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Court : Mumbai Nagpur

Decided On : Jul-09-2014

Judge : A.B. Chaudhari

Appeal No. : Second Appeal No. 399 of 2013

Appellant : Ashok

Respondent : Head Master, Zilla Parishad High School and Another

Judgement :

Oral Judgment:

1. Being aggrieved by the Judgment and Decree dated 24th June, 2013 passed by learned District Judge-1, Bhandara, in Regular Civil Appeal No.14 of 2010 whereby the Judgment and Decree dated 08th April, 2009 passed by learned Civil Judge [Junior Division], Lakhni, in Regular Civil Suit No.61 of 2009 has been confirmed, the present Second Appeal has been filed by the appellant who is an employee/Deputy Engineer working with Nashik Municipal Corporation, Nashik.

2. The matter came up before me since an application for early hearing, namely Civil Application (CAS) No.374 of 2014 has been moved by the appellant. Since the matter relates to the correction of Date of Birth of the employee in service who is to retire on 31st July, 2014, on the basis of the alleged incorrect date of birth, I have decided to take up the Second Appeal for final disposal and accordingly the counsel for parties were heard.

3. The following Substantial Questions of Law arise in the present Second Appeal :-

[1] Whether the case of the appellant is covered by amended Rule 38(2)(f) which was amended by Maharashtra Civil Services (General Conditions of Service) (Amendment) Rules, 2008 to put restriction for the employees in applying for change of date of birth beyond the period of five years from the date of entry in the service book? ... No.

[2] Whether the Dakhal Kharij Register of Zilla Parishad School in respect of the appellant [Exh.20] duly proved by bringing original register before the Court would be a strong documentary evidence with strong probative value for holding his date of birth as 07.02.1959 instead of 23.07.1956? Yes.

4. In support of the appeal, the learned Counsel for the appellant vehemently argued that the wrong date of birth namely 23.07.1956 was recorded in his service book. According to him, no application for correction of date of birth after the period of five years from the date of entry in the service book was made. But then the counsel argued that he had applied on 20.11.2006 to his employer for correction of his date of birth as 07.02.1959 in place of 23.07.1956 and the basic evidence about entry in the Dakhal Kharij Register that was made on 01.12.1967 i.e. entry in the Zilla Parishad School was produced at Exh.20 after verification from the original Dakhal Kharij Register was proved by the concerned employee of the Zilla Parishad. The counsel then argued that the courts below, however, applied the amended rule which came into effect from 24.12.2008 but the application made by the appellant was prior to the amendment and hence his case would not be covered by the amended rule.

5. Per contra, the learned counsel for the respondent No2/Nashik Municipal Corporation has opposed the appeal and argued that there is no Substantial Question of Law involved in the present appeal since the Courts below have recorded the findings of facts based on the Rule 38(2)(f), that, in fact, the application admittedly was made five years after the entry in the service and, therefore, this Court should not interfere with the concurrent view taken by the courts below. He cited the following decisions in support of his submission and

prayed for dismissal of the second appeal :-

[1] State of Maharashtra and another Vs. Gorakhnath Sitaram Kamble and others (2010) 14 SCC 423],

[2] Secretary and Commissioner, Home Department and others Vs. R. Kirubakaran [1994 Supp (1) SCC 155], and

[3] State of T.N. Vs. T.V. Venugopalan [(1994) 6 SCC 302].

CONSIDERATION :

6. Rule 38(2)(f) of the Maharashtra Civil Services (General Conditions of Service) Rules, 1981, is reproduced below:-

"38.(2)(f): When once an entry of age or date of birth has been made in a service book no alteration of the entry should afterwards be allowed, unless it is known that the entry was due to want of care on the part of some person other than the individual in question or is an obvious clerical error."

Similarly, the amendment of the said rule by Maharashtra Amendment No.MCS 1007/C.R.7/07/SER-6 dated 24.12.2008, Instructions Nos.1 and 2 is reproduced below after amendment:-

"(1) No application for alteration of the entry regarding date of birth as recorded in the service book or service roll of a Government servant, who has entered into the Government service on or after 16th August 1981, shall be entertained after a period of five years commencing from the date of his entry in Government service.

(2) Subject to Instruction (1) above, the correct date of birth of a Government servant may be determined, if he produces the attested xerox copy of the concerned page of the original birth register where his name and date of birth has been entered as per the rules for the time being in force regarding the registration of birth, and maintained at the place where the Government servant is born, such proof should be considered as an unquestionable proof for change of date of birth in service record."

7. Comparison of the old rule and amended rule clearly shows that the rule making authority has after amendment in 2008 prohibited the employees from making any application for correction in the date of birth after the period of five years from the date of entry in service but since the amendment is not retrospective, it must be read as prospective.

8. In this case, however, I find that the application was made for correction of date of birth by the appellant employee on 20.11.2006 and his case would be covered by the old rule.

9. Nevertheless the rigours provided by Instruction No.2 of Rule 38(2)(f) for the proof of correct date of birth cannot be dispensed with even if old rule is applied. In the instant case, the Appellant has produced and relied on the Dakhal Kharij Register of Zilla Parishad School in which the appellant was admitted on 01.12.1967. The original register was produced in the evidence of the concerned Official before the Trial Judge and the entry or the extract of birth was also duly proved by the said witness. The witness was not at all cross-examined. On the contrary, the employer remained absent, with the result the said document as well as the evidence tendered by the said witness, so also of the appellant went totally unchallenged. I have perused the document No.3720 duly proved by producing original register by the concerned employee of Zilla Parishad, Bhandara. I find that the date of birth of the appellant mentioned therein is 07.02.1959 and the date of birth of the person below his name i.e. Yadav Dudhram Giripunje. is 23.07.1956. There is, therefore, a strong reason to believe that while giving the School Leaving Certificate to the appellant, an obvious clerical mistake crept in and instead of putting the date of birth of the appellant in the School Leaving Certificate that was produced before the employer and entered in Service Book, the date of birth relating to Yadav was put in his certificate. It is true that late application for correction of date of birth certainly is an act on the part of the employee which cannot be condoned, but then the Court of law cannot be oblivious of the fact that such mistakes do occur. The date of birth viz. 7th February, 1959 in the original Dakhal Kharij Register duly proved also went unchallenged. A strong presumption arose in favour of the appellant. The appellant thus proved to the hilt his correct date of birth as 07.02.1959. The mistake in not making application within the five

years on the part of the appellant cannot be utilized to punish him for all times to come when otherwise in law, his date of birth is 07.02.1959.

10. I have perused the decisions cited before me. State of Maharashtra and another Vs. Goraknath Sitaram Kamble and others [2010 (14) SCC 423] [cited supra] is the only decision pertaining to the Bombay Rules. The Apex Court referred to the amended rule of 2008, but the present case at hand is the one under old rule which permitted such a change if an obvious clerical mistake is found. I have categorically found that there was an obvious clerical mistake in entering the date of birth of Yadao Giripunje in the Certificate of the appellant, whose name is to be found just below the name of appellant in the Dakhal Kharij Register. On facts, the decision is, thus distinguishable.

11. In the result, I make the following order:

ORDER

[a] Second Appeal No.399 of 2013 is allowed.

[b] The impugned Judgment and Decree dated 24.06.2013 passed by the District Judge-1, Bhandara, in Regular Civil Appeal No.14 of 2010 confirming the Judgment and Decree dated 08.04.2009 passed by learned Civil Judge [Junior Division], Lakhni, in Regular Civil Suit No.61/2009, both are set aside.

[c] Regular Civil Suit No.61 of 2009 is decreed. It is declared that the correct date of birth of the appellant is 07.02.1959 and shall be carried out accordingly in all the relevant records.

12. In the circumstances of the case, there shall be no order as to costs.

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