

(1991) 04 AHC CK 0040
In the Allahabad High Court
Case No : C.M.W.P. No. 11049 of 1989

Ahmad Husain

APPELLANT

Vs

Managing Director, U.P. State Road Transport Corpn. and
Others

RESPONDENT

Date of Decision : 05-04-1991

Acts Referred:

Uttar Pradesh Basic Education Act, 1972 — Section 10

Citation : (1991) 63 FLR 557 : (1994) 3 LLJ 388 : (1991) 1 UPLBEC 557

Hon'ble Judges : R.R.K. Trivedi, J

Bench : Single Bench

Advocate : C.P. Childayal, for the Appellant; Ajay Sharma and V.M. Sahay, S.C.,
for the Respondent

Final Decision : Allowed

Judgement

R.R.K. Trivedi, J.

1 Heard Shri Ajai Sharma, learned counsel for the petitioner and Shri V.M. Sahai, learned counsel for the respondents. In this writ petition counter and rejoinder affidavits have been exchanged and both the learned counsel are agreed that this writ petition may be heard and finally disposed of at this stage.

2. The facts giving rise to this petition are that the petitioner was employed on 18th May, 1949 as a work charged daily wage employee by respondents. The petitioner is aggrieved by action of the respondents in retiring him on 30th June, 1989 on the basis of the notice, dated 9th May, 1989 which has been filed as Annexure-7 to the writ petition. The petitioner made a representation on 28th September, 1988 and along with this representation he filed a school leaving certificate and affidavit, dated 27th September, 1988. The school leaving certificate has been issued on 1st September, 1988 by the Basic Siksha Parishad, Barabanki and the certificate has been signed by the Deputy Inspector of Schools, Barabanki. According to this certificate the date of birth of the petitioner

is 3rd January, 1931. It has also been mentioned in the certificate that the language of petitioner was Urdu and he left the school from Class 1st. In his affidavit petitioner has stated that at the time he was employed, he had not been asked to give any certificate of date of birth. In the affidavit it has also been said by petitioner that he studied in Primary School in Tehsil Hajdscash, district Barabanki and the certificate has been issued to him by Basic Siksha Parishad, Barabanki. The representation, dated 28th September and the school leaving certificate, dated 1st September, 1988 and affidavit, dated 27.9.1988 have been filed as Annexures-1, 2 and 3 to the writ petition. As no orders were passed on this representation petitioner filed a second representation on 4th October, 1988 and again submitted the school leaving certificate and the affidavit. This representation is Annexure-4 to the writ petition. As the petitioner did not receive any communication about the decision taken on his representation, he filed a writ petition in this Court and the Division Bench vide order, dated 5th May, 1989 directed the respondent to decide the representation filed by petitioner within a period of one month. The order of this Court has been filed as Annexure-5 to this writ petition. Petitioner then filed an application, dated 11th May, 1989 along with the order of the Court, dated 5.5.1989 and a copy of the school leaving certificate and a copy of the representation, dated 28th September, 1988 and 4th October, 1988. However the petitioner was already served with a notice, dated 9th May, 1989 intimating him that he shall attain the age of superannuation on 30th June 1989. The representation filed by petitioner has been decided by respondent No. 2 Deputy General Manager, U.P. State Road Transport Corporation, Central Workshop, Kanpur, vide order, dated 29th May, 1989. The representation of the petitioner has been rejected.

3. In the order, dated 29th May, 1989 the representation filed by petitioner on 4th October, 1988 has been referred to. It has been said in the order that the petitioner had not given any certificate regarding his date of birth at the time of appointment nor it has filed at any time subsequent thereto. It has been further said that it is known to the petitioner that in case of illiterate employees and those who have no certificate or affidavit showing their date of birth. The age mentioned in the record of Employees' State Insurance Corporation is taken to be correct, then it has been said that the petitioner was aware about the age mentioned in the record of Employees' State Insurance Corporation. Hence a consideration at this stage is not possible as the petitioner has attained the age of superannuation. With the aforesaid reasoning the representation of the petitioner has been rejected.

4. Aggrieved by this order, the petitioner has filed the present writ petition for the relief that the notice, dated 9th May, 1989, Annexure-7 and the order, dated 29th May, 1989 (wrongly recorded as 27th) may be quashed. The petitioner has also sought for a writ of mandamus directing the respondents not to interfere in the working of the petitioner upto the age of 60 years on the basis of the date of birth mentioned in school leaving certificate.

5. Respondents have filed a counter affidavit in which it was admitted that the petitioner was employed on 18th May, 1949. However nothing has been said in the counter affidavit as to what is the source of information for recording his date of birth on which basis the notice, Annexure-7 to the writ petition, has been issued asking the petitioner to retire on 30th June, 1989. It has been accepted that the petitioner had moved a representation on 28th September, 1988. A copy of the said representation has been filed as Annexure-1 to the counter affidavit. The respondents have said that the petitioner was immediately asked to submit his card relating to insurance which was claimed to have been lost by the petitioner and a note to this effect was made in the representation. This note has been written in Hindi and it has been signed in Urdu. The respondents case is that there is no provision in the Certified Standing Order applicable to the petitioner for maintaining the service book nor any service book is maintained with regard to workmen of the respondents. From a perusal of the paragraphs 4, 5 and 9 of the counter affidavit it appears that though effort was made by the respondents to ascertain the age of the petitioner from the record of the Employees' State Insurance Corporation, However, admittedly no reply was received. The respondents appear to have proceeded on assumption that the year 1929 is mentioned as birth year of the petitioner in the said record. It has been alleged by the respondents in the counter affidavit that the correction of date of birth has rightly been refused.

6. Learned counsel for the respondents placed before me the original service record of the petitioner in which it has been shown that he was employed on 1st June, 1954. No date has been mentioned, only year 1929 has been mentioned in column meant for mentioning the date of birth. The petitioner continued as employee of the respondents Corporation but the authorities never tried to ascertain the correct date of birth of the petitioner. It is accepted that the petitioner is illiterate or semi-illiterate and he was not supposed to know the correct procedure of recording date of birth. In my opinion, the maintenance of service record is the responsibility of the employer and it is also the responsibility of the employer to record the correct date of birth as it is very essential for an employee's service career. Such a record is equally necessary for the employer also. The excuse sought by the respondents on the basis of the Certified Standing Order that they are not required to maintain the service record is not acceptable. On this basis it cannot be said by the respondents that they stood absolved of the responsibilities of noting a correct date of birth of the petitioner who was their employer.

7. The second important aspect of the case is that according to respondents the age mentioned in the record of Employees' State Insurance Corporation is accepted in such a case for affecting retirement etc., admittedly petitioner could not produce the Insurance card on which his date of birth year might have been noted. The respondents did not receive any communication from the Corporation indicating the birth year or the age of petitioner according to record maintained by Insurance Corporation. In these circumstances, the respondents cannot retire

the petitioner on basis of the year 1929 mentioned in their service record. The matter was admittedly pending before the respondents since September, 1988 and the order was passed on 29th May, 1989, The office of the Employees' State Insurance Corporation is situated in same city and department could ascertain the correct facts by deputing some official for this purpose. However, for the reasons known to the respondents they felt satisfied only by sending reminders and have retired the petitioner by a notice, dated 9th May, 1989.

8. Now it has to be considered as to whether the respondents have rightly retired the petitioner on the basis of the birth year 1929 mentioned in the service record. It is not clear as to how the respondents have chosen 30th June, 1989 for retiring the petitioner on the basis of the year 1929. No rule or regulation or Standing Order has been placed before me for determining the age of superannuation in such circumstances. If only year is mentioned it could be very well said that the petitioner was born on 1st January, 1929 and it can also be said that he was born on 31st December, 1929 but in the two dates of the same year the difference will be one year and in these circumstances, the notice, Annexure-7 to the writ petition, retiring the petitioner on 30th June, 1989 is wholly illegal and arbitrary. In my opinion, in such doubtful cases only the last date of the year i.e. 31st December, 1929 can be taken to be the date for calculating the age of superannuation. The reason for the aforesaid view is that in case of doubt the benefit will go always to the weaker side or who shall suffer more....In case the employee is allowed to continue for some time more, no harm will be caused to the employer, as he will be paid his salary against his work.

9. For the reasons stated above, in my opinion, the petitioner cannot be legally retired on the basis of the notice, Annexure-7 to the writ petition, dated 9th May, 1989. The notice was illegal and arbitrary and is liable to be quashed.

10. Petitioner has claimed that his correct date of birth is 3rd January, 1931 and in support of this he has filed school leaving certificate issued by Basic Siksha Parishad, Barabanki, which is Annexure-2 to the writ petition. He has also filed his affidavit. All this material was before respondent no. 2. However he has failed to record any reason for not accepting the affidavit and the certificate filed by petitioner which remained uncontroverted. The certificate has been issued by Basic Education Parishad, Barabanki which is established u/s 10 of the U.P. Basic Education Act, 1972 which is a statutory body. The certificate has been issued under the signature of Deputy Inspector of Schools, Barabanki. There was no reason to doubt that the certificate is genuine and 3rd January, 1931 could be accepted as the date of birth of the petitioner. The respondent No. 2 however, disposed of the representation of petitioner without applying his mind and without considering the impact of the documents filed before him along with representation. If the entry relating to date of birth contained in service book is interpolated or contains overwriting or there is otherwise reason for the authority to think that the entry is incorrect, the enquiry to ascertain correct date of birth

is obligatory. It cannot be denied in the present case that the year of birth could not be legally used for effecting the superannuation as chosen by respondents. They failed to receive any communication from the Employees' State Insurance Corporation regarding the age or date of birth of the petitioner. In these circumstances, it was obligatory on respondent No. 2 to consider all the documents and apply his mind to the facts and circumstances of the case and then to record reason for accepting or not accepting the documents filed by petitioner. It is true that the respondent No. 2 cannot be expected to decide the case as a judicial court or quasi-judicial authority but at least he could assign some reason for not accepting the documents filed by petitioner. This Court by order, dated 5th May, 1989 directed the respondent No. 2 to decide the representation of petitioner. The respondent No. 2 has rejected the representation for the reasons which cannot be sustained in law and in fact he has not decided the dispute before him. The order suffers from manifest illegality and is arbitrary and cannot be sustained in law. Now the question remains as to what relief can be granted to the petitioner at this stage. Petitioner has attained the age of superannuation even according to the date of birth mentioned by him. According to the school leaving certificate the date of birth of petitioner is 3rd January, 1931. Thus he attains the age of superannuation on 2nd January, 1991 when he became 60 years of age. Thus the second relief claimed by petitioner cannot be granted for mandamus directing the respondents not to interfere in his working. However, in the facts and circumstances mentioned above it is a fit case where the petitioner should be suitably compensated as the respondents in this case failed to ascertain the correct date of birth of the petitioner which was necessary in the facts and circumstances of the case and was also obligatory of them. In my opinion, an amount payable to petitioner as one year's salary will meet the ends of justice. The reason for the above relief is that if 1929 is taken to be the year of birth according to the view expressed by him, the above date of birth ought to have taken as 31st December, 1929. The petitioner claims his date of birth as 3rd January, 1931, so there is a difference of only one year and in absence of the positive finding arrived at by the competent authority, the petitioner can be only awarded compensation in lieu of salary as the petitioner has already attained the age of superannuation and is out of job since 30th June, 1989. In my opinion, it will not be a fit case where he should be asked to approach the authority again for deciding the representation afresh.

11. For the reasons stated above, this writ petition is partly allowed. The impugned notice, dated 9th May, 1989, Annexure-7, and impugned order, dated 29th May, 1988, Annexure-9 to the writ petition, are hereby quashed. The respondents are directed to pay the amount, equal to salary for one year to petitioner by way of compensation for illegally retiring him on 30th June, 1989. The rate of salary payable shall be rate payable to petitioner during the period 1st July, 1989 to 30th June, 1990. Petitioner shall be also entitled for the benefit and adjustment in matters of other payment like pension, gratuity, provident fund, etc. There will be no order as to costs.

12. A certified copy of this order shall be supplied to the learned counsel for the parties on payment of usual charges within two weeks.