finding in respect of the charge which has been levelled against such an accused. If such an accused is acquitted, there is no question of holding any enquiry in respect of the accused being a child on the relevant date but, if the finding of guilt recorded by the Court below is affirmed and this Court on the basis of materials on record is prima facie satisfied that the accused may be a child/Juvenile within the meaning of the relevant Act on the date of the commission of the offence, it should call for a finding from the Children's Court/Juvenile Court in accordance with Section 32 of the Act. If the finding so received is accepted by this Court, then this Court in terms of Section 26 of the Juvenile Act should pass an order directing the Juvenile Court to pass orders in accordance with Sections 21 and 22 of the Act.

16. So far the resent appeal is concerned when the conviction and sentence was used against the appellant, the Juvenile Act was not in force but during the pendency of the appeal before this Court, Section 26 of the Act has become applicable. In view of Section 26, this Court has to examine the findings recorded by the Court below regarding the guilt of the appellant. If the findings recorded by the Court below that the charges levelled against the appellant have been established is affirmed by this Court, then it has to consider whether a prima facie case has been made out that appellant was a child within the meaning of the Children Act. If this Court is not satisfied, on the materials on record, the appeal has to be dismissed. However; if this Court is of

the opinion that the accused concerned may be a child on the date of the commission of the offence, it has to direct enquiry in accordance with section 32 of the Act. If the finding of the Juvenile Court is in favour of the accused and this Court accept that finding, it has no option but to forward the records to the Juvenile Court for passing orders in terms of Section 21 and 22 of the Act. As the applicability of the provisions of the two Acts is dependent on the age of the accused on the date of the commission of the offence, this Court as well as the Juvenile Court have to be cautious while recording the finding on that question, so that persons found guilty of committing offences which are shocking to the conscience of the Court do not escape punishment by getting themselves declared as children/juveniles on the basis of certificates. It need not be pointed out that when the framers of the Act thought of extending special privilege and protection to delinquent juveniles who are of immature mind and misguided, it was never intended that benefits of such provisions should be derived by other accused persons through procured medical or school certificates. As such, in my view enquiry under Section 32 must be held in its real spirit.

17. Now coming to the facts of the present case the appellant has been convicted under Section 302 read with other sections and has been sentenced to undergo rigorous imprisonment for life. In the statement under Section 313 as well as in the judgment, the age of the appellant has been mentioned as 25 years. According to the procedure, indicated above, the appeal has to be heard on merit first to determine the guilt of the appellant and if the finding recorded by the trial court is affirmed then the next question has to be examined as to whether it is a fit case where a finding be called for, in accordance with Section 32 of the Juvenile Act, which is now in force, regarding the age of the appellant on the date he is alleged to have committed the offence. Thereafter the appeal has to be disposed of in accordance with the procedure indicated above.

18. The appeal should now be listed before an appropriate Bench for hearing on merit and disposal.

19. P.N. Mishra, J. In olden days (Brother N.P. Singh, J. has also noted) every home was a 'Child care home'. Every home protected their child, every child was cared for, looked after, educated and made to live as a proud citizen of the country. Those were the days now petrified in the myths, folklore's and songs of the past. When people started living low shrouded with mixture of ignorance, deprivation and subjugation, every home suffered and children suffered most. Independent India inherited with its glorious past liabilities of decades of servitude and the responsibility to lit the dark abyss of future. And who represented the future ? Children who alone go into it, live, smoothen and stream roll the rough roads, through which the country has to march ahead. Children Act now crystallised in the Juvenile Justice Act, 1986 needed no introduction as neglected or delinquent juveniles could not be ignored. Social maladjustment's and economic constraints which caused neglect of and delinquency in children needed a justice system exclusive for them. A justice system as available for adults was not suitable for juveniles. Brother N.P. Singh, J. has taken notice of such provisions of the Juvenile Justice Act and made a candid approach to the problems and contentions raised before us. I am in complete agreement with the conclusions recorded by him.

20. I have, however, ventured to state a few things only because the framers of the Juvenile Justice Act have recorded in the statement of objects thereof that a review of the working of the then existing Children Act would indicate that much greater attention was required to be given to

children who may be found in a situation of social maladjustment, delinquency or neglect; that a justice system as available for adults was not considered suitable for being applied to juveniles; and that it was necessary that an uniform juvenile justice system should be available throughout the country, which should make adequate provisions for dealing with all aspects in the changing social, cultural and economic situation in the country besides recording, there is also need for involvement of informal system and community based welfare agency in the care, protection, treatment, development and rehabilitation of such juveniles.

21. Brother N.P. Singh, J. has already said that in the context of delinquency, law givers always attempted to protect them for future. Sections. 82 and 83 of the Indian Penal Code, which provide that nothing is an offence which is done by child under seven years of age, and that nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge the nature and consequence of his conduct on that occasion. These provisions, however, were mainly introduced for the reason that unless done with criminal intention, any act or omission is not an offence.

22. Children Acts of different States of the country including Bihar, however, intended to provide for a specialized approach towards the prevention and treatment of juvenile delinquency in its full range, in keeping with developmental needs of the child found in any situation of social maladjustment. A glance at the provisions of the Juvenile Justice Act shows that a juvenile's case has to be handled by the police at the first instance and the courts on production of the child before it in a manner that he is not allowed to be in the company of the delinquent adults and no sooner he is found involved in any crime, step is taken to separate his case from the case of the adult criminals. Section 18 of the Juvenile Justice Act enjoins the police to release with or without surety any person accused of a bailable or non-bailable offence, if he is apparently a juvenile and if there appears reasonable grounds for believing that his release is likely to bring him into the association of any known criminal or put him to moral danger or that his release would defeat the ends of justice to take him to the juvenile court.

23. The court then is enjoined from committing the juvenile child to a proceeding. The court has to make an order sending him to an observation home or a place of safety for such period during the pendency of the enquiry regarding him specifying so in the order. Where a juvenile is arrested, the officer-in-charge of the police station to which the juvenile is brought, has a duty to inform the parent or guardian of the juvenile, if he can be found on such arrest and direct him to be present at the juvenile court at which the juvenile would appear. The officer-in-charge of the police station is also required to inform the Probation Officer of such arrest, in order to enable him to obtain information regarding the antecedents and family history of the juvenile and other material circumstances likely to be of assistance to the juvenile court for making the enquiry. If this duty enshrined in Section 19 of the Act, to inform the parent or guardian of the juvenile and the Probation Officer, is performed by the officer-in-charge soon after the arrest of the juvenile and before a production in the court, many of the problems which presently arise in courts, may not occur. It is the police which arrests and brings the accused before the court. A juvenile delinquent arrested along with the adult criminals is taken to the regular court of law instead of a juvenile court, no parent or guardian remains present in court to protect his interests, no Probation Officer remain ready with information regarding the antecedents and the family history of the juvenile. The child is remanded to jail custody. Damage to the cause is done before the knowledge that a child has been arrested and sent to custody in jail with hardened criminals is

revealed. The Act gives power to the State Government to frame rules for such purposes. But rules have not been framed. A duty so clearly envisaged by the Act to inform the parent or guardian and the Probation Officer before the child is produced in the court is not being observed. A child is still taken to the regular court instead of taking him to the juvenile court.

24. A Juvenile Welfare Board is as necessary as juvenile homes, special homes and after-care organizations. The Act has burdened the State Government to act in this regard. But the State Government has until now not awakened to it. If it does not rise to the occasion and continue to relish in the plight of the juveniles, it shall be accused by the posterity of neglect and callousness.

25. Section 56 of the Act takes care of such delinquent juveniles who were undergoing sentence at the commencement of the Act. It shall serve out its purpose, once such children convicted of offences and undergoing sentence of imprisonment are taken out of jails and sent to a special home or kept in safe custody in such place and manner as the Government thinks fit for the remainder of the period of sentence. Section 26 of the said Act which has been fully dealt with by brother N.P. Singh, J. will apply to trials, appeals or revisions which are pending. Juvenile, if found guilty, shall be forwarded to the juvenile court which shall pass orders in accordance with the provisions of the Act. These two provisions shall not be of any help in the cases arising after the Act has come into force. A juvenile has to be tried as provided in the Act, kept as provided therein, convicted and sentenced in no other manner but in the manner prescribed therein. The police and the court of the first instance, therefore, have to discharge a solemn duty of identifying the Juvenile at the threshold of the proceeding, separate his case from the case of adult delinquents and proceed in accordance with the Act. Any departure shall render the proceeding questionable. The offence may go unpunished but the child shall suffer the consequences of the company of the hardened criminals. The Juvenile justice Act is a solemn promise by the present to the future. Those who are charged with the statutory duty must not fail.

26. My observations above are my anxieties to achieve the purpose that obedience to law by all concerned alone shall ensure justice to delinquent children. Since I am in complete agreement with the views of and the conclusions in the judgment by brother N.P. Singh, J. I order accordingly. Bimalendu Narayan Sinha, J. I am entirely in agreement with my learned brother N.P. Singh, J. as to the answers proposed and the reasons therefor given by him. I, however, wish to add few words of my own.

27-28. In the past, penal law and its administration was to fit the crime, not the offender. The offenders were subjected to punitive measures of compensatory, retributive or deterrent character with no attention or very little to their personal and social circumstances. But gradually with the sweeping social and economic changes together with the rapid progress of sciences dealing with the social circumstances and behaviour, punitive and deterrent criminal justice has been by a predominantly reformatory approach to the offenders giving consideration to their personal and social characteristics.

29. The Juvenile Justice Act has been enacted with that end in view. It has been enacted "to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to, and disposition of, delinquent juveniles. Maxwell in his book on "The Interpretation of Statutes" (Eleventh Edition, page 275) has stated as follows :-

"All statutes are now construed with a more attentive regard to the language, and criminal statutes with a more rational regard to the aim and intention of the legislature, than formerly."

30. Taking into consideration the aim and intention of the Juvenile Justice Act, the application of its provisions should not be denied to an offender where by the time the trial commences or concludes the accused ceases to be a juvenile although when the offence was committed he was a juvenile within the meaning of the Act.

Ordered accordingly.

Cases Referred.

¹(1952) AC 109 : (1951)2 All England Reporter 587 at page 599

^{1A}AIR 1953 SC 244

²1988(2) R.C.R.(Criminal) 262 : 1986 Cri. LJ 1736, as follows at page 1740

³ AIR 1978 Cal 529

⁴ AIR 1964 SC 207

⁵ AIR 1952 SC 369

⁶ AIR 1957 SC 657, it was observed at page 663

⁷1984(1) R.C.R.(Criminal) 444 : AIR 1984 SC 237