
(2008) 12 UK CK 0020

In the Uttarakhand High Court

Case No : Writ Petition No. 122 of 2007 (S/S)

Chandra Singh Negi

APPELLANT

Vs

General Manager, Uttaranchal Power Corporation Ltd. and
Others

RESPONDENT

Date of Decision : 15-12-2008

Acts Referred:

Constitution of India, 1950 — Article 309

Uttar Pradesh Recruitment to Services (Determination of Date of Birth) Rules, 1974 — Rule 2

Citation : (2009) 7 SLR 348 : (2009) 1 UC 541

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : Dinesh Gahtori, for the Appellant; B.D. Upadhyay, for the Respondent

Final Decision : Allowed

Judgement

Sudhanshu Dhulia, J.—Heard Sri Dinesh Gahtori, Learned Counsel for the Petitioner and Sri B.D. Upadhyay, Learned Counsel for the Respondents.

2. This is a second round of litigation for the Petitioner. Initially the Petitioner had filed a writ petition before this Court being Writ Petition No. 134 of 2006 (S/S) where the Petitioner had stated that although he has retired as a class IV employee from Uttarakhand Power Corporation on 15-6-2004 (w.e.f. 30-11-2004), yet he is not being given pension, though he is entitled for pensionary benefits under the service Rules. The said writ petition was disposed of by the learned Single Judge vide judgment and order dated 15-2-2006 holding that pension is a right of the Petitioner and not a bounty and further directed the Respondents "to release pension and other retiral dues within two months after the receipt of the certified copy of this order". All the same, instead of complying with the aforesaid orders of this Court, the Respondent-Corporation has slapped an order on the Petitioner, dated 25-11-2005 according to which after retirement of the Petitioner, it came to the knowledge of the Corporation after examining the

service records that the initial date of birth recorded in the service book of the Petitioner was 1-7-1934 (as against 19-11-1944 claimed by the Petitioner) and since this was the initial date of birth recorded and any change in this date of birth was not permissible, the Petitioner should have retired in June, 1994 after reaching 60 years of age. Therefore, the date of superannuation of the Petitioner was 30-6-1994 and the pension of the Petitioner would be determined as per the last salary drawn on the said date by the Petitioner. It is this order dated 25-11-2005 which the Petitioner has challenged before this Court in the present writ petition.

3. Admittedly, the Petitioner was an employee of Uttarakhand Power Corporation Ltd. The Petitioner was initially appointed in the U.P. Electricity Board (as it was then) as Peon on 9-5-1962. The controversy in the present writ petition is with regard to the date of birth of the Petitioner. As per the Petitioner, his date of birth, which is recorded in his service book, is 19-11-1944 whereas according to the Power Corporation, the correct date of birth of the Petitioner was 1-7-1934 which was subsequently corrected as 19-11-1944 and, therefore, since there is no provision for correction in the service record after recording the date of birth of the employee, the correct date of birth of the Petitioner will be treated as 1-7-1934. The Respondent-Corporation has admitted that the Petitioner did work in the Corporation till 2004, but this was on a wrong assumption regarding his date of birth, which has now been corrected vide order dated 25-11-2005. The Corporation asserts that after the Petitioner retired in 2004, it came to the knowledge of the Corporation that the initial date of birth of the Petitioner was recorded as 1-7-1934 and since it was subsequently corrected to 19-11-2004 (sic, 1944), an order was passed on 25-11-2005 (post retirement of the Petitioner) wherein service benefits and the fixation of the pension, etc. of the Petitioner have to be now done treating his date of birth as 1-7-1934 and his date of retirement as 30-6-1994, instead of 30-11-2004.

4. The contention of the Petitioner is that he was illiterate the time of his entry in service and he had not done his High School, therefore, no High School certificate was produced and his date of birth was recorded initially as 1-7-1934 when he got his appointment, which was, in fact, his wrong date of birth. Although the Petitioner did not make any effort to get his date of birth corrected, it was, however, noted by his superior officers and on 3-11-1962, the then Superintending Engineer of Hydel Yamuna Circle, Dehradun wrote a letter to the Medical Officer In-Charge Civil Hospital, Dehradun as follows:

The following members of inferior staff who are working in this office, could not produce their horoscopes or any other proof in support of their age and dates of birth. Kindly examine them and intimate their age to the undersigned. The incumbents are being directed to present themselves before you in this connection.

1. Sri Ram Samujh

2. Sri Top Bahadur

3. Sri Gauri Datt

4. Sri Amar Singh

5. Sri Chandra Singh

5. Consequent to the said letter, the Petitioner was medically examined and as per the record, an opinion was given by the concerned Medical Officer that after the X-ray examination of the body of the Petitioner, his age seems to be 18 years. Consequently, in the service book of the Petitioner, 19-11-2004 (sic, 1944) was recorded as his date of birth.

6. The main thrust of the Petitioner is that he did not move any application for correction in his service record. It was done vide letter dated 3-11-1962 of the Superintending Engineer and consequent to it, after a medical examination, entries were made in the service record of the Petitioner. Indeed it is not a case where either the service book entries as regarding the date of birth have been changed by any effort made by the incumbent himself nor is it a case where said entries are changed when the incumbent is on the verge of his retirement. Therefore, it appears to be a perfectly bona fide case where initial "wrong" entries in the service book have been "corrected", that too promptly and on direction of the Superintending Engineer of the Electricity Board (as it was then).

7. The Learned Counsel for the Power Corporation argues that as per the Rules pertaining to the service of the Petitioner, entries once made in the service book regarding date of birth cannot be changed and no application for this purpose would be entertained. Reference in this regard has been made to the Government Order dated 28-5-1974, wherein the Rules pertaining to date of birth of State Government servants, namely, Uttar Pradesh Recruitment to Services (Determination of Date of Birth) Rules, 1974 (From hereinafter referred to as the Rules) have been adopted by the Uttar Pradesh State Electricity Board. Necessary provision of Rules is contained in Rule 2 which is being quoted below:

2. Determination of correct date of birth or age. - 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 aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his service book 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 relating of 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 of age in any circumstances whatsoever.

8. These Rules have been framed under the Proviso to Article 309 of the Constitution of India.

9. The Learned Counsel for the Corporation has not been able to satisfy this Court as to how the Rules would be applicable in the case of the Corporation and, in fact, at the relevant point of time it was not even a Corporation but called U.P. Electricity Board. The Learned Counsel for the Respondent has stated that the said Rules were adopted by a Government Order dated 28-5-1974. But, since at the relevant point of time, it was a Board these Rules have to be adopted by the Board of Directors. There is no document on record which shows that these Rules have been adopted by the Board. However, even assuming for the sake of argument that the Rules are applicable in the case of the Petitioner, the next argument of the Respondent is that these Rules although framed in the year 1974 and adopted in the same year will also have a retrospective effect. As the matter pertains to 1962, when the Petitioner had entered service.

10. The Learned Counsel for the Petitioner, on the other hand, asserts that the Petitioner had joined service in the year 1962 and immediately thereafter his date of birth was corrected and new entries were made in the service record and all this happened prior to the year 1974 and, therefore, these Rules, in any case, will not have any retrospective effect. An examination of the said Rules clearly shows that no retrospective effect has been given to these Rules. It is true that the Rules framed under Proviso to Article 309 of the Constitution of India can have retrospective effect as these Rules are legislative in nature. But to make it retrospective such intent must be shown in the Rules. There is no such provision in the Rules which shows that these Rules were made to be retrospective in effect. Therefore, these Rules cannot be made applicable in the present case. Be that as it may, even if the retrospectivity of the Rules is presumed, yet, in the present case it does not help the Respondents inasmuch as the Rules simply state that the date of birth of the Government servant as recorded in his High School or equivalent examination would be his date of birth for all purposes at the time of his entry into Government service and in case, where the Government servant has not passed such an examination or has passed such an examination after joining the service, then the date of birth or the age recorded in his service book at the time of his entry in service shall be deemed to be his correct date of birth. It further says that no application or representation shall be entertained for correction of such date of birth in any circumstances whatsoever.

11. Now, let us examine the facts of the present case. Admittedly, the Petitioner joined the service on 9-5-1962 and at that time the date of birth recorded in the service book of the Petitioner was 1-7-1934. Immediately thereafter, the Superintendent Engineer of Hydrel Yamuna Circle, Dehradun writes a letter bearing No. 3932 HYC/20B-35 Misc. dated 3-11-1962 to the Medical Officer In-Charge Civil Hospital, Dehradun requesting him to examine the Petitioner for determination of his date of birth. This letter, the Petitioner has annexed as Annexure 8 to the writ petition. The veracity of this letter has not been challenged or doubted by the Respondents. The Respondent's reply to this averment of the Petitioner is that the date of birth could not have been corrected in view of Rule 2 of the Rules (as referred above).

12. It has been seen that in compliance with the aforesaid letter of the Superintending Engineer, the Petitioner was examined by the Medical Officer In-Charge Civil Hospital, Dehradun and it has been reported that on examination of the Petitioner including X-ray examination on him on 19-11-1962, the Petitioner appears to be of 18 years of age. This report of Medical Officer is also annexed by the Petitioner as Annexure No. 9 to the writ petition and again the veracity of this report has not been doubted by the Respondent. Consequently thereafter, the date of birth of the Petitioner was corrected and instead of 1-7-1934, the new date of birth i.e. 19-11-1944 was recorded.

13. There is one aspect in this case which has clearly impressed this Court while framing an opinion in favour of the Petitioner and i.e. the promptness with which the service book entries were corrected. It is to be noted that the Petitioner entered in service on 9-5-1962. The Petitioner was illiterate at the time of his entry in service and for whatever reasons, the date of (birth of the) Petitioner was shown at that time as 28 years (Date of birth being recorded as 1-7-1934). Immediately after a few months i.e. in November, 1962, the Superintending Engineer writes to the Medical Officer that since there is neither a High School certificate nor any Horoscope to determine the age of the Petitioner, it is best that he is examined medically so that the correct age of the Petitioner can be arrived at. The Petitioner was immediately medically examined and based on this medical examination his service records were corrected. This is not one of the cases, which are not uncommon before the Courts, where corrections are made in the service book at the very far end of service, when the incumbent is about to reach the date of his superannuation. In this case, the correction was made barely a few months after the incumbent had entered in service, in fact, in the same year in which he had got appointment. The circumstances and the chain of events leading to this correction of date of birth also reveal that the facts are genuine and there is no reason to doubt the bona fide of the Petitioner.

14. The Apex Court had an occasion to examine this aspect where reliance had to be placed between the entries made in the service record and the medical examination, the Apex Court relied heavily on the medical examination and said "we see no reason to ignore this scientific fixation of age when we have records which are flagrantly conflicting" (*Jiwan Kishore Vs. Delhi Transport Corporation and Another*,).

15. In *U.P. State Road Transport Corporation v. U.P. Public Services Tribunal (V) Lucknow and Anr.* [(1998) 3 UPLBEC 2115], a learned Single Judge of Allahabad High Court relying upon the aforesaid case of the SC has also favoured medical examination report when there is a discrepancy on the documents relating to the date of birth of the incumbent.

16. The Learned Counsel for the corporation finally objected on a technicality, which is apparently not without reason. He submits that in case the correct date of birth of the Petitioner is taken as 19-11-1944, then at the time of his entry in service, the Petitioner was less than 18 years of age and, hence, he was not

eligible for appointment. This Court can see this point made by the Respondent-Corporation but at this stage when the Petitioner has retired and seeking his retirement benefits, this Court is not inclined to go into this aspect, particularly in this light of the fact that the Petitioner cuts short of the minimum age of recruitment by barely a few months. This aspect can also be seen in the light of the fact that the age of the Petitioner was determined after all by X-ray examination on his body. It is well settled principle of law that in these examinations, a difference of a year or so can always be there and this benefit, this Court would give to the Petitioner and, therefore, this Court is not inclined to accept the argument of the Respondent-Corporation. Moreover, in this case where both law as well as equity are so heavily in favour of the Petitioner, this Court will not be impressed by the theory of a technical loophole as presented by the Respondent-Corporation.

17. Hence, the order dated 25-11-2005 which has been impugned in the present writ petition is liable to be quashed.

18. The order dated 25-11-2005 is hereby quashed.

19. It is further directed that the Respondent-Corporation will release the pension of the Petitioner including the entire arrears and all other service benefits to which the Petitioner is entitled within a period of one month from the production of certified copy of this order and the Petitioner shall be treated to be have retired on 30-11-2004 and the pensionary benefits would be granted taking the said date in mind.

20. Writ petition is allowed. No order as to costs.