
(2008) 09 MP CK 0033
In the Madhya Pradesh High Court

Sant Kumar Agrawal

APPELLANT

Vs

Laxmibai National Institute of Physical Education and Others

RESPONDENT

Date of Decision : 11-09-2008

Acts Referred:

Fundamental Rules — Rule 56

Citation : (2009) ILR (MP) 144 : (2009) 1 JLJ 223 : (2009) 1 MPHT 446 :
(2009) 1 MPLJ 248

Hon'ble Judges : S.C. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.C. Sharma, J.

The petitioner before this Court a retired employee has filed a writ petition i.e., W.P. No. 1991/2006 (S) challenging the decision of the Board of Management of Laxmibai National Institute of Physical Education, Gwalior by which he has been retired w.e.f. 28-2-2002 and has also filed another writ petition i.e., W.P. No. 108/2006 (S) challenging the charge-sheet dated 5-10-2005 issued by the Competent Authority and also the further disciplinary proceedings, arising out of the same issue relating to correction of date of birth in his service book and, therefore, both the writ petitions were heard analogously together and disposed of by this singular order. For the sake of convenience, the facts in Writ Petition No. 1991 of 2006 (S) are exposited herein.

The petitioner before this Court in W.P. No. 1991/2006 (S) being aggrieved by a decision dated 12th January, 2006 taken by the Board of Management of Lakshmibai National Institute of Physical Education, Gwalior has filed this present petition challenging his retirement w.e.f. 28-2 2002. It has been contended in the writ petition that he was initially appointed as Personal Assistant to the Dean and was promoted to the post of Assistant Director in August, 1991 and a show-cause notice was issued on 2-9-2005 in which it was stated that he has wrongly intimated his date of birth as 15-1-1948, whereas his correct date of birth is 20th

February, 1942. After the show-cause notice the matter was placed before the Board of Directors and the Board of Directors have passed a resolution on 12th January, 2006 resolving to retire the petitioner w.e.f. 28-2-2002 and subsequently an order has been passed on 20-2-2006 retiring the petitioner and the respondents has further passed an order dated 14-3-2006 for recovery of the salary and subsistence allowance paid to the petitioner w.e.f. 28-2-2002. It has been further stated in the writ petition that the date of birth of the petitioner as reflected in the extract of birth register is 15-1-1948, however, on account of a mistake in the Higher Secondary School Certificate, the date of birth of the petitioner was mentioned as 20-2-1942. The petitioner has also submitted that as there was a mistake in the Higher Secondary School Certificate a Civil Suit was preferred by the petitioner and the Civil Court vide judgment and decree dated 13-10-1976 directed the Board of Secondary Education to correct the date of birth from 20-2-1942 to 15-1-1948. It has also been stated by the petitioner that efforts were made by the petitioner for correction of date of birth by submitting representation as well as the judgment and decree to the Board of Secondary Education and while all this was going on he was appointed as Personal Assistant to Dean at Lakshmibai National Institute of Physical Education, Gwalior in the year 1986. The petitioner while entering into the service has stated his date of birth to be 15-1-1948 and it has also been reflected in the service book that the aforesaid date of birth is mentioned as per the judgment and decree passed in Case No. 165/A/1974, dated 13th October, 1976. It has been further stated by the petitioner that the respondents have earlier also retired the petitioner from service on 28th February, 2002 treating the date of birth of the petitioner to be 20th February, 1942 ignoring the entry in the extract of birth register and the retirement of the petitioner in the year 2002 was subjected to judicial scrutiny before this Court. A writ petition was filed by the petitioner which was registered as W.P. No. 1822/2001 and after hearing the parties at length, this Court has allowed the writ petition filed by the present petitioner on various grounds. It has also been contended by the petitioner that a review petition was filed by the management and it was stated in the review petition that the judgment and decree delivered in the civil suit was set aside subsequently by the Appellate Court on 27-7-1977 and this fact was suppressed by the petitioner. This Court has dismissed the review petition filed by the respondents. The contention of the petitioner is that once a writ petition filed against his retirement in the year 2002 has been allowed and the review petition filed by the respondents has been dismissed, subsequent action could not have been taken by the respondents again retiring the petitioner w.e.f. 28-2-2002. The petitioner has raised various grounds before this Court and has contended that the order of retirement dated 20-2-2006 and the subsequent order of recovery of salary is bad in law. The petitioner has also contended that the entry relating to birth register should have been taken into account and the Board of Management has erroneously taken a decision to retire the petitioner w.e.f. 28-2-2002 and has also erroneously taken a decision to change date of birth of the petitioner from 15-1-1948 to 20-2-1942, he could not have been retired with

retrospective effect and therefore, the decision is illegal.

Respondents have filed a reply and it has been stated by the respondents that they have rightly passed an order retiring the petitioner w.e.f. 28-2-2002 as the petitioner was also in service of other department prior to his appointment at Lakshmibai National Institute of Physical Education, Gwalior and he has incorrectly declared his date of birth to be 15-1-1948, and the date of birth of the petitioner as reflected in the Higher Secondary Certificate is 20-2-1942. The petitioner has also disclosed 20-2-1942 as his date of birth while serving other organisations. It is also stated by the respondents that the petitioner has filed a civil suit for correction of his date of birth in the mark-sheet of Higher Secondary Certificate and vide judgment and decree dated 13-1-1976, the Civil Court had directed correction of date of birth from 20th February, 1942 to 15th January, 1948. It has also been stated by the respondents that an appeal was preferred by the State of Madhya Pradesh against the judgment and decree and the Appellate Court has set aside the said judgment and decree on 27th July, 1977 and this fact was concealed by the petitioner. The petitioner at the time of entry into the service in the year 1986 has incorrectly mentioned his date of birth as 15th January, 1948 knowing fully well that the judgment and decree of the Civil Court has been set aside. It has also been stated by the respondents that Second Appeal was also preferred against the judgment and decree delivered by the Additional District Judge, Gwalior in Appeal No. 7-A/1977 and the second appeal was also dismissed by this Court vide order dated 3rd April, 2006. The respondents have further stated that a SLP was also preferred before the Apex Court, however, the same has also been dismissed. It has been contended by the respondents that earlier also they have passed an order of retirement in respect of the petitioner and the same was set aside by this Court, however, in review petition filed by the institution, liberty was given to the employer to take action after hearing the petitioner and after granting due opportunity of hearing in accordance with law. The respondents have further stated that a show-cause notice was issued to the petitioner and after considering the reply of the petitioner it has been resolved by the Competent Authority to correct the date of birth of the petitioner from 15-1-1948 to 20-2-1942 and the same has been corrected in the service book, consequently action for retiring him w.e.f. 28-2-2002 has been taken in the matter and also for lodging of a FIR with the Police. The contention of the respondents is that the order passed by them does not suffers from any illegality and it is the petitioner who has played fraud with the employer while entering into the service.

Heard learned Counsel for the parties at length and perused the record.

In the present case, it is not in dispute that the date of birth of the petitioner as reflected in the Higher Secondary School Leaving Certificate is 20-2-1942. The petitioner while joining the service as Personal Assistant to Dean in the year 1986 has stated his date of birth to be 15-1-1948 and an endorsement has been made in the service book that his date of birth is 15-1-1948 as per the judgment

and decree passed by the Civil Court on 13-10-1976. It is also not in dispute that the judgment and decree passed by the Civil Court on 13-10-1976 was set aside by the First Additional District Judge in Appeal No. 7-A/1977, dated 27th July, 1977 against this a second appeal was preferred before this Court and the same has also been dismissed by this Court on 3rd April, 2006. A SLP was also preferred by the petitioner and same has also been dismissed, meaning thereby the order passed by the Appellate Court has become final and the judgment and decree directing the correction of date of birth to be 15-1-1948 stands set aside, thus the date of birth of the petitioner as reflected in the Higher Secondary School Leaving Certificate, Le., 20-2-1942 is correct. The petitioner at the time of entry into the service has not stated his date of birth 15-1-1948 on the basis of birth register. The contention of the petitioner that he was not aware of the order passed by the Appellate Court is very difficult to believe. The petitioner has engaged a Counsel to represent him in the civil suit and it was the same Counsel who has defended him before Appellate Court and therefore, the statement of the petitioner that he was not aware of the order passed by the Appellate Court cannot be believed. The fact remains that in the Higher Secondary School Certificate the date of birth of the petitioner was 20-2-1942. It is true that the petitioner was earlier also retired from service by treating his date of birth to be 20-2-1942 and the same was subjected to judicial scrutiny before this Court, the writ petition filed by the petitioner was allowed. This Court while allowing the writ petition has held as under:

8. Considering the same in the back drop of the statutory requirement as per FR 56 and Note 5, it was not at all just and reasonable on the part of the respondents to insist upon producing the Higher Secondary Certificate when the rule contemplates production of some confirmatory documentary evidence, the judgment and decree issued by a Competent Court of law will also come within the said category of confirmatory documentary evidence. The words "as far as possible" before the confirmatory document and "such as" appearing before High School or Higher Secondary School clearly indicates that High School or Higher Secondary School Certificate were one of the documents contemplated as confirmatory documents but cannot be construed to mean that no other document is admissible. In the present case, the confirmatory document evidencing the date of birth available, Le., judgment and decree passed 10 years prior to appointment of the petitioner, certificate issued by the Statutory Authority, who maintained the birth register and the finding recorded in the judgment and decree which was accepted by the employer cannot be brushed aside and ignored only on the ground that the Higher Secondary Certificate and mark-sheet in original have not been produced. It is the considered opinion of this Court, that the respondents in the present case have not acted in a just and reasonable manner in changing the date of birth declared by the petitioner at the time of his appointment and the change made unilaterally is not sustainable.

Apart from the above if the statutory rules which is applicable to an employee for claiming change in date of birth within 5 years is made applicable vice-versa on

the employer also, there is no reason, why the employer did not take action within the 5 years period for changing the date of birth. Having accepted the same and permitted it to be acceptable for more than 10 years, there is no reason for the employer to make a change in the date of birth. This action, if viewed in the backdrop of the allegation made by the petitioner that it has been done malafidely by the Registrar only to harass him because he was agitating and claiming promotion and other benefit, seems to be prima facie tenable.

That apart the change having being done without giving proper opportunity of hearing to the employee concerned and without considering the implications of Fundamental Rule 56 and Note 5, appended thereof seems to be totally unjustified and unsustainable. The judgment relied upon by the learned Counsel for the respondents is clearly distinguishable not only on the facts but also on the ground of the interpretation of the rule in question. On the contrary, the judgment of Supreme Court in the case of Sarjoo Prasad (*supra*), wherein change in date of birth already recorded by the employer without complying with principle of natural justice and hearing of employee has been declared to be illegal.

Considering the totality of the facts and circumstances of the case and the discussions made hereinabove, the action of the respondents in retiring the petitioner seems to be unsustainable. As the change in date of birth entered in the service record made by the respondents employer without considering the rule in question properly and without giving due opportunity of hearing and recording reasons thereof is unsustainable. Apart from the above the respondents have not replied to the objection made by the petitioner that the Registrar is not competent to take action. The appointment of the petitioner having being made by the Board of Directors, it is not known as to under what authority the Registrar has changed the date of birth of the employee. Even FR 56 and Note 5, contemplates alternation after sanction of the Ministry and Department of the Central Government. This requirement also seems to have been ignored while passing the impugned order.

Considering the aforesaid, totality of the facts and circumstances of the case and the findings recorded hereinabove, I have no hesitation in holding that the order impugned Annexure P-31 (C), dated 28-2-2002 retiring the petitioner from the said date is unsustainable.

The respondents institute has preferred a review petition against the order passed by this Court and it was specifically pleaded in the review petition that the judgment and decree of the Civil Court has been set aside on an appeal preferred by the State Government vide judgment and dated 27-7-1977 passed by the Appellate Court and, therefore, a prayer was made to review the earlier order passed by this Court in W.P. No. 1822/2001. The Review Petition was dismissed and the following order was passed:

Having heard learned Counsel for the petitioner and on perusal of the record, it is

seen that the findings recorded in the judgment and order dated 8-7-2003 in W.P. No. 1822 of 2001, interference made in the matter was not based solely on the judgment of the learned Trial Court. This Court has interfered in the matter as there was non-observance of FR 56 and Note 5 with regard to non-grant of opportunity in the matter of changing the date of birth in the service book of the petitioner (S.K. Agrawal) so also action taken by the Registrar with regard to change of the date of birth as the petitioner was appointed by the Board of Directors, this Court had only observed in Paragraph 11 that action taken for changing the date of birth without recording reasons is not correct. Under such circumstances, the respondents were only required to take action after hearing the petitioner and they were at liberty to proceed in the matter after giving due opportunity of hearing to the petitioner and under the provisions of law. If, subsequently, certain facts have come on record, the applicant should give reasonable opportunity to the employee and then take action. For this review or recall of the order passed by this Court is not necessary.

This Court having decided the petition in question on the basis of other grounds and not merely on the basis of the judgment passed by the learned Trial Court, no case is made out for review or recall of the order. However, it is clarified that keeping in view the observations made by this Court in Paragraph 11 of the order dated 8-7-2003 passed in W.P. No. 1822 of 2001, the employer/applicant shall take action after complying with the requirements of law.

Thus, it is evident that while dismissing the review petition liberty was granted to the employer to pass appropriate orders in accordance with law, Le., to correct the date of birth of the petitioner as per the provision of Fundamental Rules 56 after granting due opportunity of hearing to the petitioner in accordance with the law. The respondents thereafter, have granted opportunity of hearing to the petitioner and have corrected the date of birth of the petitioner and the Competent Authority, Le., Board of Management has taken a decision to correct the date of birth of the petitioner and to retire the petitioner w.e.f. 28-2-2002, a show-cause notice is very much on record dated 2-4-2005 and it reflects all minute details of the matter. The petitioner has also submitted a reply to the show-cause notice and therefore, principle of natural justice and fair play have been followed in the matter. In the present case, the date of birth of the petitioner as reflected in the Higher Secondary School Certificate was 20-2-1942 and there is categorical statement made in the return that the petitioner while doing other Government service has mentioned the same date of birth prior to joining at Lakshmibai National Institute of Physical Education, Gwalior. The petitioner has entered his date of birth as 15-1-1948 as per the judgment and decree passed by the Civil Court which is no longer in existence and therefore, the entry which was made on the basis of the judgment and decree of Civil Court has rightly been corrected by the employer on the basis of Higher Secondary School Certificate. The respondents have also enclosed Annexure R-5 which is an application submitted by the petitioner for the post of Personal Assistant. In this application the date of birth mentioned as 15-1-1948. The birth certificate which

has been filed by the petitioner along with an application for taking documents on record is dated 26-3-2007, however, keeping in view the totality of the circumstances of the case, this Court is of the Considered view that the management has rightly changed the date of birth of the petitioner from 15-1-1948 to 20-2-1942 which is based upon Higher Secondary School mark-sheet. This Court does not have any sympathy in the matter in favour of the petitioner. A Division Bench of this Court in the case o S.C. Verma Vs. Union of India (UOI) and Another, , has held that in respect of an educated person, the best evidence as to age is matriculation certificate and the date of birth stated on the basis of matriculation certificate was held to be in order. In the case Mahendra Kumar Soni Vs. State of M.P. and Others, , this Court in Para 7 has held as under:

7. To appreciate the first submission of Mr. Ruprah, learned Counsel for the petitioner it is apposite to refer to Rule 84 of the Code, It is relevant to state here the Rule which has been brought on record is in Hindi, translation of the same, in essence, would be as under:

Every appointee, at the time of his appointment, under the Government service on any designation, shall declare his date of birth in Christian Era supporting documents thereto, viz., matriculation certificate and birth certificate issued by the Municipality etc. If the exact date of birth is not known then an approximate date of birth shall be mentioned. Service description, service book or other documents pertaining to the date of birth which are kept on record, shall mention/state the exact date of birth of an employee or a date of birth determined under Rule 85 of the Code shall be mentioned therein. As such the noted date of birth shall be treated as final. Except clerical error, no other modification/correction shall be made later on.

On a perusal of the aforesaid Rule it becomes graphically clear that the said Rule postulates that how a clerical error can be rectified in the date of birth. But to say so that the Rule does alone govern the field and the employer does not have any authority to rectify the situation despite any mischief coming to the knowledge, would be travesty of justice. Reliance on the Rule can be made to some extent but that cannot be the summum bonum of the entire action conceivable at the instance of an employer. In the instant case, the notice sent by the Sub-Divisional Officer clearly shows that the factum of interpolation came to the knowledge of State Government when there was a scrutiny with regard to some other aspects. If any interpolation is noticed, definitely, in our considered opinion, the Rule would not be the governing factor but principle of inherent power has to be invoked and it can be exercised after following the principles of natural justice. In the present case as interpolation was noticed, action could have been initiated despite the language couched in the Rule 84 of the Code. We have no hesitation to say that Rule 84 of the Code is not the only power conferred on the authority, the employer, to correct the date of birth if circumstances otherwise so warrant. It does not limit the power. On the contrary,

it only enables the authority to rectify a clerical error. Thus, Rule 84 of the Code is in a different realm whereas taking action after following due procedure by law meaning thereby the principles of audi alteram partem for curing any kind of mischief or put the controversy to rest is in another compartment. This, in fact, is a part of general power which ordinarily rests with the employer.

It was held in the present case that the employer does not have the power to correct the date of birth if circumstances so warrant by invoking inherent powers after following principles of natural justice. In the present case, this Court has already granted liberty to the employer to take action after compliance with the requirement of law and the employer has certainly taken action after complying with the requirement of law and therefore, the decision taken by the Management dated 12 January, 2006 does not warrant any interference.

The matter relating to correction of date of birth recorded in the service book was subjected to judicial scrutiny in the case of Phool Chand Rathore Vs. Nagar Palika Parishad and Others, , and this Court while deciding the aforesaid case has held that in case of exceptional circumstances where there is clinching and irrefutable evidence that the date of birth entered in the service book is wrong, the same can be corrected. It has also been observed that a mistake or fraud cannot be perpetuated. In the present case, the petitioner has entered his date of birth at the time of recruitment to be 15-1-1948 based upon a judgment and decree passed in Civil Suit No. 165-A/1974, dated 13th October, 1976. At the time the entry was made the aforesaid judgment and decree was no longer in existence as the judgment and decree was set aside by the Appellate Court on 27-7-1977 and, therefore, the respondents are justified in passing the order dated 12th January, 2006 in the matter. The decision taken by the Board of Management dated 12th January, 2006 is therefore, upheld. The petitioner has also prayed for quashing of the order dated 14-3-2006 by which the respondents have ordered for recovery of salary and allowances w.e.f. 1-3-2002. The learned Counsel appearing for the petitioner has relied upon a judgment delivered by the Hon'ble Supreme Court in the case of 2002 (6) ALT 46 (SC) . In the aforesaid case, the question of correction of date of birth was involved and the employee therein has received salary even for the period for which he was not lawfully entitled. The Appeal was filed by the State of M.P. was allowed, the order passed by the Tribunal was set aside, however, the payment of salary to the petitioner therein for the extended period was protected by the Apex Court. The Apex Court in Para 3 has observed as unde:

3. In that view of the matter, the appeal deserves to be allowed and the order under challenge is set aside. Before we part with the case, we would like to observe that since the respondent has served on the basis of the judgment under challenge for six months, the appellants shall not recover the salary which has already been paid to the respondent during that period.

In the present case, earlier also the date of birth of the petitioner therein was corrected by the respondents from 15-1-1948 to 20-2-1942 and he was retired

from service on 28th February, 2002 treating his date of birth as 20-2-1942. His retirement in the year 2002 was challenged before this Court and the order of retirement was quashed by this Court in W.P. No. 1822/2001 and the petitioner has continued in service by virtue of the judgment delivered by this Court. The respondents have again corrected the date of birth as liberty was granted to them by this Court in MCC No. 543/2005 and the respondents have taken a decision on 12 January, 2006 to retire the petitioner w.e.f. 28-2-2002 treating his date of birth to be 20-2-1942. As the petitioner has continued on account of an order passed by this Court the pay and allowances already drawn by the petitioner shall not be recovered from the petitioner as he has worked for respondents during the aforesaid period, however, while calculating his pensionary dues, the respondents shall take into account the date of retirement as 28-2-2002 only. Terminal dues of the petitioner shall be calculated treating 28-2-2002 as the date of his retirement for all purpose. The question of payment of further subsistence allowance or arrears of salary does not arise. The petitioner has also been charge-sheeted by the respondents by issuing the charge-sheet dated 5-10-2005 and various charges have been levelled against the petitioner. The petitioner has sought quashing of suspension, charge-sheet dated 5-10-2005 and other consequential relief in a separate writ petition, i.e., W.P. No. 108/2006 (S). The scope of interference of quashing the charge-sheet is quite limited and the Apex Court while considering the question of quashing a charge-sheet in the case of *Union of India v. Kunisetty Satyanarayana* (2006) 12 SCC 28, has held in Paragraphs 13, 14, 15 and 16 as under:

It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge-sheet or show-cause notice vide *Executive Engineer, Bihar State Housing Board Vs. Ramesh Kumar Singh and others*, , *The Special Director and Another Vs. Mohd. Ghulam Ghouse and Another*, , *Ulagappa v. Divisional Commissioner, Mysore* (2001) 10 SCC 639, *State of Uttar Pradesh Vs. Brahm Datt Sharma and Another*, .

The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at the stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ petition lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

Writ jurisdiction is discretionary jurisdiction and hence such discretion under

Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.

No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter.

In the present case, the petitioner has not been able to make out a case for interference and the petitioner certainly has a liberty to raise all such grounds in his defence while facing the Departmental Enquiry. The case of the petitioner is not at all covered under the parameters laid down by the Apex Court in catena of judgment relating to quashing of the charge-sheet. Merely because, a charge-sheet has been issued that does not give rise to any cause of action, until and unless a final order has been passed in the matter after evaluating the material established on record by the Competent Disciplinary Authority. However, if any adverse order is passed by the Competent Disciplinary Authority, the petitioner shall be at a liberty to challenge the same in accordance with law.

Resultantly, no case for interference with the charge-sheet dated 5-10-2005 is made out in the facts and circumstances of the case. The respondents while taking decision dated 12th January, 2006 has also observed that they shall be taking further appropriate action against the petitioner in the matter. It is needless to mention that the power of taking action against an employee lies with the Appointing Authority and in the facts and circumstance of the case. The Appointing Authority shall be free to take appropriate action as required under the law against the petitioner. Resultantly, the decision taken by the Management dated 12th January, 2006 is upheld, and the subsequent order of retirement dated 20-2-2006 is also upheld, however, the order dated 14-3-2006 to the extent recovery has been ordered in respect of salary and subsistence allowance already paid to the petitioner since first March, 2002 is set aside.

For the reasons detailed in this order the other writ petition filed by the petitioner, ie., W.P. No. 108/2006 (S), wherein the petitioner has assailed the charge-sheet, dated 15-10-2005 is also dismissed.

This order shall also governs the disposal of W.P. No. 108/2006 (S) filed by the petitioner.

Resultantly, the present writ petition stands dismissed. No order as to costs.