(2005) 11 PAT CK 0037

In the Patna High Court

Case No : CWJC No. 11696 of 2004

Baban Singh APPELLANT

Vs

State of Bihar and Others RESPONDENT

Date of Decision : 30-11-2005

Acts Referred:

Bihar Financial Rules — Rule 88, 97, 97(1), 97(2)
Bihar Service Code, 1952 — Rule 73, 9
Miscellaneous Rules of the Board of Revenue, Bihar, 1958 — Rule 233, 25, 9

Citation : (2006) 3 BLJR 2336 : (2006) 1 PLJR 200

Hon'ble Judges : Shiva Kirti Singh, J

Bench : Single Bench

Advocate : Chakradhari S. Singh and Shantanu Kumar, for the Appellant; Archana Shahi, JC to GP 7, for the Respondent

Final Decision : Allowed

Judgement

Shiva Kirti Singh, J.—This writ petition has been hard in detail at the stage of admission itself and is being disposed of finally with consent of the parties.

2. Petitioner was initially appointed as a Constable in Bihar Military Police, Battalion 10 and he joined the said post on 1.2.1968. As has been confirmed from the original service book of the petitioner, at the time of joining petitioner had given his age as 21 years by only mentioning his year of birth as 1947. On that basis the concerned Commandant issued a letter bearing No. 28 dated 5.12.2003 addressed to the DIG (Personnel), Bihar in which date of retirement of several police employees were mentioned and against petitioner''s name the date of retirement was shown as 30.6.2005. Petitioner did not protest against such date decided on 5.12.2003 but subsequently by memo No. 1095 dated 29.5.2004 (Annexure-5) date of retirement of several police employees were revised by the Commandant, BMP 14 and petitioner''s date of retirement was redetermined as 31.1.2005. Petitioner has challenged the aforesaid decision evidenced by Annexure-5 insofar as it relates to the petitioner.

3. Learned Counsel for the petitioner has submitted that the earlier decision contained in Annexure-4 was a correct decision in respect of the petitioner based upon provisions in the Bihar Service Code, particularly Rules 9 and 25 thereof as well as Rule 233(iii) of the Bihar Board''s Miscellaneous Rules, 1958. It was further submitted that while issuing the decision contained in Annexure-5 petitioner''s date of birth was wrongly redetermined on erroneous ground that it was required to be done by Rules 9 and 73 of the Bihar Service Code and para 1 and 2 of Rule 97 of the Bihar Financial Rules.

4. On the other hand, learned Counsel for the State submitted that petitioner''s date of retirement was earlier wrongly determined as 30.6.2005 by applying Rule 97(1) of the Bihar Financial Rules and it has been correctly revised now by the impugned decision contained in Annexure-5 as 31.1.2005 by applying the provisions of Rule 97(2) of the Bihar Financial Rules.

5. In view of rival submissions noticed above the main issue is to decide whether in view of entry of 21 years and 1947 as year of birth against the column of age in the service book of the petitioner whether petitioner''s age was decided correctly on the earlier occasion as per Rule 97(1) of the Bihar Financial Rules or it had to be corrected on the basis of Rule 97(2) of the said Rules. Rule 97(1) and (2) may usefully be extracted for ready reference :

97. (1) If a Government servant is unable to state his exact date of birth but can state the year, or year and month of birth, the 1st July or the 16th of the month respectively may be treated as the date of his birth.

(1) If he is only able to state his approximate age, his date of birth may be assumed to be the corresponding date after deducting the number of years representing his age from his date of appointment.

6. A perusal of original service book of the petitioner makes it clear that petitioner was unable to state his exact date of birth or the month of birth but he could and did state the year as 1947. Hence, there is no difficulty in holding that Rule 97(1) was correctly applied in the case of the petitioner while issuing Annexure-4 wherein his date of retirement was shown to be 30.6.2005. Rule 97(2) of the Bihar Financial Rules could not be applied in the case of petitioner because the original entry mentions the year 1947 and hence, petitioner''s case is covered by Rule 97(1). Rule 97(2) can apply only if the Government servant had been unable to disclose even the year of his birth and would have stated only his approximate age.

7. By way of abundant caution learned Counsel for the petitioner has submitted that in any case Rule 97 of the Bihar Financial Rules could not have been applied to petitioner, a police personnel in Bihar Military Police Service because Section 4 of the Bihar Financial Rules which contains Rule 88 to Rule 97 clearly mentions as headnote that those are special Rules for the Public Works Department. It was further submitted that the introductory part of the aforesaid Rules disclose that the Rules contained in Volume 1 are essentially executive orders of the Governor.

8. Besides challenging the applicability of Rule 97 of the Bihar Financial Rules in case of Departments other than Public Works Department of Government of Bihar it was highlighted that statutory Rules contained in Bihar Board''s Miscellaneous Rules, 1958 cover the field and they provide the same thing which is provided in Rule 97(1) of the Bihar Financial Rules but they do not contain the provisions of Rule 97(2) of the said Rules. To show that the Bihar Board''s Miscellaneous Rules, at least as standing on 26.1.1957 have been held to be statutory in nature reliance was placed upon a Full Bench judgment in the case of Maheshwar Prasad Singh and Others Vs. The State of Bihar and Others, .

9. Learned Counsel for the petitioner referred to decision in the case of The State of Bihar and Others Vs. Bharat Singh @ Bharat Rao, in which the Division Bench while hearing Letters Patent Appeal upheld the decision of a Single Judge holding that when only the year of birth was mentioned in the service book the date of retirement would be end of the year in which he would complete the age of retirement but he clearly conceded that the said judgment was passed without considering the relevant Rules and the correct principle appears to be laid down in the Division Bench judgment of this Court in the case of State of Bihar and Others Vs. Devendra Kumar Mishra . Learned Counsel further pointed out that in this judgment the Court had noticed and placed reliance only upon Bihar Financial Rules and on the basis of Rule 97(1), in a similar case it was held that 1st July would be the date of superannuation when the employee had mentioned only the year of his birth. Such provision was held to be rational and just but it was not noticed that it was in Section IV which contains special Rules only for the Public Works Department. But he again fairly submitted that in para 11 of the said judgment the Division Bench had noticed that Rule 233(iii) of the Bihar Board''s Miscellaneous Rules and Rule 97(1) of the Bihar Financial Rules are exactly identical.

10. There is no requirement of giving a finding in this case whether Rule 97 of the Bihar Financial Rules would apply to employees of Departments of Bihar Government other than Public Works Department or not because it has been held above that petitioner''s case is covered by provision of Rule 97(1) of Bihar Financial Rules which are exactly identical to Rule 233(iii) of Bihar Board''s Miscellaneous Rules. Hence, this Court has no difficulty in holding that the Division Bench judgment in the case of State of Bihar v. Bharat Singh is not a binding precedent because it is per incuriam of the relevant Rules. In fact the judgment itself mentions that the Division Bench found the matter too petty and, therefore, did not allow the issue to be continued in Letters Patent Appeal. The Division Bench judgment in the case of State of Bihar v. Devendra Kumar Mishra must be accepted as a binding precedent for this case because of the finding in that judgment that Rule 233(iii) of Bihar Board''s Miscellaneous Rules and Rule 97(1) of the Bihar Financial Rules are exactly identical and in case covered by such Rule, 1st July must be prescribed as the date of superannuation. Even if Rule 97(1) of the Bihar Financial Rules is held to be inapplicable to employees of Departments other than Public Works Department it would make no difference

because of the aforesaid finding and in view of the fact that as per Full Bench judgment in the case of Maheshwar Prasad Singh v. State of Bihar the main body of the Bihar Board''s Miscellaneous Rules as existing on 26.1.1950 must be treated to be statutory in nature.

11. For all the aforesaid reasons, the writ petition is found fit to be allowed. The impugned decision contained in Annexure-5 insofar as it relates to the petitioner is hereby quashed and it is held that the earlier decision contained in Annexure-4 showing petitioner''s date of superannuation as 30.6.2005 must be accepted by the respondents as correct and in accordance with law. In that view of the matter, petitioner must be treated to be in continuous service at least till 30.6.2005. The dues of salary and other admissible emoluments must be paid to him within two months from the date of production/communication of a copy of this order. Since by resolution dated 24.3.2005, brought on record as Annexure-7 to IA No. 4002/2005 the age of superannuation of Government servants in the State of Bihar has been extended from 58 years to 60 years with immediate effect, the concerned respondents are directed to take a decision whether petitioner''s case is covered by such resolution, immediately on production of a copy of this order and if he is found to be covered then benefit of such resolution extending the age of superannuation to 60 years should also be given to the petitioner by reinstating him on his earlier post within one week and to treat him in continuous service till reinstatement. It is clarified that petitioner would be entitled to all consequential benefits on such reinstatement.

12. The writ petition is allowed to the aforesaid extent. In the facts of the case, there shall be no order as to costs. Writ petition allowed.