
(2009) 04 PAT CK 0102
In the Patna High Court
Case No : CWJC No. 11890 of 2005

Ganesh Sinha

APPELLANT

Vs

The B.R.A. Bihar University, Muzaffarpur

RESPONDENT

Date of Decision : 22-04-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 11
Evidence Act, 1872 — Section 115
Majority Act, 1875 — Section 3

Citation : (2009) 3 PLJR 359

Hon'ble Judges : Mihir Kr. Jha, J

Bench : Single Bench

Advocate : Chakradhari Sharan Singh, for the Appellant; Ajay Bihari Sinha, for the Respondent

Judgement

Mihir Kr. Jha, J.—In this writ application, the petitioner, working as an Accountant of Ram Dayalu Singh College, Muzaffarpur, a constituent college under B.R.A. Bihar University, Muzaffarpur (hereinafter to be referred to as "the University"), has assailed the order passed by the Registrar of the University dated 1st September, 2005 for superannuating him from service with effect from 18th of August, 2004 on the basis that he had already completed 44 years of service in the college. Learned counsel for the petitioner, while assailing the impugned order, submits that the appointment of the petitioner was made on a Class-4 post in Ram Dayalu Singh College (hereinafter to be referred to as the "College") on 18.8.1960 at the age of 16 years 5 months and 22 days, his date of Birth being 10th February, 1944. Learned counsel for the petitioner had also explained that the petitioner had acquired the qualification of Intermediate in Commerce in the year 1966 and thereafter he was promoted by the College on the post of Clerk on 1.10.1966 and as such, when the College become a constituent unit of the University in the year 1976, his services were absorbed as a Class-III non-teaching employee against the post of Clerk. Learned counsel has further

submitted that it was the University which had also promoted the petitioner on the post of Accountant on 14.2.1996 and as such, the University could not have superannuated the petitioner without completing 62 years of age in terms of Section 67 of the Bihar State Universities Act hereinafter referred to as the Act. He has, therefore, submitted that the petitioner was entitled to continue in service till February, 2006 and as such, the impugned order superannuating him with effect from 18th August, 2004 on the basis of completion of 44 years of service was in teeth of the provisions u/s 67 of the Act.

2. Learned counsel for the University on the other hand has contended that the University had found that the petitioner was initially engaged as a Peon on 2.2.1957 in the College against a leave vacancy of one Sri Nand Kishore Pandey and in fact, he had worked from 2.2.1957 to 3.3.1960 and thereafter when his service was terminated w.e.f. 4.3.1960 he came to be reappointed as a Peon only of the fourteen days, w.e.f. 18.8.1960. He would, therefore, submit that the very basis for the petitioner to claim that his date of birth was 10th February, 1944 and such date of birth was declared at the time of his initial appointment was itself shrouded in mystery. Counsel for the University had, therefore, submitted that if the date of birth of the petitioner is accepted to be 10th of February, 1944, he would be deemed to have been appointed in the College at the age of less than 13 years as his first appointment in the college is said to be made in the College on 2.2.1957. Counsel for the University in this context had submitted that as the petitioner had passed all his examination including the Matriculation after his entry in service in the College on 2.2.1957, they could not be treated to be an authentic proof of his date of birth and in that view of the matter, the decision of the University in the light of the Government decision to allow a person to have a maximum tenure of 44 years treating his age on the date of appointment to be 18 years, cannot be said to be irrational. Counsel for the University in this context had referred to and relied on a Full Bench judgment of this Court in the case of Ragjawa Narayan Mishra Vs. Chief Executive Officer, Bihar Rajya Khadi Gramoudyog Board and Others, as also a Division Bench judgment of this Court in the case of Baidyanath Prasad Sinha vs. The State of Bihar & Ors. reported in 1983 Labour & Industrial Cases 162.

3. This Court would find that the very basis for the petitioner to claim that his date of birth was recorded in the service book as 10th February, 1944 which could have entitled him the protection of Section 67 of the Act itself suffers from an apparent fallacy inasmuch as that there is nothing on the record to show that at the time of appointment of the petitioner in the College in the year 1957, he had declared his date of birth as 10th of February, 1954. The photocopy of the extracts of his service book which was produced by the petitioner himself to support his date of birth of being 10th February, 1944, and has been kept on records of this case, would go to show that the service book of the petitioner in fact was opened on 18.9.1997 i.e. almost after 40 years of his entry in service of the College. Obviously, this service book, therefore, cannot be accepted as authentic proof of his date of birth. It is not denied by the petitioner that

appointment in the college was made on 2.2.1957 which would make him to be less than 13 years of age at the time of his first appointment. It would also mean that the petitioner was a minor and yet was found eligible to be employed in an affiliated college. There can be no quarrel that the appointment of a person is a contract between him and the employer and a minor cannot have the capacity of enter into such a contract. A 13 year old boy in fact could not have been appointed even in an affiliated college, and as such, it is difficult to accept that the age of the petitioner was 13 years on the date of his appointment.

4. It has to be noted that the petitioner on his own showing had passed his matriculation examination while continuing in the service of the College which is admitted by him in paragraph No. 6 of the writ application. Thus, the petitioner cannot also rely on the date of birth on his matriculation certificate which was neither the basis of his entry in the College nor was ever acted upon at the time of his joining in the year, 1957. The moment this fact remains uncontroverted that the petitioner in the year 1957 was not even a matriculate, his subsequent passing of matriculation examination while continuing in College at least could not be made the basis for computing his age specially when the service book, noting his date of birth on the basis of matriculation certificate, was opened in the year 1997 i.e. after 40 years of his entry in service.

5. Obviously, the petitioner at the time of entry in service of the College on 2.2.1957 had taken advantage of his own declaration of being a major i.e. 18 years or even the date on which he was reappointed i.e. on 18.8.1960 when he in view of aged declared in matriculation certificate was either 13 years or 16 years of age respectively. In that view of the matter, the ratio, laid down by the Division Bench of this Court in the case of Baidyanath Prasad Sinha (supra) would squarely apply to the facts wherein the Division Bench had held that a person having obtained an advantage by declaration of his higher age which was really not available at the time of his initial appointment, he could not be given further benefit for continuing in service on the basis of date of birth mentioned in matriculation certificate, when the same was not declared by him at the time of entry in service.

6. The petitioner thus is also bound by his own conduct of entering into contract of a service representing himself to be a major as on 2.2.1957 and thus he cannot be permitted to take a contrary plea of a different date of birth to the one which he had declared at the time of his first appointment in the College. That is precisely the concept of estoppel by conduct u/s 115 of the Indian Evidence Act which lays down that:--

"When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative, shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

7. The Privy Council in the case of Durga Prasad Singh vs. Tata Iron and Steel Co. Ltd. reported in AIR 1918 P.C. 125 had explained the estoppel by conduct to mean that a party is prevented from relying on true facts on account of his conduct or language. Judged in this background when there is nothing to show that even on 2.2.1957 when the petitioner was first appointed in the College, he had declared his date of birth as 10.2.1944 and yet he was appointed he has to be held as a major having at least 18 years of age on this day. Such problems in fact have been faced by almost all the organizations, in this State, the Universities being no exception. The State Government in order meet such situation had issued Circular with regard to maximum length of service by treating the minimum age of employee to be 18 years on the date of appointment. When such decision of the State Government was assailed before this court a Full Bench of this Court in the case of Ragiawa Narayan Mishra (supra) had laid down the law in relation to a similar 1998 circular of State Government confining the continuance of service of a Government servant for a period of 40 years, treating entry at the age of 18 years and continuance up to the age of 58 years. The following statement of law laid down in the Full Bench judgment in fact would also cover also the case of the petitioner:--

"13. The plain perusal of the aforesaid statutory provision would, undoubtedly, go to suggest that the Government by virtue of an amendment by addition Rule 5 in Appendix-5 in the Bihar Pension Rules which came into effect, on 23.8.1950, long before the petitioners came to be admitted in the service of the Board and it is very clear there from that the qualifying age of the Government servants for consideration of the pensionary benefits came to be raised from 16 years to 18 in the Government service. Otherwise, also, the aforesaid, circular of 1998 has a purpose and policy behind it. It is clarificatory. There is no dispute about the fact that the service between the employer and the employees is a matter of contract. Once, a person is validly entered into the service of the Government he is offered the contractual and statutory protection and the initial entry in the service always is the outcome of the contractual relationship. Who would be competent to contract? It has been provided in Section 11 of the Indian Contract Act, 1872, as to who is the competent to contract. Section 11 of the said Act reads herein as under:--

Who are competent to contract.-- Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

14. It is very clear and evident from the said provision that in, so far as, the competence for a valid contract in terms of the age is concerned, one has to attain the age of majority and majority obviously would be according to law. The provision of Section 3 of the Majority Act. 1875, clearly provides as to what is the age of a person domiciled in India. It is in this context, it would be necessary and profitable to refer the provision of Section 3 of the Majority Act, 1875 which is

reproduced as hereunder:--

"3. Age of Majority of persons domiciled in India.--(1) Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.

(2) In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day."

15. It leaves no any manner of doubt that in this country the age of majority of a person, domiciled in India, has been on his attaining the age of eighteen years and not before. Of course, it would be not very material at this stage to consider that in computing the age of a person, the day on which he borns is to be included as a whole day.

16. Be that as it may, one thing is certain that admittedly both the petitioners when they entered into the contract with the respondent-Board they had not attained the age of majority. Apart from its legal impact and effect, the ramifications and end result of the status of a contract in terms of the service relationship, a person could be said to have entered into a valid service, only, when he has attained the age of majority. So the minimum age prescribed at the entry point in the Government service has been 18 years. The maximum age prescribed for the exit point is 58 years. In other words, the total length of period of Government service in any case for pensionary benefits would not exceed 40 years. It is in this context, the Government Circular mentioned hereinabove needs to be considered. When there is a clear Rule provision anything contrary to or inconsistent with or incompatible to it, any circular or resolution or order, will not have any legal and valid effect to abridge the right enshrined in the Rule provision. Even if the said circular of 1998 as relied upon by the petitioners is considered to be beneficial to them then, also, it cannot be read at this juncture with the existing statutory provision incorporated in the Bihar Pension Rules, as well as, the Bihar Service Code. Therefore, from that point of view also the petitioners cannot be allowed to contend that they have right to continue even beyond the age of 58 years though provided in Rule 73 of the Bihar Service Code which prescribes the superannuation age of 58 years.

17. Thirdly, it is settled and established proposition of law and principles of jurisprudence that a person who takes undue advantage by one or other reasons at the entry point in the service cannot be allowed to urge that he be given higher benefit and if it is urged then, clearly, it goes to show that something wrong or irregular has been done, at the entry point, in service. So the settled principle, also, creates a very strong impediment in getting the relief from this Court which is exercising extraordinary, prerogative, equitable and discretionary writ jurisdiction by invocation of the provision of Article 226 of the Constitution of India...."

8. If case of the petitioner is examined in the light of aforesaid law laid down by

the Full Bench of this Court, Section 67 of the Act will be of no avail. It is true that u/s 67 of the Act, there is a provision that the date of retirement of a non-teaching employee who is in the service of the University prior to the commencement of the Act, shall be the date on which he would attain the age of 62 years. The question still would be as to what would be the basis for the petitioner to contend that as a non-teaching employee when he had entered in service of the College in the year 1957 he was aged about 13 years and yet got employed in the College. There being no proof of this fact from any records and the service book produced and relied by the petitioner being of the year 1997, this Court would find it very difficult to accept the submission of the petitioner that his date of birth should be accepted as 10.2.1944, for being continued in service till attaining of his age of 62 years i.e. upto February, 2006.

9. This Court, therefore, following the ratio of the Full Bench judgment of this Court in the case of Ragiawa Narayan Mishra (*supra*) must hold that the decision of the University in the impugned order does not suffer from any infirmity factual or legal, and as such the impugned order superannuating the petitioner on completing 44 years of his service in College with effect from 18th of August, 2004 cannot be interfered.

10. As a matter of fact, the University has been rather kind and considerate to the petitioner because admittedly the petitioner had been appointed in the College for the first time on 2.2.1957 and if the 44 years period is reckoned from that date, the petitioner's retirement could have been made effective with effect from February, 2001. The petitioner has in fact got benefited of a period of three years service even for the purposes of counting of his length of service for calculation of his pension and post retirement benefit and should be thankful to his stars because had the University acted upon the entries made in the service book, the petitioner could have been in fact made to retire with effect from February, 2001.

11. One thing, however, should be clarified here that even though, the length of service for the purposes of calculating of pension and post retirement benefit of the petitioner would be up to 18th of August, 2004 as per the impugned order, the petitioner having already worked till 1st September, 2005, the date of issuance of the impugned order, he would be entitled for payment of salary and allowances till 1.9.2005 as he had admittedly worked on the post of Accountant in the College till that date when he was sought to be removed from service by way of his superannuation.

12. Subject to the aforementioned clarification, this Court would find no reason to interfere with impugned order and consequently, the writ application of the petitioner, being devoid of any merit, must be and is hereby dismissed. There would be however no order as to cost.