

(2009) 10 JH CK 0012
In the Jharkhand High Court

Employers in relation to the Management of Kustore Colliery	APPELLANT
Vs	
Their Workmen being represented by The Joint Secretary, Janta Shramik Sangh	RESPONDENT

Date of Decision : 14-10-2009

Acts Referred:

Citation : (2009) 10 JH CK 0012

Hon'ble Judges : Gyan Sudha Misra, C.J;D.K. Sinha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This appeal has been preferred by the appellant- Management known as Employers in relation to the management of Kustore Colliery of Bharat Coking Coal Ltd. (BCCL in short) against the order dated 7.12.2005 passed in W.P.(L) No. 5401 of 2005, by which the learned Single Judge had been pleased to dismiss the writ petition and thus refused to quash and set aside the award dated 17.3.2005, whereby the Central Government Industrial Tribunal, Dhanbad had passed an order in favour of the respondent-workman Md. Gulam Rabbani holding therein that the date of birth of the respondent was correctly recorded in Form B register, which was the register prepared at the time of entry into the service of erstwhile colliery, which later became a part of the BCCL on account of Coal Nationalization Act.

2. As a consequence of this award, the respondent- employee would have enjoyed four more years of service as his date of superannuation was 1st July, 2009 but inspite of the award in favour of the respondent-employee, he could not enjoy the fruits of the award as the appellant-Management of the employers of Kustore Colliery, Dhanbad assailed the award passed by the Central Government Industrial Tribunal, Dhanbad by filing a writ petition before the learned Single Judge bearing W.P.(L)No. 5401 of 2005 and as already stated, the learned Single Judge was pleased to dismiss the writ petition vide order dated 7.12.2005. However, the appellant-Management preferred an appeal being LPA No. 53 of

2006. But the said appeal was also dismissed vide order dated 28.6.2006 on the ground of limitation as also on the ground that the learned Judges of the Division Bench did not find any ground to interfere with the order passed by the learned Single Judge. The appellant-Management thereafter did not acquiesce with this order and had filed a SLP before the Supreme Court, which gave rise to Civil Appeal No. 5089 of 2008. The said appeal was finally disposed of by order dated August 18, 2008, whereby the learned Judges of the Apex Court was pleased to hold that the disposal of the appeal on the ground of delay was not justified and the delay was ordered to be condoned and the appeal was ordered to be heard on merit. This is how, this appeal has been listed for hearing and has come up before us.

3. Mr. A.K. Mehta, learned Counsel for the appellant-Management, has assailed the award passed by the Tribunal as also the order passed by the learned Single Judge on the ground that the respondent-workman having submitted himself to the jurisdiction of the Medical Board, where he was referred to, for assessment of his age, so as to infer whether his date of birth was correctly recorded as 1949 in the Form B register or his date of birth which was subsequently inserted by the Management as 1945 was correct or not, cannot be permitted to contend that he should not have been referred to the Medical Board for assessment of his age as his date of birth was correctly recorded.

4. At this stage, a little factual background is necessary to be related, which is to the effect that the respondent-workman at the time of his entry into the service in the year 1969 had furnished his date of birth as 1949, which was duly accepted by the erstwhile Colliery(which subsequently got merged with the BCCL after Nationalization of Collieries) and the same was also incorporated in the Form B register. However, after seven years of his service, a transfer order was passed shifting him from Lodna Colliery to Kustore Colliery and at this stage the date of birth of the respondent-workman also was recorded by the Management, showing his date of birth as 1945. Since the Management had recorded the respondent's date of birth as 1945, the Management raised a dispute after seven years of his entry into service that there was a discrepancy in the date of birth of the respondent-employee as his date of birth in the Form B register which was prepared at the time of entry into his service was 1949 but at the time of order of transfer, his date of birth was recorded as 1945 and, therefore, the respondent-workman was referred to the Medical Board for his physical verification and assessment of his age. The respondent-employee is admittedly not even a matriculate, although he had been treated to be a literate person, submitted to the action of the Management and appeared before the Medical Board and the Medical Board assessed his age and recorded that his date of birth should be 1945 and not 1949, which was recorded in the Form-B register at the time of his entry into the service.

5. In view of this, the respondent-workman although was permitted to discharge his duty as per his date of birth recorded as 1945, he was restrained from

discharging duties after the date when he reached the age of superannuation as per his date of birth assessed by the Medical Board, which was 1945.

6. The respondent thereafter raised an industrial dispute and a reference was made to the Central Government Industrial Tribunal for adjudication of the terms of reference which was to the effect as to whether the respondent's date of birth was rightly recorded as 1949 and whether his superannuation could be counted by taking his birth to be 1945. The Tribunal after hearing the Management as also the workman, was finally pleased to hold that the respondent-workman's date of birth as recorded in the form B register at the time of his entry into the service was correct and had recorded a finding that the Medical Board was not justified in re-assessing his age contrary to the date of birth which was recorded in the form B register at the time of his entry into the service.

As already stated, this award was challenged by the Management before the learned Single Judge and finally after travelling upto the Supreme Court, the matter came up before this Division Bench for consideration.

7. Learned Counsel for the appellant-Management, therefore, submitted, as already stated hereinbefore, that the respondent having submitted to the action of the Management and having submitted to the examination by the Medical Board where his date of birth was assessed as 1945, should not be allowed to turn around and submit that his date of birth, which was recorded at the time of his entry into service in Form-B register alone, should be relied upon by the Management.

In support of his argument, learned Counsel for the appellant has also relied upon two judgments of the Supreme Court reported in *Bharat Coking Coal Ltd. Vs. Presiding Officer and Another*, and *Seema Ghosh Vs. Tata Iron and Steel Company*, and submitted that once an employee submitted himself to the medical check up by the Medical Board, he cannot be permitted to urge that he was wrongly referred to the Medical Board for examination.

8. On deliberation of what has been argued by the learned Counsel, in the light of the judgments referred to hereinbefore, we find absolutely no grain of substance in his argument, as it is well acknowledged and well settled that the ratio of any decision has to be applied in the facts and circumstance of a particular case. In the instant matter, it cannot be over looked that the employee had duly given his date of birth as 1949 and that date of birth was inserted way back in 1969. The Management accepted his date of birth as 1949 and never raised any question about the date of birth and after seven years of his service, when an order of transfer was passed against him, it is the Management who changed the date of birth of the respondent and recorded his date of birth as 1945. The discrepancy in regard to the date of birth of the respondent - workman, therefore, emerges not on the account of discrepancy created by the respondent-employee, but the same was created by the Management, meaning thereby that it is the Management, which changed the date of birth of the

respondent and wrote an incorrect date of birth of the respondent in the transfer order. In our view, it was the duty of the Management to insert the correct date of birth in the transfer order of the workman as per his date of birth recorded in the Form-B register. If a date of birth in the transfer order was inserted other than what was recorded in the service book, the lapse and discrepancy created in recording the date of birth of the employee will have to be attributed to the Management and not to the respondent-workman. The cases relied upon by the learned Counsel are the cases where the discrepancy in the date of birth was created at the instance of the employee due to which they were subjected to medical board and hence were restrained from challenging the order, which issue is an altogether different matter, and it is fit to be reiterated that the discrepancy in regard to the date of birth of the respondent did not emerge on account of any lapse on the part, of the respondent but it was clearly a lapse on the part of the Management

9. At this juncture, we consider it appropriate to observe that whenever an employee approaches a court of law for change of his date of birth, he is thoroughly subjected to a meticulous scrutiny as to why he wishes to change his date of birth after long years of service. In our view, the Management also is required to be subjected to the same yardstick, meaning thereby that if the Management had any doubt regarding the workman's date of birth then it is certainly required to send him to medical board within a reasonable time and even if that reasonable time is stretched to an unusually long number of years, like seven years in the instant matter, then the Court has to look into the circumstance whether the dispute in regard to assessment of the date of birth emerges on account of lapse on the part of the employee or the Management.

10. In the instant matter, it is crystal clear that it is the Management, which had created a situation by recording a wrong date of birth in the transfer order of the respondent contrary to the entry in the service book made at the time of entry into the service and then came up with the plea that discrepancy was found in the date of birth of the respondent due to which he was sent for medical examination. The discrepancy, as already stated, in the instant matter was a situation created by the Management and not by the respondent and, therefore, the Management was clearly unjustified in sending the respondent to the Medical Board for re-assessment of his age.

11. The Tribunal, therefore, in our view was absolutely justified in holding that the respondent-workman's date of birth recorded at the time of his entry into the service, which was 1949, was absolutely correct and the Medical Board was not justified in permitting the Management to change his date of birth.

12. However, long time has elapsed and the respondent-workman in the process has already attained the age of superannuation on 1st July, 2009 and hence even if his date of birth is taken to be 1949, he cannot avail the benefit of further service. The question therefore arises as to what relief can be granted to the respondent in the given situation since the respondent-employee could not

discharge his duties for four years on account of his illegal superannuation as he was illegally restrained from discharging duty during these period. The question therefore emerges as to whether he can be held entitled for arrears of salary of adequate compensation is fit to be granted to him, in view of the fact that he could not be permitted to discharge duties on account of his illegal superannuation.

13. Learned Counsel for the appellant submitted that the respondent-workmen although has succeeded in regard to his actual date of birth, he cannot cannot be permitted to claim entire back wages for the period during which he could have discharged duties but for his wrongful superannuation on account of recording of his incorrect date of birth by the management.

14. Learned Counsel for the appellant has relied upon a decision of the Supreme Court rendered in the case of Chandu Lal v. The Management of Pan American World Airways Inc. reported in 1985 STPL 12031 SC in order to contend that if it is not possible to reinstate an employee on account of his superannuation, he cannot be held entitled to the entire back wages without discharging any duty and at the most it would be a case for payment of adequate compensation. Thus, learned Counsel for the appellant accepts the position that if the workman is not able to enjoy the fruits of the award on account of his superannuation, then it would be a fit case for grant of compensation to him.

15. In the instant matter, we have noticed that the Industrial Tribunal had passed an award in favour of the respondent workman granting him the relief of reinstatement, but he could not enjoy the benefit of the award on account of the challenge to the award at the instance of the management by filing a writ petition, which was dismissed by the learned Single Judge, and further by filing an appeal against the order of the learned Single Judge. By the time if the appeal of the management was dismissed by this Court, observing that the respondent workman would not be eligible to avail the benefit of the award on account of his superannuation, a duty is surely cast upon this Court in the interest of justice to ensure that the respondent workman is not deprived of the benefit of the award merely because he has superannuated. Therefore, two options are left before this Court - either to grant him back wages for the entire period during which he was wrongfully deprived from discharging duties or to grant him adequate compensation.

16. Since there is no material before this Court to the effect that the respondent workman was not gainfully employed during the period when he was wrongfully denied the benefit of the service, it would not be appropriate to grant him the entire back wages for four years period which could have been availed by the respondent workman in case he had not been wrongfully superannuated. Hence, we are of the view that the ends of justice would be met, if the respondent workman is paid 50% of the back wages for the period during which he was out of service in lieu of the benefit of the award which was passed in favour of the respondent workman by the Industrial Tribunal and has been upheld upto this

Court. Thus, 50% of the back wages for the period during which the respondent workman was out of service, i.e. from March, 2005 to February, 2009, which would have accrued had he not been wrongfully superannuated, will be paid to him.

17. The appeal is dismissed subject to the modification of the award as indicated here in before.