

(1989) 03 SHI CK 0001

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 298 of 1974

Kedar Ishwar

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 28-03-1989

Acts Referred:

Administrative Tribunals Act, 1985 — Section 2
Constitution of India, 1950 — Article 229, 233, 234, 235, 311

Citation : (1990) 1 ShimLC 269

Hon'ble Judges : V.K. Mehrotra, Acting C.J.; Bhawani Singh, J

Bench : Division Bench

Advocate : K.D. Sood, for the Appellant; L.S. Panta, Dy. A.G. and M.L. Chauhan, Asstt. A.G., for the Respondent

Judgement

V.K. Mehrotra, A.C.J.

1. Petitioner Shri Kedar Ishwar was appointed as Senior Subordinate Judge-cum-Asstt. Sessions Judge at Bilaspur in September 1961. On April 16, 1969, he was promoted to the Higher Judicial Service and was posted as District & Sessions Judge, Mahasu. In April 1971 he was appointed as Registrar of this Court and continued to hold the post till the afternoon of November 30, 1974, when he was retired through Notification of that date as having attained the age of superannuation. The Notification mentioned that the Petitioner attained the age of superannuation on November 3, 1974.

2. According to the Petitioner, the date of his birth was 19th of Kartik 1974 B. K. He was born in Mandi town and a report in that regard was made to the Mandi Municipal Committee on 17th Manghar, 1974 B. K. An entry to that effect was also made in the Register of birth maintained by the Municipal Committee. According to the Petitioner, his correct date of birth, as also evidenced by this record, was November 3, 1917.

3. The date of birth of the Petitioner, as recorded in the Matriculation certificate,

was, says the Petitioner, erroneously given out as November, 3, 1916. This was the date disclosed by him in the declaration submitted by the Petitioner when he joined as Government Advocate-cum-Public Prosecutor, Mahasu and Sirmur Districts at Simla in July 1958. The office of the Accountant General, which maintains the service record of the gazetted officers, consequently, declared the date of birth of the Petitioner as November 3, 1916. The Notification directing the retirement of the Petitioner mentions November 3, 1916, as said earlier, to be the date of birth of the Petitioner.

4. The Petitioner says that when he came to know in the year 1962 about the wrong entry regarding date of his birth, an application was made by him on October 26, 1962, to the Judicial Commissioner of Himachal Pradesh, along with a copy of his horoscope, in which the date of his birth was shown to be the same as was recorded in the Municipal Birth Register. This horoscope was prepared long before the Petitioner joined the Government service. A copy of the birth entry, as recorded in the Mandi Municipal Committee record, and the certificate from the President, Municipal Committee, Mandi, dated May 22, 1962, showing that the name of the Petitioner's father was Gauri Datt alias Tandlu, along with some other certificates, was furnished by the Petitioner to the Judicial Commissioner. The certificate also showed that only one son was born to Shri Tandlu on 19th Kartik 1974 B. K. during the year 1973-74 Bikrami (or within one year of that date). The Judicial Commissioner went through the evidence, including the horoscope, and directed the Registrar of his Court to write to the Himachal Pradesh Administration to accept November 3, 1917, corresponding to 19th Kartik 1974 B. K. as the correct date of birth of the Petitioner. The Registrar wrote a letter to the Himachal Pradesh Administration on June 28, 1963, on these lines

5. The Petitioner received a letter dated July 12, 1963, from the H. P. Administration (Appointment Department) through which he was asked to get his date of birth corrected in the Matriculation certificate and then move the Administration for a change in the date of birth in the service documents. The Petitioner says that he made verbal enquiries from the Punjab University and was informed that the rules did not permit the correction of the date of birth as given in the Matriculation certificate. Enquiry was made by the Petitioner from the Punjab University because he had passed his Matriculation Examination, as well as B. A. and Law examinations, from that University before partition of the country.

6. After the establishment of the High Court of Himachal Pradesh with effect from January 25, 1971, an application was made by the Petitioner to the Chief Justice who was his appointing authority. In it, the Petitioner pointed out that the date of his birth, as recorded in the service record, namely, November 3, 1916, was wrong and that the correct date of his birth, namely, 19th Kartik 1974 B. K., corresponding to November 3, 1917, be recorded in the service record. The Chief Justice, according to the Petitioner, examined the matter and directed his

Secretary to forward the application of the Petitioner for the correction of the birth entry for consideration of the Government of Himachal Pradesh. A letter dated May 8, 1973, was then sent to the Government by the Secretary to the Chief Justice. The State Government, in the department of personnel, made some enquiry from the High Court through letter dated October 8, 1973, in regard to the date of birth of the Petitioner. The matter remained pending for quite sometime and a detailed reply thereafter sent by the Deputy Registrar (Admn.) of the High Court to the Joint Secretary (Personnel) to the Government of Himachal Pradesh through letter dated June 15, 1974. Later, through letter dated November 30, 1974, the State Government informed the Registrar of the High Court that the application of the Petitioner for change in the date of birth had been thoroughly considered but "it is regretted that it is not possible to accede to the request of Shri Kedar Ishwar as it is not proved that the date of birth as originally given by him was a bona fide mistake". The Notification retiring the Petitioner with effect from the afternoon of November 30, 1974, was issued the same day.

7. In the present writ petition, Petitioner Kedar Ishwar has challenged the order of November 30, 1974, rejecting his application for correction of the date of birth as given in the service record and the consequential order of retirement. Apart from other reasons, the challenge is founded on the ground that the State Government had no jurisdiction to take a final decision regarding correction of date of birth of the Petitioner as the appointing authority of the Petitioner, on the post of the Registrar, was the Chief Justice of the High Court and not the State Government. The order was violative of the provisions, inter alia, of Articles 229 and 233 - 235 of the Constitution. The State Government has filed a reply in the writ petition. A number of documents have been appended with this reply. The stand, broadly, taken is that the date of birth mentioned in the Matriculation certificate was conclusive. It had to be accepted as such. Since the Petitioner could not get his Matriculation certificate corrected in that regard, it is not open to him to challenge the date of his birth in the manner in which he was trying to do so.

8. At one stage, after the coming into force of the Administrative Tribunals Act, 1985, and the establishment of the Himachal Pradesh Administrative Tribunal, a question arose whether this petition was required to be transferred to the Tribunal for disposal or not. The matter was considered at length by a Division Bench. Speaking through Chief Justice P. D. Desai, the Division Bench ruled on September 24, 1986, that:

the High Court is not deprived of the jurisdiction to deal with and decide the question arising for decision in the present case, namely, the correctness or otherwise of the date of birth of the Petitioner, who, at the material time, was the Registrar and, therefore, an officer on the establishment of the High Court, as also a substantive member of the Higher Judicial Service of the State. The reason being, firstly, that being an officer of the High Court covered by Article 229, there

is a specific exclusion in regard to him in clause (c) of Section 2 of the Act and, secondly, because being a member of the Higher Judicial Service, he cannot be regarded as a person appointed to any civil service of the State or holding any civil post under the State...

9. This decision was not assailed by the State Government and has become final between the parties.

10. The submission which was made on behalf of the Petitioner, by his learned Counsel Shri K. D. Sood, was that the question about the correction of the age of Petitioner Kedarishwar in the service record was to be considered, and a decision about it taken, by the High Court itself. Since the High Court had not done so and had abdicated its functions in favour of the State Government, it was liable to be commanded to do so itself. The State Government had no jurisdiction in the matter and its decisions were without the authority of law.

11. The right of an employee to seek correction of a wrong entry in the matter of his date of birth has been succinctly stated by a Division Bench of this Court, speaking through R.S. Pathak C J., in *Manak Chand v. State of Himachal Pradesh* and Ors. ILR 1975 HP 641, thus:

...Now, Government servant has the right to continue in service until he attains the age of superannuation, except where the rules validly provide for compulsory retirement at an early age. In order to determine the period for which such Government servant is entitled to continue, it is necessary to determine his true date of birth. If his service record indicates a particular date as his date of birth, that date of birth must be accepted for the purpose of determining whether he has reached the age of superannuation.... A Government servant is entitled to show that the entry made in his service record does not represent his true date of birth. That is a right which flows from his right to continue in service until he reaches the age of superannuation.... Therefore, involved in his right to continue in service is his right to show that the recorded entry of his date of birth is erroneous.... If the entry is found to be erroneous it must, in all fairness to the Government servant, be corrected....

12. Article 235 of the Constitution provides for the control of the High Court over the District Courts and courts subordinate thereto.

13. A constitution Bench of the Supreme Court, while dealing with this Article, observed in *the State of Uttar Pradesh v. Batuk Deo Pati Tripathi* and Anr. 1978 Lab IC 839 that:

...The ideal which inspired the provision that the control over District Courts and courts subordinate thereto, shall vest in the High Courts is that those wings of the judiciary should be independent of the executive. Tracing the history of that concept, Hidayatullah, J. in *The State of West Bengal Vs. Nripendra Nath Bagchi*, , has highlighted the meaning and purpose of Article 235 as construed by this Court in various decisions, requires that all matters relating to the

subordinate judiciary including compulsory retirement and disciplinary proceedings but excluding the imposition punishments falling within the scope of Article 311 and the first appointments and promotions should be dealt with and decided upon by the High Courts in the exercise of the control vested in them....

14. Referring to an earlier Constitution Bench decision of the Court in *Samsher Singh Vs. State of Punjab and Another*, the Bench proceeded further to observe that:

...in asking the State Government to depute the Director of Vigilance to hold an inquiry against a judicial officer was deprecated by the Supreme Court as an act of self-abnegation. The High Court abdicated its control over the subordinate judiciary which includes the power to hold a disciplinary inquiry against a defaulting Judge by surrendering that power to the executive.

According to the learned Judges.

...that truly, was an act of self-abnegation.

15. A year later another Constitution Bench spoke about the control of the High Court over subordinate Judiciary within the meaning of Article 235 of the Constitution it was in *Chief Justice of Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others*, After a detailed examination of the various constitutional provisions, and having noticed a large number of its earlier decisions, the Supreme Court said (in paragraph 38 of the report) that:

...the control over the subordinate judiciary vested in the High Court under Article 235 is exclusive in nature, comprehensive in extent and effective in operation. It comprehends a wide variety of matters" and among others, it includes premature or compulsory retirement of Judges of the District Courts and subordinate courts.

16. In the present case the Division Bench, while deciding that the writ petition was not liable to be transferred to the Administrative Tribunal, noticed (in paragraph 15 of its order reported in ILR 1987 HP 151 *Kedar Ishwar v. State of H P. and Ors.* the observations of the Supreme Court contained in paragraph 38 in *Dikshitulu* in its material part The Bench felt that though a dispute with respect to the date of birth and consequentially, regarding the precise date of retirement on superannuation, is a matter concerning the conditions of service, yet, the constitutional scheme particularly the provisions of Articles 229 and 235 indicated that the matter fell within the exclusive jurisdiction of the High Court.

17. It is true that the Bench was considering a limited question whether the High Court could retain the present writ petition for disposal by itself or the case was liable to be transferred for decision to the Administrative Tribunal, the conclusion that the question of determination of the correct date of birth was a matter within the concept of "control" under Article 235 lends weight to the submission made on behalf of the Petitioner that it is the High Court alone which is competent to take a decision in the matter.

18. If the matter of retirement of an officer, like Petitioner Kedar Ishwar, falls within the ambit of the term "control" as used in Article 235 of the Constitution, as undoubtedly it does, the inevitable conclusion, as a corollary, is that the determination of the correctness or otherwise of the entry about the date of birth in the service record would be a matter within the exclusive domain of High Court for determination. The High Court cannot abdicate its powers in this respect in favour of the State Government by asking the latter to go into this question. Unfortunately, in the present case this is precisely what has been done by the High Court. A reference by it to the State Government of the matter clearly was an act of self-abnegation on its part. The Petitioner is plainly right in making a grievance against it.

19. If, as we hold, it was for the High Court to have gone into the question of the correctness or otherwise of the entry of the date of birth of Petitioner Kedar Ishwar in the service record itself, the matter could not have been forwarded by it to the State Government. The State Government had no jurisdiction in the matter. Any decision by the State Government about it would be non-est. Merely because the High Court asked it to go into the question would not clothe the State Government with the requisite jurisdiction to go into the matter. The result would be that the reference by the High Court to the State Government through the letter dated May 8, 1973 (Annexure-PN), culminating in the eventual decision contained in the Government's letter dated November 30, 1974 (Annexure-PP), that the request of Petitioner Kedar Ishwar for correction of his age could not be acceded to are held to be without jurisdiction and are quashed.

20. An impassioned appeal was made by the Counsel for the Petitioner that the Court should examine the evidence on record of the writ petition and come to its own conclusion about the correctness or otherwise of the claim of Petitioner Kedarishwar about the true date of his birth. We are not inclined to do so and it is on that account that we have not noticed the material brought on the record of this writ petition in that respect in any detail. We feel that it would be proper that the High Court should examine the question on its administrative side.

21. To borrow the observations of a Division Bench of the Allahabad High Court in *D.K. Agarwal v. The High Court of Allahabad* and *Anr.* 1988 Lab IC 606:

...We would not be justified in arrogating to ourselves, sitting on the judicial side of the Court, the task which, in law, should be done by the Court on its administrative side.

22. The Supreme Court, before which an appeal was taken by *D.K. Agarwal* against the judgment of the Allahabad High Court, also said in its judgment reported as *D.K. Agarwal v. High Court of D.K. Agarwal Vs. High Court of Judicature at Allahabad*, (in paragraph 10 of the report) that:

...There can be no doubt that whether a member of the Higher Judicial Service should be granted the selection grade or the super-time scale is a matter exclusively within the administrative jurisdiction of the High Court. This Court will

not ordinarily interfere with any decision of the High Court in such a matter.... All that the Court will ordinarily do is to refer back the matter for consideration of the High Court....

On the facts of that case the Supreme Court intervened in the matter by disposing it off finally, without referring it again to the High Court, for the reasons given by it in the latter part of the judgment.

23. However, soon thereafter, in *Nek Shyam Shamsheri and Another Vs. State of Uttar Pradesh and Others*, while dealing with the grant of super-time scale to officers of the U. P. Higher Judicial Service, the Court observed (in paragraph 19 of the report) thus:

As the Petitioners have been granted the Selection Grade, it is now for the High Court to consider the question of granting of Super-time Scales to the Petitioners. The decision of that question falls entirely within the administrative jurisdiction of the High Court and this Court cannot embark on adjudicating the same.

24. The result of the discussion clearly is that the writ petition deserves to and succeeds to the extent that the reference made by the High Court to the State Government to take a decision in the matter of correctness or otherwise of the entry relating to the date of birth of Petitioner Kedar Ishwar and the decision of the State Government, upholding the existing entry, are quashed. The High Court is directed to examine the question itself on the administrative side and record its own decision in the matter on the basis of the material before it, including that which has been placed on the record of the present writ petition. Since the Petitioner retired long ago, and may only be entitled to some pecuniary benefits if the decision of the High Court goes in his favour, we hope that it will be possible for the High Court to take a decision in the matter soon.

25. Parties are left to bear their own costs.