

Ram Khelwan Pathak Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Feb-20-1998

Reported in : 1998(2)AWC1171; (1998)3UPLBEC1954

Judge : O.P. Garg, J.

Acts : [Constitution of India, 1950](#) - Article 23; Uttar Pradesh Recruitment to Service (Determination of Date of Birth) Rules, 1974 - Rule 2

Appeal No. : C.M.W.P. No. 266 OF 1997

Appellant : Ram Khelwan Pathak

Respondent : State of U.P. and Others

Advocate for Def. : S.C.

Advocate for Pet/Ap. : H.N. Sharma, Adv.

Judgement :

O. P. Garg, J.

1. By means of this writ petition, under Article 226 of the Constitution of India, the petitioner has prayed that the orders dated 30th April, 1996 and 23rd November, 1996, Annexures-2 and 3 to the writ petition, passed by respondent No. 2. Executive Engineer, Minor Lift Canal Division, Jaunpur be quashed and the date of

superannuation of the petitioner be treated for the purposes of obtaining pensionary benefits as 28th February, 1997.

Counter and rejoinder-affidavits have been exchanged.

2. The petitioner was appointed as class IV employee on the post of Chaukidar under the establishment of Minor Lift Canal Division, Jaunpur in the year 1969. He was confirmed on the said post in the year 1973. In the service record of the petitioner, his date of birth had been recorded as 3rd November, 1994. The age of superannuation for class IV employee is 60 years and therefore on the basis of the said date of birth, the petitioner was to retire on 30th November, 1994.

3. It is alleged that the petitioner was not knowing about his correct date of birth and consequently he made a representation after receiving a notice of retirement on 13.9.1993. Sri Ashok Kumar, the then Executive Engineer, Minor Lift Canal Divisions, Jaunpur referred the petitioner for medical examination by the Chief Medical Officer. After taking into consideration the report of the Chief Medical Officer. Jaunpur, Sri Ashok Kumar. the then Executive Engineer passed order on 21.2.1994. a copy of which is Annexure-1 to the writ petition to the effect that the notice dated 13.9.1993 issued to the petitioner shall stand partially amended, inasmuch as the petitioner shall retire on 4.2.1997, meaning thereby the date of birth of the petitioner was accepted as 4.2.1937 instead of the year 1934. In pursuance of the said order the petitioner continued to work from 1st December, 1994, onwards. Subsequently, the successor of Sri Ashok Kumar. Executive Engineer passed an order, Annexure-2 to the writ petition, on the basis of the date of birth incorporated in the service record of the petitioner, i.e., 3.11.1934 that he shall be deemed to have been superannuated on 30.11.1994. This order was passed on 30.4.1996 by Sri Dinesh Kumar, Executive Engineer after obtaining the opinion of the District Government Counsel (Civil), Jaunpur. Accordingly, the petitioner was relieved on 30.4.1996. Subsequently an order was passed on 23rd November, 1996. Annexure-4 to the writ petition that since the petitioner had continued to work after the date of superannuation which was 30.11.1994. a sum of Rs. 51,074 as being the amount of salary for the period 1.12.1994 to 30.4.1996 shall be recovered from the petitioner from out of the amount of leave

encashment, gratuity as well as provident fund.

4. In the counter-affidavit, the respondents have taken the plea that the correct date of birth of the petitioner as was known to the petitioner himself and the department was 3.11.1934 and on its basis the petitioner stood superannuated on 30.11.1994 and that it was on account of connivance of the petitioner with the office staff who manipulated and tempered the office record and sent a letter to the Chief Medical Officer, Jaunpur for fixing the actual date of birth of the petitioner which was not permissible under the rules and the entry of the date of birth of the petitioner as 4.2.1937, on the basis of the report of the Chief Medical Officer was totally without jurisdiction and authority ; that since the petitioner has been illegally paid the salary for the period over and above the date on which he should have been retired, the recovery of the amount, aforesaid has been rightly ordered.

5. It is a case of class IV employee, who was virtually illiterate. On the basis of date of birth incorporated in his service record, the petitioner was to stand superannuated on 30.11.1994 on attaining the age of 60 years. A notice dated 13.9.1993 was served on him. The petitioner made a representation that his date of birth was not correctly recorded whereupon Sri Ashok Kumar, the then Executive Engineer, Minor Lift Canal Division, Jaunpur readily referred the matter to the Chief Medical Officer (for short C.M.O.) for determination of date of birth/age of the petitioner and as said above, on the strength of the report of the C.M.O., year of birth of the petitioner in the service record was modified and corrected as 1937. Learned standing counsel urged that the act of Sri Ashok Kumar, Executive Engineer in entertaining the representation of the petitioner and to refer the case to the C.M.O. at the fag end of the career of the petitioner was wholly unjustified. This submission of the learned standing counsel is not without force.

6. There have been a number of judicial pronouncements on the question of change or otherwise of the date of birth. In *Union of India v. Harnam Singh*, (1993) 2 SCC 162, the Hon'ble Supreme Court observed that :

'A Government servant, after entry into service, acquires the right to continue in service till the age of retirement, as fixed by the State in exercise of its powers regulating conditions of service, unless the services are dispensed with on other

grounds, contained in the relevant service rules after following the procedure prescribed therein. The date of birth entered in the service records of a civil servant is, thus of utmost importance for the reason that the right to continue in service stands decided by its entry in the service record. A Government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the Government servant must do so without any unreasonable delay. In the absence of any provision in the rules for correction of date of birth, the general principle of refusing relief on grounds of laches or stale claims, is generally applied by the Courts and Tribunals. It is nonetheless competent for the Government to fix a time limit, in the service rules, after which no application for correction of date of birth of a Government servant can be entertained. A Government servant who makes an application for correction of date of birth beyond the time, so fixed, therefore, cannot claim, as a matter of right, the correction of his date of birth even if he has good evidence to establish that the recorded date of birth is clearly erroneous. The law of limitation may operate harshly but it has to be applied with all its rigour and the Courts or Tribunals cannot come to the aid of those who sleep over their rights and allow the period of limitation to expire. Unless altered, his date of birth as recorded would determine his date of superannuation even if it amounts to abridging his right to continue in service on the basis of his actual age.'

In order to put an end to the controversies about the corrections in the date of birth, the State of U.P. has adopted the U. P. Recruitment to Service (Determination of Date of Birth) Rules, 1974. Rule 2. as amended by the first amendment of 1980, reads as follows :

'The date of birth of a Government servant as recorded in the certificate of his having passed the High School or equivalent examination at the time of his entry into the Government service or where a Government servant has not passed any such examination as aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his servicebook at the time of his

entry into the Government service shall be deemed to be his correct date of birth or age, as the case may be, for all purposes in relation to his service, including eligibility for promotion superannuation, premature retirement or retirement benefits and no application or representation shall be entertained for correction of such date or age in any circumstances, whatsoever.'

From the above provision of Rule 2, it is clear that no application or representation can be entertained for correction of date of birth or age so made in any circumstances, which stands recorded in the service book. In *Balgar v. Principal G. S. V. M. Medical College, Kanpur and another*, (1991) 2 VPLBEC 1407, it was observed that there is a legal fiction that date recorded in the service book at the time of entry into the service shall be deemed to be the correct date of birth or age of an employee for all purposes, including age of superannuation. This shows that a finality is being attached by a legal fiction to the date of birth or age recorded in the service book of an employee and as no application or representation can be entertained in view of Rule 2 of the Rules, no enquiry can also be made in respect for determining the date of retirement on attaining the age of superannuation on the basis of any other date of birth or age considered to be correct age of the petitioner. It is not in respect of an employee only, but the competent authority is equally bound by such entry of date of birth or age. In case the representations at the fag end of the career of an employee are entertained, the very purpose of framing rules will be frustrated. Therefore, the competent authority cannot allow an employee to question the date of birth recorded in the service book of the employee. In the instant case, Sri Ashok Kumar, Executive Engineer should have rejected the representation of the petitioner outright as only a ruse. As a matter of fact, no useful purpose was going to be served by referring the matter to the C.M.O. It is well-settled that the medical evidence, particularly when an employee has crossed the age of 55 years, is of no consequence to determine his age, much less date of birth. It is only an estimate or approximation, which may be arrived at on the basis of physical features and other relevant date including ossification tests. Till now, there has been no advancement in the medical science to the extent that it may determine the exact age or date of birth of a particular person. The Executive Engineer, therefore, not only erred but went beyond his competence to refer the dispute to the C.M.O. Such a reference was clearly barred

by provisions of Rule 2, referred to above. In all the circumstances, the petitioner should have stood superannuated on his attaining the age of 60 years on 30.11.1994 on the basis of the date of birth incorporated in his service record.

7. Now, the question is as to in what manner the period for which the petitioner has worked after the date of his superannuation should be treated. Undoubtedly, the petitioner has worked for the period 1.12.1994 to 30.4.1996, i.e., for a period of 27 months beyond the period of his actual date of retirement. He has been paid the salary for the aforesaid period and now the department has ordered that a sum of Rs, 51,074 shall be deducted from various retiral benefits, such as. leave encashment, gratuity as well as provident fund, payable to the petitioner. Learned counsel for the petitioner urged that the petitioner was not at fault in continuing to work after the period of retirement as it was the Executive Engineer himself, who had consciously taken the decision that the petitioner was to retire in the year 1997. The petitioner is an illiterate person and the extension of his service came into being on account of so-called wrong decision of the Executive Engineer and since the petitioner is not at fault, he should not be deprived of the salary for the period for which he has actually worked in the form of making deductions from his retiral benefits. Learned counsel further urged that in case the deductions are allowed to be made, it would amount to 'begar' which is prohibited under Article 23 of the Constitution of India. A reference was made to *Suraj Narain v. State of M. P. and others*, AIR 1960 MP 303, in which it was observed that to ask a man to work and then not to pay him any salary or wages, savours of begar which is prohibited under Article 23 of the Constitution. It is a fundamental right of a citizen of India not to be compelled to work without wages. In this view of the matter, the stopping of pay and making an employee to work is not only against rule, but it also offends the spirit of Article 23. The expression 'begar' has been elucidated in *S. Vasudevan and others v. S. D. Mittal*. AIR 1962 Bom 53. To bring the case within the mischief which clause (1) of Article 23. provides against, it must be established that the person has been forced to work against his will and without payment. Even assuming that the threat of penal consequence would have the effect of making the Government servants to work against their will, it is without doubt that it was not intended to make them work without any payment : on the other hand, they would be getting their full remunerations for the work they would be doing.

8. In a case where an employee has worked beyond the period of his retirement the residue period should be treated as fortuitous as has been held by Hon'ble Supreme Court in *S. V. Bhima Bhatta and another v. State of Karnataka and others*, JT 1996 (2) SC 236. The matter also came to be considered in another case in *Mahmood Hasan and others v. State of U. P. and others*. JT 1997 (I) SC 353, where the employees were reverted to a lower post as their promotion was against rule, it was held that those who will have to step down on account of correctional process need not refund the pecuniary or other benefits enjoyed by them for they had actually worked during that period. There is yet another direct authority on the point in *Shyam Babu Varma and others v. Union of India and others*, (1994) 2 SCC 621. In which the Apex Court dealing with the similar situation, ruled that since the petitioner received higher pay scale not due to fault or his own, it shall not be just and proper to recover the salary already paid to him. A Division Bench of this Court had the occasion to deal with the similar controversy in *Harish Chandra Srivastava v. State of U. P. and others*, (1996) 3 UPLBEC 1840. In that case also, an order was passed without giving an opportunity, to withhold superannuation benefits to the petitioner, who was wrongly promoted and was paid the higher salary, it was observed that the impugned order was liable to be quashed not only on the ground of want of affording reasonable opportunity of being heard to the petitioner but also on the ground that the petitioner cannot be held responsible for securing promotion on the higher scale of pay by misrepresenting the department and. therefore, payment of salary cannot be recovered. Also see *Gabriel Saver Fernandes v. State of Karnataka*, 1995 Suppl. (I) SCC 149.

9. In the instant case, the petitioner has committed no fraud or misrepresentation nor he misled the department with a view to continue in service after the actual date of retirement. It was the department which took the conscious decision to continue the petitioner after modifying the notice in pursuance of which the petitioner was to retire on 30.11.1994. Subsequently, the mistake was realised by the department and the erroneous order passed earlier by Sri Ashok Kumar, Executive Engineer was recalled and the petitioner was relieved of his duties on 30.4.1996.

10. There is no doubt about the fact that the petitioner has actually worked for the period 1.12.1994 to 30.4.1996 and has accordingly been paid the salary. Since there was no fault on the part of the petitioner, he cannot be deprived of the benefit of salary which has been paid to him for the work which he has actually put in for the aforesaid period. Depriving him of the salary for the aforesaid period would amount to begar, which is prohibited under Article 23 of the Constitution. In *Collector of Madras and another v. K. Rajamanickam*, 1995 (2) SCC 98, the Hon'ble Supreme Court ordered that there shall be a direction not to recover any amount paid to an employee for a period of seven months during which he had worked. It was, however, observed that the retiral benefits should be computed as if the employee has retired on the date on which he was actually to stand superannuated. In another case in *Burn Standard Company Ltd. and others v. Deen Bandhu Majumdar and another*, (1995) 4 SCC 172, the question of treatment of the post superannuation period of service was dealt with. It was held that the post superannuation period of service would not entitle the employee to any service benefit other than the salary drawn.

11. In the result, the writ petition succeeds and is to be allowed. It is hereby directed that the petitioner shall not be denied the benefit of salary for the period 1.12.1994 to 30.4.1996 by deducting the same from his retiral benefits. However, the retiral benefits payable to the petitioner shall be calculated as were admissible to him on the actual date of his retirement, i.e., 30.11.1994, ignoring the post superannuation period of service. Parties shall bear their own costs.