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SooperKanoon Citation : sooperkanoon.com/134834

Court : Patna

Decided On : Mar-11-1996

Judge : S.K. Chattopadhyaya, J.

Appeal No. : C.W.J.C. No. 3116 of 1995 (R)

Appellant : Suleman

Respondent : State of Bihar and ors.

Advocate for Pet/Ap. : Mr. Jai Prakash

Disposition : Application Allowed

Judgement :

S.K. Chattopadhyaya, J.

1. Heard Mr. Jai Prakash, learned Counsel for the petitioner and Mr. Rajiv Kumar, JC to G.P.I. and also Mr. V. Shivnath, learned Government Pleader No. I.

2. In this writ application, the petitioner has impugned the order dated 1.9.1995 as contained in Annexure 7 by reason of which he has been directed to refund the salary paid to him for the period 16.6.1988 to 30.6.1994 on the ground that his year of birth being 1930, he ought to have retired in the year 1988. The petitioner has also prayed for a direction to the respondents to correct the date of birth of the petitioner in the service book.

3. On 16.4.1960, the petitioner was appointed as a Grade IV employee in the office of the Additional Collector in the Collectorate of Dhanbad. As per his School Leaving Certificate, (Annexure 2) his date of birth is 11.4.1940 which is subsequently supported/Confirmed by the Gradation List published by the authorities. In the Gradation List, the petitioner has been shown at serial No. 84 with the date of birth as 11.4.1940.

4. The grievance of the petitioner is that all of an sudden in the month of June 1994, the petitioner was informed that he would be made to retire from service on 30.6.1994. The petitioner immediately made a representation to respondent No. 2 to the effect that his date of birth being 11.4.1940, he could not have been made to retire on 30.4.1994. His contention was that his date of birth is 11.4.1940, but the year has been changed from 1940 to 1936 by some interested persons with some ulterior motive at his back. The authority concerned did not pay any heed to the representation filed aforesaid and made the petitioner to retire on 30.6.94 on the ground that he has attained the age of 58 years. On 7.7.1995, the show cause notice was issued to the petitioner informing him that the age of the petitioner was recorded in the service record as 15.6.1930 which has been interpolated by overwriting, making the same as 15.6.1936. Responding the show cause notice the petitioner filed his reply on 29.7.1995 (Annexure 6), and by order dated 1.9.1995, the petitioner was directed to refund the salary paid to him for the period as aforesaid.

5. The counter affidavit filed on behalf of the respondent Nos. 2 and 3 has been sworn in by the Deputy Collector in-charge Establishment Section of the Collectorate. In reply to the statement made in paragraph 5 to 9 of the writ application the deponent in paragraph 5 of the counter affidavit, averred that the statements in those paragraphs are not correct. Similarly, in paragraph 15, the statement made in paragraph 13 to 20 of the writ petition, have been denied as not correct. The main thrust of the respondent is on Annexure A, which is an application purported to have been made by the petitioner for enrollment as a subscriber to the provident fund. It is stated that in that application, he gave his date of birth as 15.6.1936.

6. Mr. Jai Prakash contends that the date of birth being 11.4.1940, the same was recorded on the basis of the School Leaving Certificate as contained in Annexure 2. This date was further confirmed by the gradation list published by the concerned authority on 12th March, 1984 as contained in Annexure 3. It is urged that if the year of birth of the petitioner would have been recorded in the service book as 1930, the gradation list could not have shown his birth of year as 1940.

7. According to him, it is not clear as to when the respondents detected the alleged interpolation in the service record inasmuch as, there is no whisper in the counter affidavit that before he was made to retire, this interpolation was detected and the petitioner was asked to show cause for explaining this interpolation.

8. It is further contended that in the year 1960, when the petitioner was employed, the maximum age limit was 25 years for appointment, and as such, if the petitioners date of birth would have been 15.6.1936 he was aged 30 and could not have been appointed on the basis of the age bar. On the other hand, if the year 1940 is taken to be correct, then he was appointed at the age of 20 years.

9. On the second point, Mr. Jai Prakash has urged that when a person is allowed to continue to work even after the retirement and payment of salary is made, the same cannot be deducted as he was rendered his service without any objection from any corner.

10. Mr. Rajiv Kumar, on the other hand, has submitted that the petitioner cannot get a declaration from this Court that his year of birth is not 1930 but 1940. He submits that after an employee has retired, he cannot claim for any correction in the date of birth recorded in the service book.

11. In support of his contention, Mr. Rajiv Kumar has relied in the decision of the Supreme Court in the case of Union of India v. Harnam Singh reported in 1993 LIC, 1010. However, he has fairly submitted that in view of the decision of the Supreme Court, the amount of salary already paid to the petitioner in lieu of his service, cannot be asked to be refunded.

12. It is now well settled that the High Court in exercise of its discretionary writ jurisdiction, ordinarily should not entertain a writ application filed as against the Government or its instrumentality towards the fag end of his service, seeking correction of his date of birth entered into in his service book. However, in the case of *Sarjoo Prasad v. General Manager*, reported in AIR 1981 SC 1481, their Lordships have held that the date of birth without notice and without giving opportunity to the appellant cannot be altered to the disadvantage and prejudice of an employee because an administrative order which involves civil consequences must be made in conformity with the rule of natural justice which at its lowest minimum requires notice and opportunity to the person affected thereby. The Supreme Court being satisfied with the facts and circumstances of that case, set aside the order retiring the appellant from service as well as the order correcting the birth date.

13. On the present case, the petitioner has retired on 30.6.1994 i.e. before moving this Court in the present writ application, I have already noticed that the School Leaving Certificate shows his date of birth as 11.4.1940 and the Gradation List of class IV employees also shows the date of birth as 11.4.1940. Thus, up to 12th March, 1984 (the date of publication of the gradation list) the petitioner had, no opportunity to file any application for correction of his date of birth in the service book. However, one thing is not clear as to how in the service book the petitioner's date of birth was entered as 1936, when the School Leaving Certificate as well as gradation list, as mentioned above, shows the year of birth of the petitioner as 1940. The authenticity of the School Leaving Certificate as well as gradation list has not been challenged by the respondents. It is not the case of the respondents that date of birth in the gradation list was entered by mistake.

14. The stand of the respondents that initially the date of birth of the petitioner was entered as 11.4.1930 and subsequently, it was changed to 11.4.1936, in my opinion, does not hold good. If the petitioner's date of birth would have been 11.4.1930, he could not have been appointed in the year 1960 due to age bar. The service record of the petitioner has been produced before the Court for perusal.

15. Mr. Rajiv Kumar, however, relying on the application and requisition form, as contained in Annexure A to the counter affidavit, has submitted that in the said application the petitioner himself has stated that his date of birth is 15.6.1936. In my opinion, this Annexure does not and cannot help the respondents in coming to the conclusion that the date of birth of the petitioner was 15.6.1936 and not 11.4.1940. The original of Annexure A has not been produced and there is no averment that the alleged date of birth on the top of the form was verified and found to be in the handwriting of the petitioner himself. There being no column in the form for giving date of birth, it can be presumed that the said date was inserted at the back of the petitioner by someone to suit the case of the respondents.

16. The genuineness of the gradation list published by the respondents has not been doubted by the respondents and as such, if the date of birth mentioned in the gradation list tallies with the date of birth mentioned in the school leaving certificate, in my opinion, the petitioner could not have been made to retire in the year 1994. Even assuming that the date of birth mentioned in the gradation list is a mistake and as such, the respondents wanted to correct the same in order to tally it with the date of birth as mentioned in the service book, but before that notice should have been given to the petitioner, which, admittedly, has not been done.

17. From the statements made in the counter affidavit, it appears that the dependent himself is not very sure as to what is the actual date of birth of the petitioner. In the gradation list the date of year is 1940, in the service book it is 1936 and now the respondents put forward a case that it was 1930 in the service book, which was changed to 1936 by some well-wisher of the petitioner. This contradictory statements cannot be allowed to stand.

18. Under these circumstances, I must hold that the order as contained in Annexure 5 is illegal and must be set aside. However, as the petitioner has already retired before moving this Court, he cannot be allowed to take back in service. As the petitioner has been made to retire four years earlier, in my opinion, justice demands that he will be compensated by directing the concerned respondent to pay him the amount which he would have received, if retained in service till 11.4.1988.

Editorial Note.-See the modified date in OF MODIFICATION, dated March 11, 1996)

19. Similarly, the order dated 31.8.1995, as contained in Annexure-7, cannot be allowed to stand in view of the decision in the case of State of Bihar v. Narasimha Sundram reported in AIR 1994 SC 599. In the aforesaid decision, the Supreme Court has held that salary which was paid to an employee even after his retirement but allowed to continue in service, cannot be recovered.

20. Mr. Rajiv Kumar, as stated above, has fairly submitted that the order for recovery of the amount cannot be justified.

21. In the result, this application is allowed and the respondents are directed to pay the amount forthwith after calculating the same in view of the aforesaid observations. There will be no order as to costs.

Editorial Note.- Vide order dated 11.3.1996, necessary modifications (corrections) have been modified in this Judgment, which is being published.

It appears that in the judgment dated 6.2.96 typographical error has crept in para 18 so far as the date is concerned. In the last line of the said para it has been typed as 'if retained in service till 11.4.88' instead of the date '11.4.98. Therefore, let it be read as '11.4.98.

In para 21 of the said judgment while allowing the writ application some direction has been given to the respondents. However, by inadvertence quashing of Annexures 5 and 7 have not been stated. Under this circumstances para 21 be read as 'In the result this application is allowed by quashing Annexures 5 and 7 and the respondents are directed to pay the amount forthwith after calculating the same in view of the aforesaid judgment.'

The judgment dated 6.2.96 is modified to the extent indicated above.

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