

(1991) 03 CAL CK 0046
In the Calcutta High Court
Case No : F.M.A. No. 408 of 1989

Paban Chandra Mondal

APPELLANT

Vs

State of West Bengal and . Ors

RESPONDENT

Date of Decision : 18-03-1991

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 114

Citation : 95 CWN 1149

Hon'ble Judges : A.N. Ray, J;A.M. Bhattacharjee, J

Bench : Division Bench

Advocate : R.N. Mitter, D.P. Adhikary and D.P. Pattanayak, for the Appellant; Balai Ch. Chatterjee and Gita Gupta, for the Respondent

Final Decision : Allowed

Judgement

A.M. Bhattacharjee, J.—An entry as to the age or the date of birth of a Government servant in the Service Book is obviously made in the official course of business and, as provided in Illustration(e) to Section 114 of the Evidence Act, the Court may presume that such official act has been regularly performed. The presumption is permissive only; but even if it was somewhat obligatory, and not merely discretionary, it could still than be outweighed by evidence to the contrary in accordance with the procedure established by Law. Therefore, even if the relevant law provides that the court shall presume such an entry to be correct, any one interested is entitled to disprove its correctness and in such a case, the relevant entry may be rectified and altered. But such rectification or alteration cannot obviously be effected to operate to the prejudice of the person concerned without giving him a reasonable opportunity of being heard. This is the clear, mandate of the principle of natural justice enshrined in the maximum Audi Alteram Partem, which is of all-pervasive omnipresence and inevitably supplements all our laws and procedure, administrative or judicial, unless its operation is forestalled by express enunciation or irresistible implication. No citation should be necessary for this too obvious a proposition that even

administrative action adversely affecting a party can only be made in accordance with the principles of natural justice. But still reference may be made to the decision of the Supreme Court in *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, as the same also relates to alteration of age as recorded in the Service Book.

2. But the case at hand is just the converse where the appellant/writ-petitioner has been served with an order of super-annuation, not in alteration of, but in accordance with, the date of birth recorded in his Service Book under his own signature. I am not aware of any law or rule which requires a person to be heard before he is sought to be retired or super-annuated on the basis of the entry relating to his age or date of birth under his signature in his Service Book, without any adverse alteration thereof behind his back.

3. The petitioner, however, on receipt of the notice of superannuation to take effect at a later date, made written representation to the higher authorities alleging that his date of birth was erroneously recorded to be 14th May, 1928 while in fact he was born on 12th November, 1936 and he enclosed therewith an attested copy of his alleged Baroscope supported by an affidavit sworn few days before. The representation was forwarded by the authorities concerned to be Respondent No. 2, the concerned Superintending Engineer; but having received no communication from that end, the petitioner moved this Court under Article 226 for appropriate relief.

4. The learned judge, before whom the petition was moved, disposed of the same with a direction to the Respondent no. 2 to consider the representation "as expeditiously as possible" with a further direction that "till such consideration is effected, status quo as of date shall continue". In pursuance of such direction, the Respondent No. 2 proceeded to consider the matter and disposed of the same by his order as hereunder : -

As ordered by his Lordship the Hon'ble Mr. Justice Umesh Chandra Banerjee on May 22, 1986 regarding the above case, I have considered the case very carefully after going through the connected papers and documents and find that there is no ground or scope of changing the date already recorded in the Service Book.

5. Being aggrieved by the said order, the petitioner has again moved -his court under Article 226 of the Constitution and the same Learned Judge, has dismissed the petition by his order dated 2.6.87 holding that, as per his order in the earlier Writ Petition, "the matter has been duly considered after going through the connected papers and documents" and that "the Writ Court would not be justified in interfering with such a finding of fact and as such the writ petition fails and is dismissed."

6. In this appeal before us, this Order has been sought to be assailed on the ground that the learned Judge ought to have quashed the impugned order passed by the Respondent no. 2 declining to accept and allow the representation

made by the Appellant-Petitioner as the same was disposed of without giving the petitioner an opportunity of being heard and without assigning any reason. In other words, the contention is that the order is bad having been arrived at in violation of the principles of natural justice.

7. An order of super-annuation on the basis of the entries recorded in the Service Book under the signature of the employee concerned is such an obvious and usual incidence of service that it cannot be regarded to amount to an administrative order to the prejudice of the employee involving evil consequences to warrant any hearing to be afforded to the employee before the issuance of such order. A clear authority for this view, if one is at all needed, is to be found in the observation of the Supreme Court in *K. Nagaraj and Others Vs. State of Andhra Pradesh and Another*, It is true that Banerjee, J. directed the Respondent no. 2 to consider the representation made by the Petitioner. But I am inclined to think that the learned Judge did, so, not because of any requirement of law, but for his anxiety to ensure the satisfaction of the petitioner that fullest possible justice, even beyond the requirements of law, has been done to him. I can quite understand when it is said that if any application or appeal or representation lies under any law or, though not expressly provided, is made against an action taken to the prejudice of a party behind his back, the same is to be disposed of only after affording the maker thereof an opportunity of being heard, even if the Relevant law does not expressly provide to that effect. But otherwise, I am yet to understand as to how any rule of natural justice can still spring into action in favour of a person in respect of any and every representation that he may choose to make against an order which he may not relish.

8. Reference in this connection may be made to the observations made in the five-Judge Bench decision of the Supreme Court in *Union of India and Another Vs. Tulsiram Patel and Others*, subsequently followed in the three-Judge Bench decision in *Satyavir Singh and Others Vs. Union of India (UOI) and Others*, where it has been ruled that even though Rule 14 of the Railway Servants Rules requires the disciplinary authority to "consider the circumstances" and to "make such orders thereon as it deems fit", the expression to consider cannot be construed to mean that the consideration "cannot be unilateral but must be after hearing the delinquent Civil Servant" and the view of the earlier three-Judge Bench in *The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others*, to the effect that consideration cannot be *ex parte* and without affording to the concerned Servant an opportunity of being heard, has been over-ruled. The Supreme Court referred to various Lexical authorities and has held that "the word consider in its ordinary and natural sense is not capable of the meaning in Chellappan's case" to the effect that consideration must always follow affording of reasonable opportunity of being heard to the person concerned. If that be the position in law in matters where the provisions of Statute or statutory Rules require consideration, the position cannot be any way the better where, as here, an officer has been directed to consider a

representation by this Court, even though, the representation has no Statutory basis.

9. But assuming arguendo that such a representation could and did lie under the law and was therefore required to be disposed of after giving the representationist an opportunity of being heard, the materials on record would not show that the Petitioner was denied any such opportunity if (and that is a very big "if") and only if we can take into consideration the Affidavit-in-opposition filed by the Respondent No. 2. For, apart from the presumption, though permissive only, that official acts, whether administrative or judicial, has been duly and regularly performed, the 2 categorical assertions in paragraph 10 of the affidavit-in-opposition by the Respondent no. 2, who is not expected to have any personal interest or bias in the matter, to the effect that the "Petitioner was heard personally on 12.5.86 was asked for clarification but he could not give any satisfactory reply", not denied by the Petitioner by an affidavit-in-reply, are good enough to stand in the way of the Writ-Court to go into the disputed question of fact as to whether the petitioner was granted or denied due opportunity of being heard in support of his representation. The contention that the impugned order of the Respondent no. 2 is bad for having been made without giving the appellant-petitioner any opportunity of being heard would have therefore failed.

10. It has also been urged that the order is bad as it does not speak. It is true that the position in law as at present is that any authority required to determine any matter Judicially or Quasi-Judicially is to dispose of the same by a reasoned order or, as is generally said, a speaking order. The five-Judge Bench decision of the Supreme Court rendered in *S.N. Mukherjee Vs. Union of India*, where the various earlier decisions of the Supreme Court on the point have been considered, may be referred to, if need be, as a recent authority on the point. And the law on the point, to quote from *S.N. Mukherjee* (supra, at 1997, para 39), appears to be that "except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision"

11. So far so good. But I have my doubts as to whether an Employer, in accepting the age or date of birth declared by the Employee himself and recording the same in the latter's Service Book does at all exercise any quasi-Judicial function. The Respondents in this case have proceeded to issue notice of Super-annuation on the basis of such record and that also cannot involve any quasi-judicial exercise. I have not been shown any law, rule, notification or instruction authorising the Respondent no. 2 or any other Departmental Authority to alter or rectify the record relating to the age or date of birth. If the Respondents or any of them have no authority to re-determine the age or date of birth, then I have my doubts as to whether the Petitioner, by making any representation to them praying for rectification, or even the learned Judge, by

directing the Respondent no. 2 to consider such representation, could, vest them with any such legal authority which is to be exercised in a quasi-judicial manner. If the representation has no legal basis and the Authorities are under no legal obligation to entertain or consider the same, then they cannot be regarded or required to have exercised a quasi-judicial function in declining to consider the same. But assuming that the Respondent no. 2 was required to act in a quasi-judicial capacity in disposing of the representation, which the Learned Judge directed him to consider in the earlier Writ Proceeding, lacks reasoning to that extent as to be violative of the principles of natural justice? The learned Judge has upheld the Order and I would also like to do so if I can. The approach of the Courts to all actions, administrative or judicial or quasi-judicial, should, whenever and wherever reasonably possible, be as enshrined in the maxim (sic) *Res Magis Valeat Quam Pereat*, let a thing be allowed to flourish or be effective, if reasonably possible, than to perish or be made void.

12. The requirement as to a reasoned or speaking order is really an extension of one of the two main rules of natural Justice namely *Audi Alteram Partem*, i.e. hear the other party. It is said that Justice must not only be done, but should also appear to have been done and even though in a given case, Justice might in fact have been done, it may not appear to have been done unless the party affected is given an opportunity of being heard. As pointed out in *S.N. Mukherjee (supra)* and the host of decisions referred to therein, these rules started proliferating into a number of other subsidiary rules, and one such rule is the requirement of a reasoned or speaking order, for such an order, by itself, would manifest that the parties were heard and/or their contentions were adverted to. Let me say again, so far so good.

13. But the rule that Justice should also appear to have been done must not be out-stretched too far, for it then would reach a breaking-point where we would be running more for appearance of justice than for real Justice. As pointed out by P.B. Mukherji, J., in the Division Bench decision of this Court in *State vs. Sankar Kumar Dutta* (67 CWN 221, at 227-228), "appearance of Justice today is an overvalued concept which has acquired almost the character of a slogan or cliché repeated from platforms and press, legal and non-legal, that Justice must appear to be done". Blind adherence to this dictum has given rise to "the erroneous impression that it is more important that Justice should appear to be done than that it should in fact be done". The Learned Judge added a note of caution to the effect that "we must not overrate 'appearance' only as to displace or undermine substance" in the administration of Justice".

14. As Lord Denning observed in the Court of Appeal in *Regina vs. Home Secretary, Ex parte Mughal* (1973 3 WLR 647 at 655) "the rules of natural Justice must not be stretched too far" as "only too often the people who have done wrong seek to invoke 'the rules of natural Justice' so as to avoid the consequences". As held by the Supreme Court in *Union of India and Another Vs. Tulsiram Patel and Others*, and also in *Satyavir Singh and Others Vs. Union of*

India (UOI) and Others, "the principles of natural Justice must be confined within their proper limits and not allowed to run wild. must not be allowed to turn into a wild and unruly horse, careering off where it lists, unsaddling its rider and pursting into fields where the sign of "no pasaran" is put up".

15. It is well-settled, as pointed out in *Tulsiram Patel* (supra, at 1416-62), that the rules of natural Justice., not being statutory and not being capable of being cast in a rigid mould or put in a legal strait-Jacket, are not immutable but flexible and would yield to and change with the exigencies of different situations and may be required to be varied with and adapted to the circumstances prevailing in any particular case. As pointed out in *Suresh Koshy George Vs. University of Kerala and Others*, "the question whether the requirements of natural Justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point". As observed in *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, "whenever. a complaint is made before a Court that some principle of natural Justice had been contravened the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case".

16. In the case at hand, the Respondent No. 2 in his Affidavit-in-Opposition has referred to and annexed the copies of some documents alleged to have been considered fey him, being Annexure-I, IE and III, and has stated in paragraph 10 in appreciable details the reasons that weighed with him in declining the prayer of the petitioner in his representation made after the receipt of the notice of Super-annuation in April, 1936. As appeared from the Annexures, the petitioner in his earlier representations In 1982 against the proposed order of transfer and in 1985 praying for extention after impending Super-annuation, has fully accepted and proceeded on the basis of his date of birth and age as recorded in his Service Book. As would appear from Annexure III, his date of birth and age were recorded in the Service Book under his over signature and on the basis of his own Affidavit in 1957. Respondent no. 2 has also pointed out that if the petitioner's present representation in 1986 was to be allowed, it would have to be accepted that the petitioner entered into service when he was aged about twelve years only.

17. If we could take the Affidavit into consideration and hold that these materials were before the Respondent no. 2, then the contention that he has not made any express reference to any of them and has not articulated the reasons in the order might have: lost force. It cannot be seriously urged that he has not given any reason at all, when he has clearly stated in his impugned order that he has considered "the case very carefully after going through the connected papers and documents and find that there is no ground or scope of changing the date of birth already recorded in the Service Book". He has not parsed just a one-word order like "rejected" or "dismissed", as we very often do in rejecting an appeal or revision in limine, and which we can very well do as pointed out in *Madhya Pradesh Industries Ltd., (AIR 1936 SC 671 at 675)*, referred to with approval in

S.N. Mukherjee (supra, at 1992). He has given the "reason, namely his inability to find in the connected papers and documents anything to warrant rectification of the date of birth. May be, he has not referred to the precise materials justifying his reasoning. But, as Lord Denning in the Court at Appeal has pointed out in *Home Secretary, Ex parte Mughal* (supra, at 655), an officer like the Respondent No. 2 "is not a Judge or a Judicial Officer. He has not to obey set rules of procedure. He is of course bound to act honestly and fairly : but so long as he does so, the Courts cannot and should not interfere". And since the Master of the Rolls was satisfied that on the materials on record in that case, as disclosed in his Affidavit, the Officer acted with fairness and thoroughness, his Lordship declined to interfere. Lord Megaw also in his concurring judgment referred (at 658) to the Affidavit of the Officer concerned, which was not contradicted, and "was satisfied therefrom " that the Officer acted fairly. And Lord Scarman in his concurring Judgment pointed out (at 660-661) that since it was "an administrative function" and "not a forensic one", there could be no failure of natural justice once it was found that the person concerned was given reasonable opportunity.

18. As I have already indicated, a reasoned order has come to be regarded as a requirement for natural Justice as that demonstrates as to whether there was a proper hearing. But no principle of natural Justice can be allowed to take the shape of a rigid formality as that, by itself, may defeat the purpose for which these informal principles took their birth. That is why the Supreme Court, in the decisions referred to hereinbefore, has ruled that the requirement of the rules of natural Justice would and do vary from case to case. If from the materials or otherwise, the reasons for the order is irresistibly apparent and star at the face, then to set aside an order solely on the ground that those reasons have not been reiterated in the order in a formal frame would be to allow form to rule and take precedence over substance. But, it is trite to say, in matters to be governed by the principles of natural Justice, it is the substance that must, count and not the form or the frame. Following the ratio of the decision of this Court in *Hafizar Rahman Vs. Aminul Hoque*, I would like to hold that if there were materials before the Officer concerned and those can reasonably justify an order, the officer concerned must be presumed to have adverted to those materials in making the order, unless the non-advertence is otherwise clearly manifested.

19. If the reasons are otherwise clearly palpable and "apparent on the face of the record, it would be in idle and empty formality to overturn an administrative order and to remit the same back only to enable the officer to write another order incorporating those reasons. The rules of natural Justice would stand metamorphosed beyond recognition and repair, if those are allowed to develop such doctrinaire rigidity.

20. But for the reasons stated in the Judgment of my learned brother Ray, J. following hereinafter, I am afraid that we can not take into consideration the Affidavit of the Respondent No. 2. As pointed out by Ray, J., the same was filed,

we do not know why and how, long after the learned Judge passed the Order under appeal and we are yet to know how the same could have any legitimate entry to the records or in the Paper-Book before us. The Writ Petitioner" could, therefore, have no opportunity to counter the same by any reply. And once he excludes that Affidavit, it is not possible to hold that the materials referred to in the Affidavit were before the Respondent no. 2 for his consideration or the Petitioner could be before him for being heard. They might have been before him and, therefore, might not have been also. And permissive presumption as to official acts having been duly performed has, as pointed out by my learned brother, probably been weakened beyond measure by the failure on the part of the Respondents to produce the relevant materials.

21. It is true I have tried to indicate hereinbefore that in administrative matters, "consideration" is not necessary but solely on the ground of its being unilateral or without a personal hearing, I have also tried to indicate that an administrative order is not necessarily bad "or not spelling out reasons, if reasons therefor are apparent on the face of the record, though not articulated in the body of the order in question. My only anxiety in dictating this longish prelude to the order proposed by my learned brother, with which I have eventually decided to agree was to sound, as strongly as I can, and an respectful agreement with the observations of the Supreme Court and Lord Denning in the Court of Appeal, a warning that in our craze for appearance of Justice, let us not allow the rules of natural Justice to be out-stretched for too long to become our masters rather than our collaborators in our voyage for Justice. As Justice Douglas pointed out in his Tagore Law Lectures (Studies in American and Indian Constitutional Law - p. 200), the "Due process" Clause in the American Constitution, in spite of all its patent and latent majesty, "had inherent dangers" and has played "havoc with legislative programme". Let not rules of Natural Justice be allowed to play the same role with our administrative actions.

22. But then, even though Law may be good, Justice is still better even if it goes beyond, but does not break, the Law. By the order proposed by my learned brother, Ray, J., with which I agree, we are not suggesting even remotely, that the Writ Petitioner's age or date of birth was wrongly recorded. We are by our order, not granting any extension of service, but only directing the Respondent no. 2 to consider the matter afresh and to dispose of the representation of the Writ-Petitioner after giving him a reasonable opportunity of being heard and indicating, as far as possible, in the Order itself proper advertence to the relevant materials.

(A.M. Bhattacharjee, J)

Ajoy Nath Ray, J.

23. The grievance of the appellant Writ-Petitioner is, that though by an earlier Order dated the 22nd of May, 1986 passed on an earlier writ, the second respondent was directed to consider the representations about the true retiring

age of the appellant yet, the said authority has proceeded ex parte, and further, has passed a rejection order, which is an unreasoned and a non-speaking order. the present (second) Writ has failed in limine, on the 2nd of June, 1987, before the same Learned Judge who had passed the earlier order.

24. The respondents affirmed an affidavit-in-opposition on the 22nd of December 1987; why they should do so more than six months after the Order appealed from has been made is quite incomprehensible. I cannot take that affidavit into consideration. Were I to do so, I would still not understand why it should be alleged here that the Writ-petitioner was heard personally on the 12th of May 1986, when the (first) Order directing consideration was passed ten days after the alleged date of hearing.

25. Mr. Mitter, for the appellant, who had no chance to file a reply (as there was no opposition) said that the affidavit as to the appellant's age referred to in the Service Book does not exist; that there are no letters of his client which are contrary to his client's. Though we gave every opportunity to Mr. Pranab Chatterjee, counsel for the respondents, either to show us the root affidavit mentioned in the Service Book, or any letters of the appellant which could clinch the issue, or even to show us that the Writ-Petitioner was heard on any day, (even if not on 12.5.86), none of the tasks could be performed.

26. On these very satisfactory facts, the impugned Order of 30th May, 1986 casts a further dark shadow. It really says nothing. The Writ-Petitioner is not to know from it why his representation has failed; is it: because of any affidavit? Is it because of any of his own alleged letters? Is it alky record or document which the second respondent has seen, and of which the mechanic Writ-Petitioner has no inkling ? Is it, because the mechanic has claimed himself to be illiterate and his claim has been found to be wrong ?

27. The legal authorities are not meant to protect such lapses on the part of the state. Will the Writ-Petitioner harbour his grievance that he has been condemned unheard, and has not been told why he has lost eight more years of service? If he does, I am sure, it will do not good or honour to our legal system. The appeal mast succeed. As there was nothing but the writ petition in the Court below, there is no point in a remand. The impugnd Order of 30.5.86 is quashed. The authorities must pass a reasoned Order within four weeks hereof complying with the first Order of 22.5.86, dealing with the true age and true retirement date of the Writ-Petitioner.