(2001) 02 PAT CK 0046

In the Patna High Court

Case No : C.W.J.C. No. 4014 of 1993

Nathun Choudhary APPELLANT

Vs

State of Bihar and Others RESPONDENT

Date of Decision : 02-02-2001

Acts Referred:
Constitution of India, 1950 — Article 24

Citation : (2001) 1 BLJR 590 : (2001) 2 PLJR 336

Hon'ble Judges : Radha Mohan Prasad, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Radha Mohan Prasad, J.—In this writ petition, the petitioner has initially challenged the validity of the order dated 2.4.1993 of the Deputy Collector (Establishment) addressed to the Executive Officer, Bihar Municipality, Bihar Sharif, contained in Annexure-1, wherein it is stated that a complaint was received from one Mahendra Prasad that even after the retirement of the petitioner he was continuing in the service of the Municipality under verbal orders of the Special Officer. As such, he asked the Executive Officer to inquire and submit a report. The petitioner has alleged that after receipt of the said letter, the Executive Officer verbally restrained him from putting his signature on the attendance register and has also restrained the petitioner from working as Tax Collector which compelled him to file the present writ petition.

2. A counter-affidavit has been filed on behalf of the Executive Officer of the Municipality (respondent No. 3) in which it has been pleaded that the petitioner completed his 40 years of service in the Municipality on 26.1.1993 and therefore, he was superannuated with effect from 31.3.1993. With respect to the said date a typographical error has occurred in the statement made in paragraph 5 of the counter-affidavit and according to the learned Counsel for the Municipality it should be read as 31.1.1993. It is further stated that it is a matter of record that the petitioner has joined the service in the Municipality in the month of January

1953 as will be borne out from the seniority list prepared in the month of June 1989, photo copy whereof has been annexed as Annexure ''C''. According to the case of . the respondents, as per the direction of the State Government dated 28th May, 1990, contained in Annexure ''B'' the employees under the Municipality are to retire on completion of 40 years of service in the absence of entry date of their birth in the service book. It is further stated that the stand of the answering respondent is further fortified from the pay bill of April wherein the name of the petitioner finds place at serial No. 5, a photo copy whereof has been annexed as Annexure ''D'' Thus, according to the case of the respondents, from Annexures ''C'' and ''D'' it is nanifestly clear that the petitioner joined the service under the Bihar Municipality on 26.1.1953 and therefore, completed 40 years of service on 26.1.1993 on which date he retired from the service of the Municipality. The respondents have also stated that the Executive Officer under Memo No. 441 dated 10.5.1993, contained in Annexure ''E'', directed the petitioner to hand over the charge of Tax Daroga to the then acting Tax Daroga, namely, Sri Awadhesh Chandra Sinha which the petitioner refused to accept as was reported by the peon. Thereafter, respondent No. 3 requested the petitioner to deposit the collected tax amount failing which prosecution will be launched against him vide letter dated 27.7.1993 which was received by him on the same day. A photo copy of the said letter has been annexed as Annexure ''F''.

3. According to the case of the respondents, the service book of the petitioner was not properly maintained and no reliance can be placed upon the said service book as column No. 5 regarding date of birth is quite blank. A photo copy of the relevant service book is annexed as Annexure ''G''.

4. A rejoinder has been filed on behalf of the petitioner in which he has denied that he joined the Municipality as Ward Jamadar on 26.1.1953. According to him, at that time after the death of his father, he was engaged in the Municipality as Daily Labourer and was not an employee in the establishment of the Municipality. It is claimed by him that he joined the service of the Bihar Municipality some time in the year 1960 or 1961 as Ward Jamadar and was later transferred as Tax Collection Peon in the year 1975. Finally, he assumed the charge of Tax Collector under the orders of the Executive Officer from one Sri Umapati Verma and vide order contained in Memo No. 1756 dated 18.11.1982 he was deputed to work on probation as Tax Collector in Ward No. 2. He was appointed as Tax Collector vide order dated 5.2.1983. According to the petitioner, as per the normal age of superannuation is provided in Rule 73 of the Bihar Service Code and Rule 5(g) of the Bihar Municipal Officers and Servants Pension Rules, 1927 an employee is to retire from the job when he attains the age of 58 years and not before that. According to him, his date of birth is 4.7.1942 as has also noticed in thetransfer certificate issued to him on 6.1.1953 by Sri Ram Janki Secondary School, Gurusharanpur, Patna, A photo copy whereof has been annexed as Annexure-9 to the rejoinder-affidavit. In support of his date of birth, he has also relied upon the certificate of Hindi Vidyapath, Deoghar, Bihar for passing of Preveshika Examination in the year 1983 which is equivalent to the Matriculation

Examination. A photo copy whereof has been annexed as Annexure 9/1.

5. It is submitted by the learned Counsel for the petitioner that the real dispute is that whether the petitioner could have been made to retire from the service by taking into account the period when the work from the petitioner was taken as Daily Labourer, even if it is presumed that as per the Government''s direction he could validly be retired after completion of 40 years of service. It has also been submitted that in fact, under the Rules an employee of the Municipality is to retire on completion of 53 years of age and not otherwise. The Government instruction issued on 28th May, 1990 (Annexure ''B'') on the face of the Rule is not valid and will not bind the Municipality.

6. Mr. Mishra, learned Counsel appearing for the respondent Municipality, on the other hand, has submitted that there is no infirmity in the Government directive, contained in Annexure ''B'', as according to Rule 4-B of the Modern Rules for appointment; etc, framed u/s 42(1)(a) of the Bihar and Orissa Municipal Act, 1922 no officer or servant of the Commissioner can be appointed unless he is above 18 years and below 25 years of age on the date of appointment. As such, even assuming that the prescribed age of superannuation of an employee in the Municipality is 58 years and the maximum prescribed age for appointment is taken into account, yet an employee can be maximum allowed to render 40 years of service and not beyond that.

7. This Court finds substance in the submission of Mr. Mishra. In absence of proper assistance, this Court without going into the question as to what is the prescribed age of superannuation for an employee of the Municipality is of the view that even according to the case of the petitioner himself that the age of retirement of the employee of the Municipality is 58 years. This Court does not find any infirmity in the Government instruction, contained in Annexure ''B'' directing to retire an employee of the Municipality on completion of 40 years of service in the absence of entry in regard to his age in the service book.

8. However, this Court finds substance in the first submission of the learned Counsel for the petitioner that the petitioner could not have been made to retire by taking into account his engagement as Daily Labourer since 26.1.1953. Even according to the Government instruction, contained in Annexure ''B'', an employee can be made to retire on completion of 40 years of service where proper entry in regard to age is not made in his service book which obvious would means that it is only after an employee is taken in regular service when normally service book is prepared and the period of engagement as Daily Labourer cannot be counted as per the provisions contained in Government instruction (Annexure ''B''). Nothing has been brought to the notice of this Court by the learned Counsel for the Municipality that there is any provision for opening of a service book of daily Labourer also.

9. It is submitted by Mr. Mishra that Annexure ''D'', which is an acquaintance roll of the month of April 1953, would show that the petitioner was in the

employment of the Municipality on that date and he received payment also. Further, he has relied upon the seniority list, contained in Annexure ''C'' which mentions 26.1.1953 as the date of entry of the petitioner in service.

10. This Court is unable to appreciate the said submission of the learned Counsel for the Municipality. Annexure ''D'' does not indicate that the petitioner was in regular service of the Municipality. On the contrary, learned Counsel for the petitioner has rightly referred to Rule 123 which has been annexed as Annexure-3 to the rejoinder-affidavit filed on behalf of the petitioner and according to which the said a quittance roll (Annexure ''D'') has been prepared. Rule 123 is the provision for the payments to be made to the labour employed each day on a work. As regards seniority list, this Court finds it difficult to accept the submission of the learned Counsel for the Municipality that the petitioner was taken in regular employment in January 1953 as it stands falsified by the said Annexure ''D'' itself. Moreover, the respondent-Municipality is the custodism of the record with respect to the service of its employees and it was for the Municipally to come out with specific case and document in support thereof with respect to appointment of the petitioner on regular basis in the Municipality. In absence of any such plea and material on record, this Court finds it difficult to accept the stand taken on behalf of the respondent-Municipality that the petitioner was taken in regular employment of the Municipality in January 1953.

11. Moreover, the said argument of the learned Counsel for the Municipality does not appear to be tenable as the transfer certificate relied upon by the learned Counsel for the petitioner, contained in Annexure-9, which was issued even before engagement of the petitioner on daily wages and genuineness of the same has not been challenged by the Municipality shows ''4.7.1942'' as the date of birth of the petitioner. Thus, in the year 1953, he was 11 years old and Article 24 of the Constitution provides that "no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment." There cannot be any doubt that the work in the Municipality is of hazardous in nature. As such, the Municipality could not have taken the petitioner in regular employment in violation of Article 24 of the Constitution in January 1953.

12. This Court, thus, finds substance in the stand of the petitioner that he was taken in regular appointment of the Municipality some times after completion of 14 years of his age from 4.7.1942. In any view of the matter, even if taking line of least resistance it is to be accepted that the petitioner was taken in regular employment soon after completion of minimum age before which he could not have been taken in regular employment as per the provision of Article 24 of the Constitution, still the Municipality was not legally justified in retiring him from service in the year 1993.

13. Accordingly, this Court holds that even as per the directive, contained in Annexure ''B'', the petitioner would be deemed to have retired in July 1996. As in place of Municipal Commissioner, Bihar, Special Officer has been appointed and is

presently functioning, this Court directs the Special Officer to issue necessary order for retirement and for payment of salary of the petitioner up to July 1996 accordingly within three weeks of the receipt/production of a copy of this order.

14. The writ application is, accordingly, allowed but without cost.

