(1999) 09 PAT CK 0116

In the Patna High Court

Case No : C.W.J.C. No. 9782 of 1998

Devendra Kumar Mishra APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 15-09-1999

Acts Referred:

Citation : (1999) 3 PLJR 700

Hon'ble Judges : R.M. Prasad, J

Bench : Single Bench

Advocate : Teg Bahadur Singh and Ram Hirday Prasad, for the Appellant; B.N. Singh, for the Respondent

Final Decision : Allowed

Judgement

R.M. Prasad, J.—Heard Learned Counsel for the parties at length for final disposal of the writ application itself. In this writ petition, petitioner is aggrieved by the order dated 29.6.1998, contained in Annexure-1, whereby he was superannuated with effect from 1.7.1998 on the basis of entry made in his service book in which against the column ''date of birth'' only year 1940 was mentioned.

2. The petitioner was initially appointed as Matriculate Constable on 11.1.1959 in the district of Bhagalpur. He passed the qualifying examination of writer constable in the year 1966 and P.T.C. examination in the year 1970. He was promoted to the rank of A.S.I. in the year 1972 and in the rank of Sub-Inspector of Police in the year 1983. It is stated that his service record all through was good and in token of it he was given 80-90 awards. It is stated that about 80 constables were appointed with the petitioner and the service records were written and filled up by the writer constable and A.S.I. in the Police line. The petitioner simply signed the service book in good faith believing that it has been correctly written and filled up. On 30th June, 1998 the petitioner vide impugned order was informed that 1940 is mentioned his date of birth and that he would be completing his service tenure on 30th June, 1998 and was retired from service on 1st July, 1998. The petitioner on receipt of the said communication

filed representation in which he claimed that in view of the principle decided by of this Court regarding fixation of date of birth in such circumstances in C.W.J.C. No. 2990 of 1993 he has been made to lose six months of service more in force which is adversely affecting him financially besides pension, gratuity provident fund benefits and thus requested for sympathetic consideration. It was also alleged by him that the column in the service book remained blank and some time afterwards some body has entered 1940 in the column of date of birth. A true copy of the said representation has been annexed as Annexure-2. However, he was declined continuance beyond 30th June, 1998, which resulted in filing of the present application. The petitioner in the writ petition has also claimed his continuance till completion of 60 years of his age on the basis of agreement between the representative of the employees working in the State and Government of Bihar, contained in Annexure-4 in which one of the clauses is that fixation of service condition will be as in the Central appointment. According to the petitioner retirement age of Central Government employees is 60 year the implementation of which to the employees of the Bihar Government is being delayed and the petitioner has been made to retire prematurely.

3. Counter affidavit has been filed on behalf of A.I.G., Police (Welfare), Bihar, Patna (Respondent no. 3) in which in support of the order, contained in Annexure-1 reliance has been placed at Rule 97(1) of the Bihar Financial Rules, hereinafter referred to as ''the Rules''. The said Rule provides that "........If a Government Servant is unable to state his exact date of birth but can state the year, or year and month of birth, 1st July or the 16th of the month respectively may be treated as the date of his birth." It is, thus, contended that since in the date of birth column of service book of the petitioner, his date of birth is recorded as 1940 his retirement with effect from 30.6.1998 is valid and in accordance with Rules. As regards the agreement it is stated that it has no legal sanction unless the Government order is issued in this regard. According to the Respondent, there is no such Government order which allow the Government employee to continue in Government service till completion of 60 years of his age.

4. this Court finds force in the said contention of the Respondent. Mere agreement did not create any right in the matter of enhancement of age of retirement of a Government Servant unless the Rule in regard to it is suitably amended. It is not disputed that the Rule applicable to the State Government employees provides 58 years as the age of superannuation, and as such the petitioner can very well be retired on completion of 58 years of his age.

5. The petitioner, however, has challenged the validity of Rule 97(1) of the Rules by filing supplementary application. Learned Counsel for the petitioner contended that Rule 97(1) is unreasonable and irrational inasmuch as merely because Government Servant is unable to state his exact date of birth and states only the year he under the said rule is made to retire on 1st July and is arbitrarily deprived of the remaining six months of the same year for which there is no rational. this Court finds force in the said submission of the Learned Counsel for

the petitioner.

6. Learned Counsel for the State has failed to point out any rational in giving benefit of only half of the year which is mentioned against the column of the date of birth in the service book. It is by now well settled that benefit of uncertainty must go in favour of the weaker side or the person who is going to suffer. In this regard reference can be made to the decision of Allahabad High Court in the case of Ahmad Hussain vs. The Managing Director, U.P. State Road Transport Corporation, Lucknow & ors., reported in 1991 LAB I.C. 2078 and to a decision of Rajasthan High Court in the case of Srinath Raj vs. Rajasthan State Electricity Board & ors., reported in 1988 (6) S.L.R. 758. In the said cases, the Medical Board/Medical Jurist determined the age between 50 to 55 years and 40 to 50 years respectively. The Court held that in such doubtful cases, the benefit should always go to weaker side or who is going to suffer, and that when the Medical Board had assessed the age it is not proper for the Respondents to treat the upper limit in order to redetermine the date of birth. this Court relying upon the said decision in the case of Atmanand Singh Vs. Bihar State Electricity Board and Others, held that benefit of such uncertainty must go to the petitioner. Here in the instant case also only year of birth has been mentioned against the column of date of birth and as such there is no certainty that the petitioner was born before 1st July, 1940 and not thereafter.

7. Under such circumstances, in my opinion, on the principles laid down in the aforementioned cases, the benefit of such uncertainty must go in favour of the person who is going to suffer. In such case, if date of birth can be treated as 30th June, according to the rule there can''t be any justification for not giving the benefit of the remaining part of the year i.e. treating the last date of the year i.e. 31st December, as his date of birth, which only appears to be rational while fixing the date of birth of a person where only year has been mentioned against the column of date of birth. In the case of entry shown as year and month only the similar principle is to be applied which would prevent it from being irrational. If a person can get benefit of 15 days of the months there appears to be no justification to deprive him of the benefit of the remaining part of the month i.e. till last date of the month. Accordingly, this Court is of the view that Rule 97(1) of the Bihar Financial Rules is wholly irrational and cannot be sustained. The writ petition is, thus, allowed. The impugned order, contained in Annexure-1 is quashed and the Respondents are directed to recompute the entire benefits/ including the retiral benefits of the petitioner by treating his date of birth as 31st December, 1940. However, in the facts and circumstances, there shall be no order as to costs.

